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WASHINGTON UNIVERSITY IN ST. LOUIS

Department of History

Dissertation Examination Committee:

David Konig, Chair

Iver Bernstein

Howard Brick

Randall Calvert

Peter Kastor

Andrew Rehfeld

UNBOUND BY LAW: ASSOCIATION AND AUTONOMY IN THE EARLY

AMERICAN REPUBLIC

by

Kevin Charles Butterfield

A dissertation presented to the  
Graduate School of Arts and Sciences  
of Washington University in  
partial fulfillment of the  
requirements for the degree  
of Doctor of Philosophy

August 2010

Saint Louis, Missouri

## Abstract

This dissertation examines how the concept of voluntary membership evolved between the 1780s and the 1830s, a period in which men and women created thousands of groups seeking everything from fraternity to profit to social reform. Before observers foreign and domestic would begin to identify the voluntary association as a defining characteristic of post-Revolutionary American culture, Americans who organized and joined such groups had struggled for decades to determine what membership ought to look like, what rights and duties the act of joining should entail. By the time Alexis de Tocqueville famously noted in 1831 that Americans were “forever forming associations,” they had come to some answers.

A revolutionary idea evolved unsteadily through the practical, day-to-day experiences of membership, as men and women began to insist upon basic principles of procedural fairness: the idea that people carried rights into every social relationship. Historians have yet to examine these debates over the norms of belonging, largely owing to the long-lasting influence of Tocqueville’s rosy picture of spontaneous cooperation and, more recently, Jürgen Habermas’s theory of associations in the public sphere. But Americans of the post-Revolutionary generations were anxious and uncertain about private governing power and the potential abuses of even voluntary commitments. In groups as diverse as women’s literary societies, men’s political fraternities, business corporations, and mutual benefit societies, Americans responded to the challenges they perceived by erecting procedural protections for members and by embracing a legalistic rather than an affective understanding of what it meant to belong. For they were anxious, too, about how they could make these groups work, how they could make collective action a reality in an age when even the survival of the new republic appeared tenuous.

Innovation born of conflict within the groups—especially, efforts to forestall and to resolve disputes over the meanings, burdens, and benefits of voluntary membership, many of which wound up in court—shaped the post-Revolutionary associational landscape. While there continued to be encomia about the natural sociability of man and the tender ties of affection, in practice the American joiners that Tocqueville described had embraced a wholly different model of associated action. The rules by which the joiners organized themselves evinced a trend toward greater precision and an increasing emphasis on legalistic formalities. What is more, law-making and judicial institutions became comfortable assuming a role as superintendent over the actions within private societies, holding them to broad standards of justice and resolving the conflicts that arose within them, such as contested expulsions, and thereby setting the furthest limits of private governing authority. They created a substructure for Americans' efforts at collective action, one that evinced a pervasive liberalism, in that it was grounded in an individualistic common law, legal guarantees of the rights of individual members, and a reliance on adversarial legalism and procedural formalities to reconcile conflict, even in these ostensibly private, wholly voluntary groups.

The conflict-driven process of defining voluntary membership had a second effect: Americans of this period came to accept the pluralist makeup of their society, in which myriad groups pursued divergent ends rather than a singular, public good. They could do so because, internally, most of these groups had begun to look the same, and those few associations that did appear to threaten the autonomy of their members, such as the Freemasons, came to stand out in ways they had not just a generation before. By about 1840, certain conceptions of voluntary membership had become so generally accepted that the judicial superintendence of private associations would become less direct, resting on broad schema of procedural expectations.

## Acknowledgments

The research for this dissertation was supported generously by the Department of History of Washington University in St. Louis as well as by the American Culture Studies program, particularly the Lynne Cooper Harvey Fellowship. Several archives and other research institutions also provided support for the research and writing of this work, and it gives me great pleasure to be able to acknowledge, in writing, my gratitude for that help: the Colonial Williamsburg Foundation; the Connecticut Historical Society; the Francis A. Countway Library of Medicine; the Gilder Lehrman Institute of American History; the Henry E. Huntington Library; the New England Regional Fellowship Consortium; the New Hampshire Historical Society; the New-York Historical Society; the New York State Archives; the Rhode Island Historical Society; the Robert H. Smith International Center for Jefferson Studies; and the Virginia Historical Society.

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## Introduction

In 1813, William Stewart found himself estranged and expelled from the Philanthropic Society in Pennsylvania, one of countless mutual aid organizations that had formed in the young American republic to allow members, who made small contributions, to make a call on the society's funds in a time of need. Stewart had told them of an illness and, according to the rules of the institution, had presented a physician's bill for forty dollars, which he claimed to have paid, and he asked for compensation. When it became evident that the doctor's bill had, in fact, been for four dollars and that Stewart had added a zero in an obvious attempt to defraud his fellow members, his request was denied and his membership promptly terminated according to the society's constitution, specifically, the clause permitting the expulsion of those "concerned in scandalous or improper proceedings which might injure the reputation of the society."<sup>1</sup>

Shamelessly, Stewart went to court. The Philanthropic Society had been formally incorporated, as had many similar organizations in Pennsylvania, either by special charter or under one of the first general incorporation acts in history, passed in 1791 to permit the speedy incorporation of literary, charitable, and religious associations. Thus, Stewart could call for a writ of mandamus to compel the society, in a formal sense a creature of the state and an instrument of state authority, to restore him to "the standing and rights of a member of the Philanthropic Society." He asserted that the question of whether his

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<sup>1</sup> *Commonwealth v. Philanthropic Society*, 5 Binn. (Pa.) 486 (1813); William Miner to Jacob Beck, Apr. 1, 1817, folder 7, Mandamus and Quo Warranto Proceedings, Supreme Court of Pennsylvania, Eastern District, RG-33, Pennsylvania State Archives.

conduct had, indeed, injured the reputation of the society had not been formally noted in the minutes of his expulsion proceedings. Chief Justice William Tilghman would have none of it—“a society that would not be injured by such a proceeding as this, on the part of one of its members, must be a society without reputation”—and he denied mandamus.<sup>2</sup>

The episode itself reveals a great deal about how Americans conceived of voluntary membership in the early decades of the United States. Stewart knew where to turn if he was unhappy with decisions made regarding his “rights” as a member, and he couched his claim in terms of proper procedure and legalistic formality. The society, too, in its affidavit, knew to invoke specific constitutional articles and terms of agreement in justifying to a panel of judges its decision to expel Stewart. Even in these early years, as some of the very first contests over the limits of the authority of voluntary groups over their members sought resolution, the participants, including Tilghman, seemed to know their parts. But what is remarkable about the case of the added zero is just how anomalous the outcome, the sustained expulsion of a member of a private society, actually was. Writing in 1864, another chief justice of the Pennsylvania Supreme Court, George Washington Woodward, attempted to chronicle the long history of cases in English and American law regarding expulsions and the contested rights of membership, and he found in Stewart’s case something “very rare in the authorities, an instance of expulsion that was sustained.” In reported appellate cases, courts rarely hesitated to compel the readmission of a member they believed had been wronged, and in that fact alone there is a hint of a neglected history, one that, I will argue, challenges long-held

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<sup>2</sup> *Constitution of the Philanthropic Society, Established at Philadelphia, May 6<sup>th</sup>, 1793: Incorporated the Seventh Day of January, 1799* (Philadelphia: Re-printed by Thomas T. Stiles, 1808).



beliefs about the nature of voluntary association—and, indeed, about the formation of a liberal political culture—in the early United States.<sup>3</sup>

Over the decades between 1780 and about 1840, post-Revolutionary concerns about preserving individual self-government could be found to be in tension with a parallel concern about how to make groups work, how to make collective action a reality in an age when even the survival of the new republic appeared tenuous. In voluntary associations of all kinds—fraternal clubs, political and social-reform societies, business corporations, religious societies, labor unions—men and women in the new United States can be seen to have responded by erecting procedural protections for members and by embracing a legalistic rather than an affective understanding of what it meant to belong. That is, while there continued to be encomia about the natural sociability of man and the tender ties of affection, in practice Americans began to embrace a wholly different model of associated action. The rules by which the joiners organized themselves evinced a trend toward greater precision and an increasing emphasis on legalistic formalities, and people often spoke at the slightest indication that those formalities were being ignored. Further, law-making and judicial institutions became comfortable assuming a role as superintendent over the actions within private societies, holding them to broad standards of justice and resolving the conflicts that arose within them, such as contested expulsions, and thereby setting the furthest limits of private governing authority. Such governmental bodies found themselves creating a legal substructure for Americans' efforts at collective action, one that evinced a pervasive liberalism, grounded as it was in an individualistic version of the common law and legal guarantees of the rights of individual members.

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<sup>3</sup> Woodward, writing at nisi prius, Mar. 11, 1864, quoted in *Evans v. Philadelphia Club*, 50 Pa. 107 (1865).

As people in post-Revolutionary America turned to build new institutions and to devise new forms of concerted action, then, there was a distinct, conscious move toward legalistic ways of thinking about social cooperation. Long neglected in studies of the formation of civil society in the early United States, that fact explains why individualism and the “voluntary principle” in religious and secular society arose simultaneously with newly effectual, more cohesive kinds of cooperation and integration. More effective association, that is, came from what I will argue was a uniquely post-Revolutionary attention to the preservation of individual autonomy within voluntary groups. This was not a paradox but a natural consequence of the fact that early national American men and women saw both of those things—personal autonomy and collective action—as best facilitated by emphases on fair procedure, openness and accountability, and assurances that individual rights would be protected in various kinds of interpersonal relationships.

Historians and social and political theorists have neglected post-Revolutionary debates and practices regarding the individual-to-group relationship that we have come to call *voluntary membership* even with all the attention that voluntarism has received in American historiography. Although myriad forms of private societies sprang forth in the decades between the Revolution and the 1830s, there were aspects of membership that were seen by some in this era to be applicable across the board, regardless of who joined or his or her reasons for doing so. Conceptual innovations and organizational changes ultimately resulted in a broad acceptance of what constituted membership and what rights and duties should accompany that status. And these are developments that, simply put, have not been examined. Though there is a voluminous literature on voluntarism and on the early national public sphere, there has been a tendency to take individuals out of that

story and to examine instead social movements, discursive practices, and the cultural causes and consequences of new forms of concerted action.

Neither have political and social theorists been attentive to the matter of the meanings and consequences of individual, voluntary membership. Defining civil society, not as the polity as a whole (as was the rule before Hegel), but rather as that sphere of social life that is plural and particularistic as opposed to the overarching public norms, common purposes, and singular identity of the state, has led political theorists of different stripes to find the worth of civil society in precisely those characteristics that differentiate it from government.<sup>4</sup> And most emphasize a built-in antagonism between civil society and political authority. Associations can serve as bulwarks against despotism, limits on the centralization of power. They can accomplish what individuals cannot and, from a classical liberal perspective, what government ought not, and thus in that way, too, limit

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<sup>4</sup> Adam Seligman, "Civil Society as Idea and Ideal," in Simone Chambers and Will Kymlicka, eds., *Alternative Conceptions of Civil Society* (Princeton, N.J.: Princeton University Press, 2002), 13-33; Kathleen M. Sullivan, "Rainbow Republicanism," *Yale Law Journal*, 97 (1988): 1713-1723. On liberals' conceptions of public sphere, see Michael Walzer, "Equality and Civil Society," in *ibid.*, 35; Nancy L. Rosenblum and Robert C. Post, eds., *Civil Society and Government* (Princeton, N.J.: Princeton University Press, 2002), "Introduction," 1-25; Nancy L. Rosenblum, *Membership and Morals: The Personal Uses of Pluralism in America* (Princeton, N.J.: Princeton University Press, 1998); John Rawls, *A Theory of Justice* (Cambridge, Mass.: Harvard University Press, 1971), 544-545. On communitarian conceptions, see Mary Ann Glendon, *Rights Talk* (New York: Free Press, 1991); Robert K. Vischer, *Conscience and the Common Good: Reclaiming the Space between Person and State* (New York: Cambridge University Press, 2010), chap. 5; J. Philip Wogamon, "The Church as Mediating Institution: Theological and Philosophical Perspectives," in Michael Novak, ed., *Democracy and Mediating Structures: A Theological Inquiry* (Washington, D.C.: American Enterprise Institute Press, 1980); Howard M. Friedman, "Rethinking Free Exercise: Rediscovering Religious Community and Ritual," *Seton Hall Law Review*, 24 (1993-1994): 1800-1824. For neo-Tocquevillean views, see Robert D. Putnam, "Bowling Alone: America's Declining Social Capital," *Journal of Democracy*, 6 (1995): 65-78; Bob Edwards and Michael W. Foley, "Civil Society and Social Capital: A Primer," in Bob Edwards, Michael W. Foley, and Mario Dani, eds., *Beyond Tocqueville: Civil Society and the Social Capital Debate in Comparative Perspective* (Hanover, N.H.: University Press of New England, 2001), 1-14; as well as Weber, "The Protestant Sects and the Spirit of Capitalism," in *From Max Weber: Essays in Sociology* (New York: Oxford University Press, 1958), 310. For good summary of critical theorists' appraisal of civil society, see Walzer, "The Civil Society Argument," in Chantal Mouffe, ed., *Dimensions of Radical Democracy: Pluralism, Citizenship, Community* (London and New York: Verso, 1992), 89-107; and Kenneth Baynes, "A Critical Theory Perspective on Civil Society and the State," in Rosenblum and Post, eds., *Civil Society and Government*, 123-145.

the size of the state, as Tocqueville first observed.<sup>5</sup> The literature that builds on Habermasian critical theory (including, but not limited to, his forty-five-year-old work on the public sphere of recent vogue among historians<sup>6</sup>) takes a tack that is only slightly different from the others. These writers describe the worth and nature of voluntary associations in terms of communication: groups emerge, grow, change, and reproduce owing to communicative interaction, and, more important still, communication is their fundamental purpose. The crucial objective is to maintain the communicative autonomy of those groups in order that they might serve their end of being an arena of critical debate, one that strengthens, because it informs, democratic government.<sup>7</sup>

In this dissertation, I will draw upon two bodies of evidence—descriptions of the interior organization of voluntary associations (charters, constitutions, bylaws, and records such as associational books of minutes); and public debates and legal records that arose out of moments of conflict between members and the groups they joined that had spilled out from behind the closed doors of the voluntary society—to show that theoretical approaches to the study of American civil society have all omitted something

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<sup>5</sup> Hannah Arendt, *On Revolution* (New York: Viking Press, 1965); Emile Durkheim, *The Division of Labor in Society*, trans. W. D. Halls (New York: Free Press, 1984); John Keane, *Democracy and Civil Society* (1988), 15 (quotation). For parallels between voluntary associations and localism in American government, see Carol M. Rose, “The Ancient Constitution vs. the Federalist Empire: Anti-Federalism from the Attack on ‘Monarchism’ to Modern Localism,” *Northwestern University Law Review*, 74 (1989-1990): 74-105; Bruce A. Campbell, “Social Federalism: The Constitutional Position of Nonprofit Corporations in Nineteenth-Century America,” *Law and History Review*, 8 (1990): 149-188.

<sup>6</sup> See sources in note 11, below.

<sup>7</sup> Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, trans. William Rehg (Cambridge, Mass.: MIT Press, 1996), 366-367; Simone Chambers, “A Critical Theory of Civil Society,” in Chambers and Kymlicka, eds., *Alternatives Conceptions of Civil Society*, 90-110. The use of the singular “arena of debate” runs counter to much recent historical work that both spatially expands and fragments the Habermasian public sphere to include more diversity than the philosopher’s initial characterization allowed, including “counterpublics” founded in class (Oskar Negt and Alexander Kluge, *Public Sphere and Experience: Toward an Analysis of the Bourgeois and Proletarian Public Sphere*, trans. Peter Labanyi, Jamie Daniel, and Assenka Oksiloff [Minneapolis: University of Minnesota Press, 1993]) and race (Brooks, “The Early American Public Sphere and the Emergence of a Black Print Counterpublic”).

vitaly important to our understanding of that world of cooperative associations. Contemporaries were simply not comfortable with unchecked private power, and they were certain that people had and ought to have legally guaranteed rights when they submitted themselves to private, associational authority. Americans were anxious, of course, that their newly founded societies would work, but groups of many kinds in the early American republic also faced accusations of overly strong or corrupt private government, acting to the detriment not just of society at large but of their own members. In consequence of these twin concerns, there was a deliberate turn toward legally guaranteed rights and procedural protections to facilitate effective cooperation and to act as barriers against internal abuses of power. In sum, Americans of this period were concerned about private authority and the threats even voluntary obligations could pose to individual autonomy, and they became increasingly confident that procedural formality, law, and constitutionally ordained government were the media through which such concerns should be channeled and resolved.<sup>8</sup>

Further, how the concept of voluntary membership itself was defined and redefined over the course of the first fifty years after the American Revolution tells us something that has been overlooked by previous studies of “voluntary associations” or “civil society,” focused as those studies have been on the very phenomenon of collective

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<sup>8</sup> Grant McConnell, *Private Power and American Democracy* (New York: Alfred A. Knopf, 1966); McConnell, “The Spirit of Private Government,” *American Political Science Review*, 52 (1958): 754-770; J. David Greenstone, “The Public, the Private, and American Democracy: Reflections on Grant McConnell’s Political Science” and “The Transient and the Permanent in American Politics: Standards, Interest, and the Concept of ‘Public,’” in J. David Greenstone, ed., *Public Values and Private Power in American Politics* (Chicago: University of Chicago Press, 1982), ix-xiv, 3-33; *The Trial of the Boot and Shoemakers of Philadelphia, on an Indictment for a Combination and Conspiracy to Raise Their Wages* (Philadelphia: T. Lloyd and B. Graves, 1806), 148. On political institutions and politics holding central place in contemporaries’ conceptions of how to address social concerns in the period before the Civil War, see Sean Wilentz, *The Rise of American Democracy: Jefferson to Lincoln* (New York: Norton, 2005). On law as playing that role, see Christopher L. Tomlins, *Law, Labor, and Ideology in the Early American Republic* (New York: Cambridge University Press, 1993).

action. Making membership the subject of analysis reveals similarities in how people conceived of participation in organizations heretofore thought to represent wholly distinct historical phenomena. More important still, those similarities evince a conscious shift in the early nineteenth century toward a reliance upon legally guaranteed rights and procedural fairness as the best way to orchestrate all sorts of social relationships. Remedies arising in one venue or situation were applied in others, and rules—broad, generally applicable, and authoritative—arose to fundamentally change how law and, thus, relationships governed by law such as voluntary membership were conceived of. Previous scholarship has omitted contemporary concerns that were especially important in the post-Revolutionary creation of American civil society. A historical understanding of the practices and principles on display as *individuals* joined, organized, and maintained voluntary associations—as opposed to another study of contemporary debates over the role those *groups* should play in the new republic—brings to light post-Revolutionary concerns about personal sovereignty and about the proper uses of law in the group life of the new United States.

Five factors combined in a manner unique to the post-Revolutionary United States to produce wholly new ways of thinking about voluntary membership in a wide range of voluntarily joined societies by the time Alexis de Tocqueville arrived to describe democracy in America. First, the disestablishment of religion in the wake of the Revolution led to a new and increasing emphasis on the role of informed consent as the only legitimate basis for affiliation. Second, on both sides of the Atlantic by the late eighteenth century, Anglo-American fraternal activity was marked by an increasing “stress not just on formality but also on institutionalization, marked by charters, greater

bureaucracy, and a hierarchy of officers,” a development related to the printing of organizational materials and the rise of national networks of affiliated societies, according to Peter Clark. With experience, in other words, the technology of association became refined, and it would proceed by leaps and bounds in the early nineteenth century.<sup>9</sup> This is a theme of much of the recent literature on the American voluntary association of the nineteenth century, work that forms an important starting point for this dissertation but which, I will argue, does not pay sufficient attention to the role of post-Revolutionary legal developments and cultural dispositions regarding the nature of *individual*, voluntary membership.

Third, public debates and anxieties about membership in particular clubs and institutions narrowed the kinds of voluntary affiliation that the public at large would accept. For example, the 1780s uproar over the Society of the Cincinnati and the controversies about explicitly political societies over the following two decades had profound effects on how Americans would describe legitimate and illegitimate sorts of voluntary affiliation in the years to come. Fourth, there was an astonishing proliferation of new kinds of societies in cities and towns across the new nation. Growing numbers and varieties of stock-issuing business corporations and groups akin to fraternal organizations but calling for fixed and regular contributions for mutual benefit helped produce a convergence in form, with all such homologous groups moving toward well-defined obligations and procedural regularity. Fifth, moments of conflict between members and the groups they participated in—some of which found their way outside of the association and into public scrutiny or, even more consequentially, into court—helped

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<sup>9</sup> Peter Clark, *British Clubs and Societies, 1580-1800: The Origins of an Associational World* (Oxford: Clarendon Press, 2000), 95.

propel a move already under way within the groups themselves: an insistence on procedural fairness and even adversarial legalism as the best means to respond to and forestall disagreement. Such disputes serve as an important but as yet unstudied entry point into the changing ideas about the meanings and legal consequences of membership, allowing us to situate within its history a concept long taken for granted: voluntary membership. Through contest, the joiners of groups of all shapes, sizes, and purposes came to think about voluntary affiliation in a new way.

### Voluntary Associations in Scholarly Perspective

Men and women established and joined voluntary associations of all kinds in astounding numbers in the first fifty or sixty or years of the American republic, according to a rich and diverse body of work described below. Historians, sociologists, and political theorists have devoted considerable energy to the explanation of this historical phenomenon and its consequences, and this chapter will summarize the most significant schools of thought within this voluminous scholarship. In creating formally organized, rule-bound, and wholly voluntary associations, Americans were forming what Philadelphia economist Samuel Blodget called “minor republics,” and that way of thinking about associational activity has prompted historians and other students of associational activity to ask how Americans came to terms with the unanticipated prevalence of such entities *within* a republic, a body politic that the founding generation had hoped would never be broken into subunits of competing loyalties that might threaten the common good.<sup>10</sup> Scholars

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<sup>10</sup> [Samuel Blodget], *Economica: A Statistical Manual for the United States of America* (1806; rpt., New York: Augustus M. Kelley, 1964), 12, 19, 199-200; Johann Nuru Neem, “Creating a Nation of Joiners: The



have more recently turned to a second question, one derived from the work of Jürgen Habermas, that asks what role these voluntary societies played in the formation of a public sphere between the state and its people, one integral to the success of the whole republican experiment.<sup>11</sup>

Although some kinds of voluntary associations, such as fraternal clubs and charitable societies, had existed in colonial British America, the membership was not extensive and was limited to a handful of urban centers (free white males in eighteenth-century Philadelphia, for example, did have a fairly high rate of participation).<sup>12</sup> After the Revolution, men and women at all levels of social standing, and in communities large and small, embraced collective and relatively formal organization as the very best of means to

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Transformation of Civil Society in Massachusetts, 1780s-1840s” (Ph.D. diss., University of Virginia, 2004); Johann N. Neem, *Creating a Nation of Joiners: Democracy and Civil Society in Early National Massachusetts* (Cambridge, Mass.: Harvard University Press, 2008); Pauline Maier, “The Revolutionary Origins of the American Corporation,” *William and Mary Quarterly*, 3d ser., 50 (1993): 51-84; Oscar Handlin and Mary Flug Handlin, *Commonwealth: A Study of the Role of Government in the American Economy: Massachusetts, 1774-1861*, rev. ed. (Cambridge, Mass: Belknap Press of Harvard University Press, 1969).

<sup>11</sup> The central work, of course, is Jürgen Habermas, *The Structural Transformation of the Public Sphere: An Inquiry into a Category of Bourgeois Society*, trans. Thomas Burger and Frederick Lawrence (Cambridge, Mass.: MIT Press, 1989). For recent work influenced by Habermas, see Albrecht Koschnik, “The Democratic Societies of Philadelphia and the Limits of the American Public Sphere, circa 1793-1795,” *William and Mary Quarterly*, 3d ser., 58 (2001): 626-627; Albrecht Koschnik, *“Let a Common Interest Bind Us Together”: Associations, Partisanship, and Culture in Philadelphia, 1775-1840* (Charlottesville: University of Virginia Press, 2007); Neem, *Creating a Nation of Joiners*; John L. Brooke, “Ancient Lodges and Self-Created Societies: Voluntary Association and the Public Sphere in the Early Republic,” in Ronald Hoffman and Peter J. Albert, eds., *Launching the “Extended Republic”: The Federalist Era* (Charlottesville: University of Virginia Press, 1996), 273-377; Joanna Brooks, “The Early American Public Sphere and the Emergence of a Black Print Counterpublic,” *William and Mary Quarterly*, 62 (2005): 67-92. For an incisive examination of the relevant historiography, see John L. Brooke, “Reason and Passion in the Public Sphere: Habermas and the Cultural Historians,” *Journal of Interdisciplinary History*, 29 (1998): 43-67; John L. Brooke, “Consent, Civil Society, and the Public Sphere in the Age of Revolution and the Early American Republic,” in Jeffrey L. Pasley, Andrew W. Robertson, and David Waldstreicher, eds., *Beyond the Founders: New Approaches to the Political History of the Early American Republic* (Chapel Hill: University of North Carolina Press, 2004), 207-250.

<sup>12</sup> The latest work on voluntarism in urban colonial British America is Jessica Roney, “‘First Movers in Every Useful Undertaking’: Voluntary Associations and the Urban Social Landscape of Philadelphia, 1725-75” (Ph.D. diss., Johns Hopkins University, 2008). Her conclusions as to the breadth of participation in voluntary societies (at one point, amounting to one in five adult males) helps to provide some sense of the breadth of these pre-Revolutionary influences on the associationalism under review in this dissertation.

improve society and their own lives. William Manning, a farmer in Billerica, Massachusetts, whose 1798 unpublished and untutored political treatise, *The Key of Liberty*, has become one of our few windows into the minds of the nonelite in the federal period, even encouraged the formation of a national association of mechanics and farmers, a “Society of Labourers,” to counter those societies of the privileged few. Association was, though, largely a local phenomenon. Parades in New York in the 1780s and 1790s reveal the many associations being organized in what one historian calls the “rush by New Yorkers to form societies that would embody every conceivable interest.” These societies were not at all similar to the committees of the Revolutionary period, which claimed to speak for whole communities, but rather were formed by and for specific ethnic, cultural, or interest groups and, particularly in the early nineteenth century, for particular segments of the laboring population.<sup>13</sup>

Many sought formal incorporation, and chartered corporations large and small reached Americans of all social levels: “the members of these corporations are increasing rapidly and daily,” noted one judge in 1810, and recent scholarship has elaborated on his claim by showing the prevalence of stock ownership among ordinary Americans, the product of deliberate efforts in government and in business to “democratize” corporate membership. The proportion of Americans formally belonging to churches roughly doubled between 1776 and 1850. One could go on at length in describing the “most

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<sup>13</sup> William Manning, *The Key of Liberty: Shewing the Causes Why a Free Government Has Always Failed, and a Remedy against It* (Billerica, Mass.: Manning Association, 1922), 35-37, 61-67; Michael Merrill and Sean Wilentz, *The Key of Liberty: The Life and Democratic Writings of William Manning, “A Laborer,” 1747-1814* (Cambridge, Mass.: Harvard University Press, 1993); Edward Countryman, *A People in Revolution: The American Revolution and Political Society in New York, 1760-1790* (Baltimore: Johns Hopkins University Press, 1981), 293-294. See also Mary P. Ryan, “Civil Society as Democratic Practice: North American Cities during the Nineteenth Century,” *Journal of Interdisciplinary History*, 29 (1999): 583. On Manning, see also chapter 7 in this dissertation.

astonishing” spread of organized collective action in the early American republic, as the practice reached new places and new people with every passing year.<sup>14</sup>

Most students of American history are first made aware of the breadth and cultural significance of voluntary association in the early nineteenth century through the work of Alexis de Tocqueville, who stood amazed as he watched Americans of the 1830s “forever forming associations” to meet needs large and small. Arthur Schlesinger’s characterization of the United States as a “nation of joiners” helped to make Tocqueville’s observation a historiographical commonplace. But the phenomenon was not something apparent only to foreign observers or to those writing at the remove of a century or more. Many contemporary Americans, Francis Wayland dryly observed in 1838, had designated voluntary associations “the peculiar glory of the present age.” They were more than aware that something new was appearing among them, and even outspoken advocates of cooperative organization such as Ohio lawyer Timothy Walker acknowledged concerns that “individual freedom of action shall be swallowed up” in what he called “the prevailing spirit of association.”<sup>15</sup>

A great deal of effort has gone to determine why so many voluntary associations, defined as groups of individuals who chose to join together in a formalized structure to effect common purposes, were created in the several decades following the American

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<sup>14</sup> *Commonwealth v. St. Patrick Benevolent Society*, 2 Binn. 441, 450 (1810) (first quotation); John Majewski, “Toward a Social History of the Corporation: Shareholding in Pennsylvania, 1800-1840,” in Cathy Matson, ed., *The Economy of Early America: Historical Perspectives and New Directions* (University Park: Pennsylvania State University Press, 2006), 294-316; James Kent, *Commentaries on American Law*, 2d ed. (New York: O. Halsted, 1832), 2:271 (second quotation); Roger Finke and Rodney Stark, *The Churched of America, 1776-2005: Winners and Losers in Our Religious Economy* (New Brunswick, N.J.: Rutgers University Press, 2005), 23, 55.

<sup>15</sup> Alexis de Tocqueville, *Democracy in America*, trans. George Lawrence (New York: Harper and Row, 1966), 513; Arthur M. Schlesinger, “Biography of a Nation of Joiners,” *American Historical Review*, 50 (1944): 1-25; Francis Wayland, *The Limitations of Human Responsibility* (Boston: Gould, Kendall, and Lincoln, 1838), 90-91; Timothy Walker, *Introduction to American Law: Designed as a First Book for Students* (Philadelphia: P.H. Nicklin and T. Johnson, 1837), 203.

Revolution. Tocqueville's contribution to what has become an unending conversation was that the phenomenon was a virtually inevitable by-product of the general equality (and thus general impotence) of each solitary citizen. Associations, then, "must take the place of the powerful private persons whom equality of conditions has eliminated." To achieve anything at all, organized cooperation was needed. It is an argument that rests entirely on Americans' rational response to perceived need and really does little in the way of historical explanation (it presumes both that people would respond rationally and that they would perceive the need), though Tocqueville's observation of the effects of equality remains an important underlying factor in many of the other historiographical threads of explanation that have taken shape in more recent years.<sup>16</sup>

A particularly persuasive school of thought has credited the rise of associational activity to the revival of American Protestantism known as the Second Great Awakening. The very concept of voluntarism, for those living in the early republic and for their historians, evokes the religious disestablishment and pluralism of the late eighteenth and early nineteenth centuries, and though the relationship of one form of voluntarism to another was neither direct nor simple there remains a compelling case for their connection. Specifically, a theological optimism of the age, a sense of responsibility to do good and thus demonstrate saving grace (or, for some historians, to find a means to induce conformity, whether that meant efforts at the social control of the unregenerate or

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<sup>16</sup> Tocqueville, *Democracy in America*, 514-517, quotation on 516; this explanation, though limited to a discussion of the American North, is also found in the anonymous review, perhaps written by Orestes Brownson, of William Ellery Channing's *Slavery*, in the *Boston Quarterly Review* (1838): 258. See also Andrew Sabl, "Community Organizing as Tocquevillean Politics: The Art, Practices, and Ethos of Association," *American Journal of Political Science*, 46 (2002): 1-19. The definition inserted here is the typical one in legal discussions of unincorporated associations (see, for example, "Judicial Control of Actions of Private Associations," *Harvard Law Review*, 76 [1963]: 985), though it is equally well suited to discussions of incorporated bodies and will be so used here.

even efforts of the orthodox to contain revivalism), and the search for an “organizing process” of a religious awakening as expressed in local groups have all been named as direct causes of the phenomenon at question, the unprecedented spread of formalized associational activity in the new republic.<sup>17</sup>

A third explanation centers on the increasing modernization of the early United States. William Ellery Channing saw the connection clearly in 1829, asserting that “the

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<sup>17</sup> Schlesinger himself saw the nation of joiners as arising from “the loins of religious voluntarism” (“Biography of a Nation of Joiners,” 21). See Michael P. Young, *Bearing Witness against Sin: The Evangelical Birth of the American Social Movement* (Chicago: University of Chicago Press, 2006); Perry Miller, *The Life of the Mind: From the Revolution to the Civil War*, bks. 1-3 (New York: Harcourt, Brace, and World, 1965), 32-47; Kathleen D. McCarthy, *American Creed: Philanthropy and the Rise of Civil Society* (Chicago: University of Chicago Press, 2003); Robert H. Abzug, *Cosmos Crumbling: American Reform and the Religious Imagination* (New York: Oxford University Press, 1994), 40-41; H. Richard Niebuhr, *The Social Sources of Denominationalism* (1929; rpt., Hamden, Conn.: Shoestring Press, 1954); Anne C. Rose, “The Social Sources of Denominationalism Reconsidered: Post-Revolutionary Boston as a Case Study,” *American Quarterly*, 38 (1986): 243-264; Daniel Walker Howe, “The Evangelical Movement and Political Culture in the North during the Second Party System,” *Journal of American History*, 77 (1991): 1216. Arguing for a direct relationship between religiously inspired organizations and the modern association is Peter Dobkin Hall, e.g., “Religion and the Origin of Voluntary Associations in the United States,” working paper 213 (New Haven, Conn.: Program on Non-Profit Organizations, 1994); and “Resolving the Dilemmas of Democratic Governance: The Historical Development of Trusteeship in America, 1636-1996,” in Ellen Condliffe Lagemann, *Philanthropic Foundations: New Scholarship, New Possibilities* (Bloomington: Indiana University Press, 1999), 3-42. In Hall’s view, this is especially the case with organizations of national scope: see also Jason Mazzone, “Organizing the Republic: Civic Associations and American Constitutionalism, 1780-1830” (J.D. diss., Yale Law School, 2004), chap. 3, “Civic Entrepreneurship.”

On social control, see Charles I. Foster, *An Errand of Mercy: The Evangelical United Front, 1790-1837* (Chapel Hill: University of North Carolina Press, 1960); Clifford S. Griffin, *Their Brothers’ Keepers: Moral Stewardship in the United States, 1800-1865* (New Brunswick, N.J.: Rutgers University Press, 1960); Daniel Walker Howe, *The Political Culture of the American Whigs* (Chicago: University of Chicago Press, 1979), chap. 7; and especially Lois W. Banner, “Religious Benevolence as Social Control: A Critique of an Interpretation,” *Journal of American History*, 60 (1973): 23-41. On associations as a means to contain revivalism itself, see Nathan O. Hatch, *The Democratization of American Christianity* (New Haven, Conn.: Yale University Press, 1989), 170.

On the organizational hypothesis, see Donald G. Mathews, “The Second Great Awakening as an Organizing Process, 1780-1830: An Hypothesis,” *American Quarterly*, 21 (1969): 39-43; James E. Block, *A Nation of Agents: The American Path to a Modern Self and Society* (Cambridge, Mass.: Belknap Press of Harvard University Press, 2002), 371-380. A variation on this explanation actually finds the organizational roots of American associational activity in the *First* Great Awakening, with the voluntarism of a Lockean sort that took hold among many groups being secularized and embraced in the last decades of the eighteenth century. John L. Brooke, *The Heart of the Commonwealth: Society and Political Culture in Worcester County, Massachusetts, 1713-1861* (1989; rpt., Amherst: University of Massachusetts Press, 2005), 241, 246, 270. Similar in spirit, attributing the organizational roots of American Revolutionary activity to the Great Awakening, is Patricia U. Bonomi, *Under the Cope of Heaven: Religion, Society, and Politics in Colonial America* (New York: Oxford University Press, 1986).

main cause” in the explosion of associational action was “the immense facility given to intercourse by modern improvements, by increased commerce and travelling, by the post-office, by the steam-boat, and especially by the press, by newspapers, periodicals, tracts, and other publications.” Concurring historians have correlated the rise in American associational activity, particularly of the creation of charitable and reform organizations, with a series of gradual (and not so gradual) economic, social, and demographic transformations that saw the people of British North America, and then the United States, becoming more capitalistic, more tightly interconnected, and, in sum, increasingly modern. With such changes, though by no means wholly restricted to Britain or the United States, came a newfound humanitarian sensibility and a greater cognizance not only of the need but also of the capacity to effect substantial change to ameliorate the sufferings and deprivations of others. Some have contended that, on the contrary, most associational activity was found in the smaller, more homogeneous communities in the United States, and thus modernization and concomitant social change were less a cause than has long been assumed.<sup>18</sup>

Building on scholarship concerning British associations, a fourth but closely related school holds that the proliferation of voluntary associations is best understood as a consequence of the decline of community, the standard *Gemeinschaft-to-Gesellschaft* narrative. According to a scholar of British voluntary association, with “the

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<sup>18</sup> [William Ellery Channing], Article V in *Christian Examiner and General Review*, 7 (1829): 106; Ronald G. Walters, *American Reformers, 1815-1860* (New York: Hill and Wang, 1978), 3-19. Thomas L. Haskell's essays, reprinted in Thomas Bender, ed., *The Antislavery Debate: Capitalism and Abolitionism as a Problem in Historical Interpretation* (Berkeley: University of California Press, 1992), are the central texts regarding capitalism and the rise of humanitarian reform, especially antislavery sentiment. Gerald Gamm and Robert D. Putnam are critical of a connection between modernization and increasing numbers of voluntary societies in “The Growth of Voluntary Associations in America, 1840-1940,” *Journal of Interdisciplinary History*, 29 (1999): 511-557.

fragmentation of the communal coherence, the diminution of the organized sociability, and the sundering of the powerful cultural identity of the older, medieval city,” clubs, charitable organizations, and mutual aid societies can be seen as a response to “a growing sense of social isolation and social distance.” With the requisite modifications, that model has held, by and large, for many historians working in a North American context, with new kinds of groups filling a void left by the (supposedly) once tight-knit communities of generations past.<sup>19</sup>

Fifth, those attentive to the implications of print and communication networks in spurring social change have portrayed association as, in a sense, a technology. Quite simply, the spread of the knowledge of *how* to associate—through print, through emulation of a nearby town, and through the geographical mobility of the members and organizers themselves—encouraged the practice. A focus on the national aspects of association-formation has put the association-as-technology hypothesis on surer footing, as recent studies have concluded that local bodies were often auxiliaries of nationwide efforts. In the past dozen years, historians’ emphasis on partisan conflict as prompting

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<sup>19</sup> Phil Withington, “Citizens, Community, and Political Culture in Restoration England,” in Alexandra Shepard and Phil Withington, eds., *Communities in Early Modern England: Networks, Place, Rhetoric* (Manchester: Manchester University Press, 2000), 134-155; Peter Clark, *Sociability and Urbanity: Clubs and Societies in the Eighteenth-Century City* (Leicester: Leicester University Press, 1986), 4; Peter Clark, *British Clubs and Societies*, 273, 411; R. J. Morris, “British Voluntary Societies and Urban Elites, 1780-1850: An Analysis,” *The Historical Journal*, 26 (1983): 95-118; Jonathan Barry, “Bourgeois Collectivism? Urban Association and the Middling Sort,” in Jonathan Barry and Christopher Brooks, eds., *The Middling Sort of People: Culture, Society, and Politics in England, 1550-1800* (New York: St. Martin’s Press, 1994), 92; Craig Muldrew, “From a ‘Light Cloak’ to an ‘Iron Cage’: Historical Changes in the Relation between Community and Individualism,” in Shepard and Withington, eds., *Communities in Early Modern England*, 156-177.

The Americanists’ scholarship in this vein is vast, including Charles Sellers, *The Market Revolution: Jacksonian America, 1815-1846* (New York: Oxford University Press, 1991), 202-236; Paul E. Johnson and Sean Wilentz, *The Kingdom of Matthias: A Story of Sex and Salvation in 19<sup>th</sup>-Century America* (New York: Oxford University Press, 1994), 3-11; Mary P. Ryan, *Cradle of the Middle Class: The Family in Oneida County, New York, 1790-1865* (New York: Cambridge University Press, 1981), 107; John Patrick Diggins, *The Lost Soul of American Politics: Virtue, Self-Interest, and the Foundations of Liberalism* (New York: Basic Books, 1984), 150; Rowland Berthoff, *An Unsettled People: Social Order and Disorder in American History* (New York: Harper and Row, 1971), 254-274.

specific kinds of association with an unprecedented zeal, part of the disciplinary effort to describe what was unique about the early national public sphere, has developed still further the idea of voluntary associations as a technology or institutional core of great utility and appeal in the nation's fluid and developing political culture.<sup>20</sup>

A sixth way of thinking about associational activity has begun to reshape scholarship regarding voluntary action, and it gives prominence to the nurturing role of the state. The study of early American civil society has long been an area of study that has emphasized the spontaneous and private nature of voluntary groups, in large part owing to Tocqueville's influence. But quite recently scholars have begun to describe formally organized collective action as a technology of a particular sort, a "technology of public action." American governments played a vital role. Association became a means to achieve what could not be achieved individually, in this view, only because governmental institutions had established a framework within which this sort of combination could happen. Political and social scientists' recent attention to the institutional aspects of what they call American Political Development has combined with a revival and expansion of the Commonwealth historians' work of the mid-twentieth century to emphasize the interconnectedness between civil society and polity. Three important caveats need to be made here: first, emphasizing the role of the state does not go very far in actually explaining the surge in association-formation in the early republic (for all agree that more

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<sup>20</sup> Neem, *Creating a Nation of Joiners*; Sidney Tarrow, *Power in Movement: Social Movements, Collective Action, and Politics* (New York: Cambridge University Press, 1994); Mazzone, "Organizing the Republic," chaps. 2-3; Theda Skocpol, *Diminished Democracy: From Membership to Management in American Civic Life* (Norman: University of Oklahoma Press, 2003). On the role of associations as something akin to an institutional scaffolding for the development of American political parties, see Brooke, "Ancient Lodges and Self-Created Societies"; Koschnik, "Let a Common Interest Bind Us Together"; Brian Phillips Murphy, "'A Very Convenient Instrument': The Manhattan Company, Aaron Burr, and the Election of 1800," *William and Mary Quarterly*, 3d ser., 65 (2008): 233-266.



was required than state encouragement and facilitation); second, this school of thought often presents “the state” as an unchanging monolith over a span of time in which American governments, in fact, evolved greatly, for example, with the disestablishment of state churches; third, scholarship in this vein has, until now, virtually ignored contemporary debates about the roles, rights, and duties of individuals within associations, focusing instead on the responses to organized groups within the republic. This third point, in particular, will be fleshed out in the next section. Still, the insights of this field of scholarship has tremendous significance for our understanding of the forms and practices found in concerted action of the early republic and will be crucial in the present work.<sup>21</sup>

The most persuasive explanations cede primacy of place to the Revolution itself and the accompanying changes in political practice, ideology, and outlook observable in its wake. According to this view (whose adherents grant that broader demographic, social, and religious change played supporting roles), after the Revolution—and in large

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<sup>21</sup> William J. Novak, “The American Law of Association: The Legal-Political Construction of Civil Society,” *Studies in American Political Development*, 15 (2001): 163-188; William J. Novak, “The Legal Transformation of Citizenship in Nineteenth-Century America,” in Meg Jacobs, William J. Novak, and Julian E. Zelizer, eds., *The Democratic Experiment: New Directions in American Political History* (Princeton, N.J.: Princeton University Press, 2003), 101-102; Theda Skocpol, “The Tocqueville Problem: Civic Engagement in American Democracy,” *Social Science History*, 21 (1997): 455-479; Theda Skocpol, Marshall Ganz, and Ziad Munson, “A Nation of Organizers: The Institutional Origins of Civic Voluntarism in the United States,” *American Political Science Review*, 94 (2000): 527-546; Scott Gregory Lien, “Contested Solidarities: Philanthropy, Justice, and the Reconstitution of Public Authority in the United States, 1790-1860” (Ph.D. diss., University of Chicago, 2006). The concept “technology of public action” is formulated in Hendrik Hartog, *Public Property and Private Power: The Corporation of the City of New York in American Law, 1730-1870* (Chapel Hill: University of North Carolina Press, 1983), 66.

The most relevant of the Commonwealth studies is Handlin and Handlin, *Commonwealth*; see also Harry N. Scheiber, “Government and the Economy: Studies of the ‘Commonwealth’ Policy in Nineteenth-Century America,” *Journal of Interdisciplinary History*, 3 (1972): 135-151. On the changing conception of “civil society” as including or being entirely separate from government, see Adam Ferguson, *An Essay on the History of Civil Society*, ed. Fania Oz-Salzberger (Cambridge: Cambridge University Press, 1995), xix; Adam Seligman, “Civil Society as Idea and Ideal,” in Simone Chambers and Will Kymlicka, eds., *Alternatives Conceptions of Civil Society* (Princeton, N.J.: Princeton University Press, 2002), 13-33; and the essays collected in Nancy L. Rosenblum and Robert C. Post, eds., *Civil Society and Government* (Princeton, N.J.: Princeton University Press, 2002).

part because of it—“supra-local perspectives” that simply had not existed in British America combined with both a secular and a religious optimism to encourage collective action. Problems could be solved, they believed, and cooperation was a means to achieve those solutions. As men and women became accustomed to formal, voluntary participation in one organization or another, or as they read or heard about such groups in neighboring communities, a cumulative effect created the world Tocqueville observed, one in which it appeared that associations of “a thousand different types” were formed in “all the affairs of social life.” In communities that had scarcely changed at all in some measurable socioeconomic or demographic way, men and women in the first few decades following a republican revolution were forming and joining associations with a frenzy that would have seemed absolutely alien to their colonial forebears. Both the language and the practices of these groups underscore the connection between that revolution and their existence, and scholars who have stressed this link have made a compelling case that, more than anything, the cooperative endeavors are evidence and consequence of a new way of viewing the world.<sup>22</sup>

Unless they are extraordinarily careful to avoid it, however, efforts to understand the historical processes behind the growing numbers of formally organized, voluntary groups of the early to mid-nineteenth century can effectively take people out of what was a profoundly personal experience. The decisions to join, to participate, or to sever ties

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<sup>22</sup> Richard D. Brown, “The Emergence of Urban Society in Rural Massachusetts, 1760-1820,” *Journal of American History*, 61 (1974): 29-51; and his “Emergence of Voluntary Associations in Massachusetts, 1760-1830,” *Journal of Voluntary Action Research*, 2 (1973): 64-73; Conrad Edick Wright, *The Transformation of Charity in Postrevolutionary New England* (Boston: Northeastern University Press, 1992); Joyce Appleby, *Inheriting the Revolution: The First Generation of Americans* (Cambridge, Mass: Belknap Press of Harvard University Press, 2000), 236-241; Gordon S. Wood, *The Radicalism of the American Revolution* (New York: Alfred A. Knopf, 1992), 328-329; Tocqueville, *Democracy in America*, 189, 513.

with private organizations can and should be understood in the context of larger historical forces. But the assumptions and the anxieties of the people involved as well as the broader concerns of current scholarship in political theory, law, and history each prompt a closer look at the place of individuals, the exact nature of the member-to-society relationship, within the voluntary associations formed in the early American republic. Thus, this dissertation will focus on what it meant in practice when people belonged—the word itself is provocative—to one or more of the myriad voluntary groups forming in the early decades of the republic. It will do so, often, by focusing upon those moments of conflict in which conceptions of membership neared or reached a breaking point, including instances in which political and legal institutions were called upon to mediate unexpected tensions between autonomy and collective action and to help to determine the enforceable rights and duties of membership. A study of how people joined (or were kept from joining), withdrew (or were held fast to associational commitments against their will), found themselves expelled, or tested the furthest limits of associational authority reveals that a post-Revolutionary turn toward procedure, legalism, and legally guaranteed rights provided the substructure upon which early American civil society was formed.

### Legal Authority and Association

Political society in the early decades of the republic comprised what one scholar has recently described as “varying forms of human association and public jurisdiction,” including laws that ranged from those “governing membership in voluntary associations, churches, unions, and corporations to the laws governing participation in towns,

municipalities and political parties.”<sup>23</sup> These first generations of Americans were acutely anxious about how such institutions should function, about which models to follow and which principles to emphasize. But to what extent was the authority of voluntary groups over their members, such as the power to make and enforce bylaws, given effective protection in the legal regimes of the early United States? To what extent were individual rights claims *within* private associations given credence by legal and political institutions? These are important legal historical questions that have been rarely asked and never answered.

The formative decades of associational law in the late eighteenth and early nineteenth centuries saw profound changes in how law itself was perceived and practiced. It became, as Christopher Tomlins has phrased it, something it was not before—“*the* paradigmatic discourse explaining life in America.” Conceived of spatially, it was law and not politics that served as the arena in which the period’s “rights discourse would actually take effect.” The fact that legal discourse and institutions acquired a new resonance in the early republic has been a means to attribute to lawyers an instrumental, even causal role in the coinciding capitalist development of the new nation. But there is cause to rethink claims for such legal instrumentalism, both for empirical reasons and for a methodological one important to this study: viewing judges and lawyers as having paved the way for early American capitalist development can produce a teleology in understanding the origins of, say, minority shareholders’ rights in business corporations

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<sup>23</sup> Novak, “Legal Transformation of Citizenship in Nineteenth-Century America,” 94. Robert Cover labeled as “nomic insularity” what can also be described as jurisdictional autonomy, the ways in which groups are and should be jurisgenerative and relatively secure from state intervention. Robert M. Cover, “Foreword: *Nomos* and Narrative,” *Harvard Law Review*, 97 (1983): 4-68.

in a way that overly narrows the scope of historical inquiry.<sup>24</sup> Rather, comprehending law and its broader, existential purposes in the post-Revolutionary era as providing nothing less than “the rule of human conduct in the state of society,” as Zephaniah Swift described matters, turns our attention away from the instrumental functions of legal changes regarding associative commitments and instead impels us to ask what something like the rights of shareholders might reveal about broader trends in the nature of interpersonal relationships and personal commitments in the early years of the republic.<sup>25</sup>

In order to gain an understanding of the changing conceptions of voluntary membership in this period, law must be understood both as a means, practical and effective, of conflict resolution through legal institutions and also as a language, a way of describing and determining social relationships. Thus, this dissertation, focused as it is on moments of conflict when conceptions of membership were tested and brought to their limits, will seek to determine the extent to which jurists and legislators extended to private groups a set of principles already present in post-Revolutionary understandings of law, that, as Hendrik Hartog has expressed it, “when we are wronged there must be remedies, that patterns of illegitimate authority can be challenged, that public power must contain institutional mechanisms capable of undoing injustice.” In this dissertation, I will argue that making a particular remedy available to member or group in a moment of

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<sup>24</sup> Tomlins, *Law, Labor, and Ideology*, quotations on 21, 28, emphasis in original; William J. Novak, *The People's Welfare: Law and Regulation in Nineteenth-Century America* (Chapel Hill: University of North Carolina Press, 1996), 8-9; Wood, *Radicalism of the American Revolution*, 323. The now-classic expressions of legal instrumentalism are found in the scholarship labeled Critical Legal Studies, especially Morton J. Horwitz, *The Transformation of American Law, 1780-1860* (Cambridge, Mass.: Harvard University Press, 1977). See Christopher L. Tomlins, “A Mirror Cracked? The Rule of Law in American History,” *William and Mary Law Review*, 32 (1991): 353-397; Peter Karsten, *Heart versus Head: Judge-Made Law in Nineteenth-Century America* (Chapel Hill: University of North Carolina Press, 1997).

<sup>25</sup> Zephaniah Swift, *A System of Laws of the State of Connecticut: In Six Books* (Windham, Conn.: John Byrne, 1795), 5.

disagreement that saw the internal mechanisms of resolution not up to the task—be it formal or informal, and including outright withdrawal or expulsion—was enormously influential in shaping the early national associational world and furthering the trends begun within the societies themselves toward formalized, legalistic understandings of the member-to-group relationship. That is, encompassing the relationships in private groups within a sphere conceived of in legal terms and monitored by legal institutions aided in the creation of an associational realm marked by clearly defined, limited, and often fleeting commitments.<sup>26</sup>

The complex interconnectedness of associational authority and governmental superintendence is apparent in two ways that will be developed over the course of the dissertation. The first is relevant only to chartered institutions. The numbers of corporations and of their members soared in the early national period: “There is scarcely an individual of respectable character in our community, who is not a member of, at least, one private company or society which is incorporated,” noted the authors of the first corporate law treatise published in the United States, and recent scholarship has confirmed widespread participation in private, often profit-seeking, corporations.<sup>27</sup> And historians have recently shown that the protection of corporate charters from unilateral revision at the hands of governments, by classifying those documents as contracts protected constitutionally from arbitrary amendment, was a means of securing the

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<sup>26</sup> Hendrik A. Hartog, “The Constitution of Aspiration and ‘The Rights That Belong to Us All,’” *Journal of American History*, 74 (1987): 1014; Christopher L. Tomlins, “History in the American Juridical Field: Narrative, Justification, and Explanation,” *Yale Journal of Law and Humanities*, 16 (2004): 323-398.

<sup>27</sup> Joseph K. Angell and Samuel Ames, *Treatise on the Law of Private Corporations, Aggregate* (Boston: Hilliard, Gray, Little, and Wilkins, 1832; rpt., New York: Arno Press, 1972), 35; John Majewski, “Toward a Social History of the Corporation: Shareholding in Pennsylvania, 1800-1840,” in Cathy Matson, ed., *The Economy of Early America: Historical Perspectives and New Directions* (University Park: Pennsylvania State University Press, 2006), 294-316.

pluralism of civil society from government. As Mark McGarvie observes, “The protection of private rights from public action required the delineation of private and public activities,” a task unachievable through political channels. *Dartmouth College v. Woodward* and another 1819 decision, *Philadelphia Baptist Association v. Hart’s Executors*, effectively privatized American civil society, he argues, allowing incorporated associations the protection of the contracts clause but requiring that a group seeking to pursue its own ends in society meet certain legal requirements.<sup>28</sup> Thus, the charter was, simultaneously, an instrument of private corporate autonomy and of public authority and supervision. I will argue that the corporate charter was also useful in ways that remain to be explicated: it facilitated the penetration of civil society by public norms and allowed legislators and jurists to set and enforce limits to the legitimate exercise of corporate authority over members.

Second, and even less studied in current scholarship, is the relationship between pluralism and juridical autonomy in a nation that, as Francis Lieber described it, appeared to be “a concatenation of various corporations, political, civil, religious, social and economical,” with the nation simply a “great corporation, comprehending all others.” For many scholars, it was the ability of early American voluntary groups to create and

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<sup>28</sup> 4 Wheat. (17 U.S.) 1 (1819); Mark Douglas McGarvie, *One Nation under Law: America’s Early National Struggles to Separate Church and State* (DeKalb: Northern Illinois University Press, 2004), 178-181, quotation on 13. A concurring position, emphasizing desires for security from the shifting partisan alignments of state government, is taken by Neem, *Creating a Nation of Joiners*. This position has recently been challenged by Scott Gregory Lien, “Contested Solidarities: Philanthropy, Justice, and the Reconstitution of Public Authority in the United States, 1790-1860” (Ph.D. diss., University of Chicago, 2006), who argues that state paternalism and active participation in shaping American civil society outlived the 1819 decisions and only declined with rise of contractarian liberalism in the later nineteenth century. The best historical background to *Dartmouth* remains Bruce Arthur Campbell, “Law and Experience in the Early Republic: The Evolution of the Dartmouth College Doctrine, 1780-1819” (Ph.D. diss., Michigan State University, 1973). On the public-private dichotomy, see Gerald Frug, “The City as a Legal Concept,” *Harvard Law Review*, 93 (1980): 1057-1154; Hendrik Hartog, *Public Property and Private Power: The Corporation of the City of New York in American Law, 1730-1870* (Chapel Hill: University of North Carolina Press, 1983).

enforce rules for their members, which has been called their jurisgenerative capacity, that was a defining component of the development of a pluralist social landscape in the youthful United States. As Mark DeWolfe Howe once described it, a pluralist would argue that groups within a larger body politic could and should “exercise within the area of their competence an authority so effective as to justify labeling it a sovereign authority.” Robert Cover, too, described and analyzed “collective, norm-generating communities” across the American political landscape throughout its history, particularly religious societies, and such jurisgenerative power became an important part of his legal theory.<sup>29</sup> I will argue that this reading of American pluralism does not withstand historical scrutiny. What allowed post-Revolutionary American civil society to become recognizably pluralistic was, ironically, the encompassment of all efforts at association within what rapidly became a remarkably consistent jurisprudence, a body of law produced in moments of contestation, which helped to describe the rights and duties of membership in a way that limited the claims a group could make on individual members. It was a jurisprudence that allowed civil rights claims to operate even within the ranks of private, voluntary associations, a jurisprudence founded on the idea that all groups comprised the same fundamental units—rights-bearing individuals.

Doubtless, in the early republic, as countless groups drafted and published constitutions, bylaws, rules and regulations, manuals, and the like, they clearly claimed

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<sup>29</sup> Francis Lieber, *Encyclopædia Americana...*, 13 vols. (Philadelphia: Carey, Lea & Blanchard, 1830-1835), 3:547; Mark DeWolfe Howe, “Foreword: Political Theory and the Nature of Liberty,” *Harvard Law Review*, 67 (1953-1954): 91; Cover, “*Nomos* and Narrative,” 32n.94; Stephen Pepper, “Conflicting Paradigms of Religious Freedom: Liberty versus Equality,” *Brigham Young University Law Review*, 24 (1993): 24; Paul W. Kahn, *Legitimacy and History: Self-Government in American Constitutional History* (New Haven, Conn.: Yale University Press, 1992), 196-200. L. Ray Gunn, *The Decline of Authority: Public Economic Policy and Political Development in New York, 1800-1860* (Ithaca, N.Y.: Cornell University Press, 1988), 105, 244, has argued that Lieber’s “concatenation” can be in large part explained by the fact that, both conceptually and in actual practice, the corporation of the early nineteenth century was a primary way in which the public and the private spheres were linked.



and acted on the power to produce “law.” But it remains to be shown how this measure of jurisdictional authority, this limited sovereignty over members, was fitted into the legal regimes of the early United States. William Novak, whose writing on a developing law of associations in this period is vital to this dissertation, expresses what I will argue is an overly jurisdictional view of associational practice when he describes an early-nineteenth-century American’s “bundle of rights and duties” as nothing more and nothing less than “the product of a very complicated and varied tally of the rules, regulations, and bylaws of the host of differentiated associations to which he belonged.” Novak finds nothing to “trump or limit the power of these majoritarian organizations.” Though he correctly emphasizes the active role of the state in fostering this regime of associational jurisdictions, whereas others have stressed its spontaneous emergence, such a jurisdictional view has taken us as far as we can go in understanding the nature of voluntary commitments in the early United States, for it neglects the effects of conceptions of both personal and popular sovereignty in shaping the practice of association.<sup>30</sup>

In the post-Revolutionary age, however, many Americans expressed comfort with the idea that political and legal institutions could and should superintend affairs within the bounds of voluntary associations, secular and religious. In a revealing opinion drafted by Justice John Gibson in 1822 concerning an election within St. Mary’s, a Catholic church in Philadelphia, he noted that, while there are occasions in the political world in which a man’s vote is wrongly withheld and yet he remains bound by the results of an

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<sup>30</sup> Novak, “American Law of Associations”; Novak, “Legal Transformation of Citizenship in Nineteenth-Century America,” 101-102. The distinction between groups that are jurisgenerative and those that are sovereign is noted in Post and Rosenblum, “Introduction,” in Post and Rosenblum, eds., *Civil Society and Government*, 7.

election, that is only because there is “no superior superintending power to correct abuses from the very root; nor could there be, for the exigencies of society require that the business of government should not in the meantime stand still: the right of the citizen, must, therefore, yield to considerations of necessity.” But in the church dispute before him, Gibson was quick to note, there *is* a “superintending power,” the courts of Pennsylvania, and justice requires that it be invoked. His choice of words was a loaded one. For James Wilson immediately after the Revolution, the people served as a “superintending power” over every branch of government. James Madison in *Federalist* 43 used the term to describe the federal role in guaranteeing republican governments within the states. In sum, the phrase expressed a principle too long ignored in the study of American voluntary membership, one that reveals an active state role and a commitment to overarching norms in shaping formalized interpersonal relationships. In short, American associational life was not so much a multitude of jurisdictions as it was a wide array of opportunities for individual voluntarism that all fell within a larger body of law; the relevant concept is not so much jurisdiction, but jurisprudence. The bonds of voluntary membership were governed and shaped by superintending authority, and, more important, many Americans came to believe that they *ought* to be so superintended. And that view would have consequences that none foresaw. As the course of legal change regarding labor unions would show (the subject of chapter 7, below), for instance, the experience of participation in and the legal superintendence of voluntary associations of diverse kinds would ultimately lay the groundwork for the legal acceptance of organized labor in the antebellum United States.<sup>31</sup>

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<sup>31</sup> Campbell, “Social Federalism,” 149-188; *St. Mary’s Case*, 7 Serg. and Rawle (Pa.) 517, 544 (1822); Robert Green McCloskey, ed., *The Works of James Wilson*, 2 vols. (Cambridge, Mass.: Belknap Press,

The jurisprudential efforts to define and delimit the power of voluntary associations over their members helped to place the voluntary association of the early American republic on an unquestionably liberal foundation, as courts proved willing to bring the associational activities of Americans within the embrace of a larger regime of civil rights. The parallels to an earlier transformation in Anglo-American law are worth noting, for the insights of Daniel Hulsebosch in writing a history of “the shift from a predominantly jurisdictional to a substantive understanding of the common law,” or, as he more succinctly put it, how “writs were becoming rights,” are of great relevance to this dissertation. Remedies arising in one situation were applied in others. And, in states north and south, a surprisingly consistent and culturally resonant system of law governing voluntary membership came into being in the early decades of the nineteenth century. William Novak has observed that “the judicial opinions in which so much of the American law of association is determined remains to be examined,” and a vital portion of that jurisprudence, centering on conflicts between member and society, is the subject of inquiry here. Michael Walzer’s observations about contemporary civil life rings true for the early American republic as well: “the state can never be what it appears to be in liberal theory, a mere framework for civil society. It is also the instrument of the struggle, used to give a particular shape to the common life.” This dissertation will examine a hitherto unexplored jurisprudence, one that served to limit the bonds of membership and to create a legal means to ensure that even those who voluntarily bound themselves could, when circumstances compelled action, be unbound by law.<sup>32</sup>

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1967), 1:186; *Federalist* 43.

<sup>32</sup> Daniel J. Hulsebosch, “The Ancient Constitution and the Expanding Empire: Sir Edward Coke’s British Jurisprudence,” *Law and History Review*, 21 (2003): 52 (see also Daniel J. Hulsebosch, “Writs to Rights: ‘Navigability’ and the Transformation of the Common Law in the Nineteenth Century,” *Cardozo Law*

## Joining in Post-Revolutionary America

As the last echoes of boisterous debates about the timing of some transition from a republican worldview to a liberal one in early American history have faded away, historians and students of American politics have grown comfortable discussing the coexistence of distinct languages of American conceptions of freedom and social organization in the early republic. These included not only republicanism and liberalism but also views centered on evangelical Christianity, historical legal rights, and even “inegalitarian ascriptive Americanist principles,” in Rogers Smith’s phrase. To understand this era, it is being increasingly emphasized by historians, is to see both liberal individualism and moral community, republican virtue and acquisitive pursuits, not so much challenging one another for supremacy as intermingling. The challenge has become how to describe a liberalism that could exist alongside these other traditions rather than how to tell a story of its triumph. Indeed, the narrative of that story has a great deal to do with the polyglot political culture of the period, something James Kloppenberg has noted in describing the important role of “the virtues of liberalism” in the ultimate predominance of ideals of personal and popular sovereignty.<sup>33</sup>

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*Review* 23 [2002]: 1049–1106); Novak, “American Law of Associations,” 187; Walzer, “Civil Society Argument,” 105.

<sup>33</sup> Daniel T. Rodgers, “Republicanism: The Career of a Concept,” *Journal of American History*, 79 (1992): 11–38; James A. Henretta, “The Slow Triumph of Liberal Individualism: Law and Politics in New York, 1780–1860,” in Richard O. Curry and Lawrence B. Goodheart, *American Chameleon: Individualism in Trans-National Context* (Kent, Ohio: Kent State University Press, 1991), 87–106; James T. Kloppenberg, “The Virtues of Liberalism: Republicanism, Christianity, and Ethics in Early American Political Discourse,” *Journal of American History*, 74 (1987): 9–33; James E. Block, *A Nation of Agents: The American Path to a Modern Self and Society* (Cambridge, Mass.: Belknap Press of Harvard University Press, 2002); Rogers M. Smith, *Civic Ideals: Conflicting Visions of Citizenship in U.S. History* (New Haven, Conn.: Yale University Press, 1997), quotation on 7; Isaac Kramnick, “The Discourse of Politics in

It was, however, in the efforts to make concerted action in American private groups both effective and acceptable—to members and prospective members, to the public, and to the legislative and judicial institutions that came to play more active roles in civil society in the early republic—that there came to be an emphasis on procedure and formalized relationships in increasingly diverse areas of social activity. In the chapters that follow, in examining the laws and practices regarding participation in several kinds of voluntary organizations, this dissertation will study the uneven and uncertain tendency toward a legalistic understanding of membership in the institutions of American civil society.

It was twentieth-century thinker L. T. Hobhouse who noted that “the function of Liberalism may be rather to protect the individual against the power of the association than to protect the right of association against the restriction of the law.” Put another way, because of the central significance of the individual in any liberal schema, rights of association and protections for concerted action are, for liberals, secondary to or derivative from those elements in a political society that are concerned with individual liberty and self-control. An understanding of how and why that describes fairly well the general tendency of the associational laws and practices of the early national United States, and of what became of the efforts to define the depth and breadth of voluntary commitments, reveals much about the conceptual and the practical aspects of a distinctively post-Revolutionary American liberalism that emphasized procedural constraint on authority and formalized relationships among members. That is, liberalism,

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1787: The Constitution and Its Critics on Individualism, Community, and the State,” in Herman Belz, Ronald Hoffman, and Peter J. Albert, eds., *To Form a More Perfect Union: The Critical Ideals of the Constitution* (Charlottesville: University Press of Virginia, 1992), 166-216; Saul Cornell, *The Other Founders: Anti-Federalism and the Dissenting Tradition in America, 1788-1828* (Chapel Hill: University of North Carolina Press, 1999).

according to political theorist Nancy Rosenblum, “asks men and women to ignore all the other things they are in order to treat one another fairly in certain contexts and for certain purposes.” By the second decade of the nineteenth century, this formalized way of thinking about the member-to-group relationship had become predominant in ways that historians have yet to appreciate.<sup>34</sup>

Even as Americans were voluntarily joining a varied assortment of groups to meet needs large and small, and despite the multiplicity of ends to which they directed such collective endeavors, they shared practices, organizational forms, and technologies of association. Historians have done exceptional work describing the formation of a relatively pluralist social landscape in the early republic, with myriad interests and a wide variety of associational opportunities, but a vital component in the embrace of this pluralism has remained unexamined. In the early republic the view that all associations shared the same elemental unit—the rights-bearing individual—grew through contests large and small over the course of the nation’s first several decades. And that way of thinking about voluntary affiliation served as a powerful stimulus to craft a legal means to temper associational authority and helped to ease the transition toward a recognizably plural society.<sup>35</sup>

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<sup>34</sup> L.T. Hobhouse, *Liberalism* (New York: Oxford University Press, 1964), 24; Nancy L. Rosenblum, *Another Liberalism: Romanticism and the Reconstruction of Liberal Thought* (Cambridge, Mass.: Harvard University Press, 1987), 162.

<sup>35</sup> Marc Harris, “Civil Society in Post-Revolutionary America,” in Eliga H. Gould and Peter S. Onuf, eds., *Empire and Nation: The American Revolution in the Atlantic World* (Baltimore: Johns Hopkins University Press, 2005), 212-213, for instance, argues that publicity and openness was an important element in contemporaries’ acceptance of the associational landscape of the early nineteenth century.

## Organization of the Dissertation

Each chapter will focus upon a different kind of voluntary organization, examining their changing modes of internal organization as well as the laws and practices of government involvement in monitoring their relationships with their members. Each chapter, too, will develop a different theme in exploring the changing forms, meanings, and legal consequences of voluntary membership.

Chapter 1 will be a study of religious associations and the changing conceptions of church membership in the face of disestablishment. Going back as far as the first debates on religious tolerance, as scholars such as Holly Brewer have begun to make clear, discussions as to what constituted consent in terms of religious affiliation were crucial to how people understood other kinds of allegiance.<sup>36</sup> This was particularly true in the era of disestablishment in the new United States, for it was there that the distinctions and the degrees of separation between the state and the group life of civil society were first being worked out. As had been the case in the colonial era, schisms, growing religious pluralism, and a drift toward genuine religious diversity all resulted in church membership as a category becoming more, not less, meaningful. Before disestablishment in Massachusetts, for instance, according to a writer in the *Herald of Gospel Liberty*, it was scarcely possible for a person to be expelled from the church except by the hangman or by exile, forcing church members to “hold in their bosom infidels and profane persons.”<sup>37</sup> As each and every state ended their establishments after the Revolution, it

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<sup>36</sup> Holly Brewer, *By Birth or Consent: Children, Law, and the Anglo-American Revolution in Authority* (Chapel Hill: University of North Carolina Press, 2005).

<sup>37</sup> *Herald of Gospel Liberty*, June 5, 1812.

became well understood that “no person can now become a member of a religious society, until, by his voluntary act, he has united with it.”<sup>38</sup> As churches came to comprise only those who had chosen to enter, membership came to mean something different than it had. And legal disputes over who belonged, such as those that centered on who was authorized to vote in a church election, help to trace the drift toward new conceptions of the role of informed consent in membership. Moreover, as churches and religiously affiliated societies began to mirror political society in this way, governmental and legal institutions showed little hesitance in monitoring the interpersonal relationships produced by membership. And the move toward what became known as the voluntary principle shaped conceptions of volitional membership in all kinds of groups, be it a reform society, a labor union, or a business corporation, in ways that historians have yet to examine, owing to the general tendency to separate each group into a separate field of study—religious history, studies of philanthropy or social reform, or labor or business history.

Chapter 2 will bring another analytical issue to the fore: once there was some agreement as to the legitimate origins of membership, how were the bonds of that membership to be understood? In a post-Revolutionary society particularly eager to make collective action a reality but also predisposed to delimit anything that smacked of arbitrary authority or unchecked power, there was a turn to emphases on procedural fairness and legal superintendence of all kinds of groups formed by voluntary affiliation. By examining various kinds of fraternal societies that had (or appeared to have) political aims, this chapter will uncover a previously neglected shift. In the last decade of the

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<sup>38</sup> *Jewett v. Thames Bank*, 16 Conn. 511, 516 (1844).



eighteenth century and the first decade of the nineteenth, more and more American joiners—as well as the jurists called upon to adjudicate internal disputes—moved away from conceptions of membership in fraternal associations as resting primarily on affection, harmony, and mutual friendship. Rather, they began to think of membership in terms more legalistic, holding to a procedure-oriented conception of the rights, duties, and furthest limits of voluntary belonging. Public debates, legal contests, and grassroots innovations in voluntary affiliation—and all three were interrelated and mutually reinforcing—ultimately produced a widely embraced, even normative conception of membership in the fraternal societies of the early American republic.

Previous attention to the phenomenon of association has obscured debates and anxieties regarding the nature of individual participation in such groups. And only very recently has attention to what Neem calls the technology of association revealed how post-Revolutionary innovations in the organization of voluntary societies significantly changed what individual members were called upon to do.<sup>39</sup> Where some scholars such as Joyce Appleby and Gordon Wood have intuited a drift toward multiple and relatively limited voluntary commitments in the group life of the early nineteenth century, this study will uncover the contested origins of ideas regarding legally enforceable rights and procedural fairness that I will argue were the basis for that turn toward attenuated obligations. In two of the most significant historical syntheses in recent years, Wood and Appleby each hypothesize that the very multiplication of associational ties served to attenuate all such bonds. Appleby goes further, describing how simultaneous appeals to American men as “voters, candidates for salvation, prospective club members, and

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<sup>39</sup> Neem, *Creating a Nation of Joiners*, chap. 4.

journal subscribers” encouraged a self-assertiveness and individuality unknown before, and women’s comparable array of choices and opportunities also fostered “an expanding sense of personal value.”<sup>40</sup> Rather than examining the effects of the diversity of American civil society in the early to mid-nineteenth century, as Appleby and Wood have done in broad strokes, this dissertation will reveal the substructure upon which that civil society was formed: ideas regarding procedural fairness, rights that were carried into diverse social relationships, and the legal superintendence of private authority. By focusing on the actual experiences and contests regarding the bonds of membership, this dissertation explores the post-Revolutionary decades as a transitional period in American associational practices, in which men and women were seizing upon a particular, procedurally focused means of creating fair but effective modes of private government.

Chapters 3 and 4 will explore parallel developments in two kinds of societies often relegated to business and institutional histories: mutual fire insurance companies and profit-seeking corporations. Both had existed in the colonial era but in numbers and forms that would seem quaint by the second decade of the nineteenth century. These chapters will describe how ideas regarding consent and procedural fairness echoed across a wide assortment of associations, all of which were seen as generally homologous by contemporaries: where today words like *shareholder* and *investor* are most often used to describe the owners of a corporation, in the early nineteenth century another word predominated: *member*. And post-Revolutionary beliefs about what it really meant when one decided to join a group—for example, ideas about whether the contractual decision to

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<sup>40</sup> Appleby, *Inheriting the Revolution*, 236; Wood, *Radicalism of the American Revolution*, 328-329. A tendency toward less demanding, largely pecuniary ties is apparent in studies of early-nineteenth-century business corporations and has been recently extended to charitable organizations: see James Willard Hurst, *The Legitimacy of the Business Corporation in the Law of the United States, 1780-1970* (Charlottesville: University Press of Virginia, 1970); Wright, *Transformation of Charity*.

join set limits to when and how an association could evolve in any significant way if even one member thought it ought not to—can be seen giving shape to corporate law and the law of mutual insurance in the early years of the nineteenth century.

Chapter 5 will examine how, in the very same years, women's societies also began to use detailed procedure and increasingly legalistic language in describing and delineating their nascent efforts at collective action. The advantages of association were, for them, even more readily apparent than they were for men, as it could allow women, together, to hold property in a way they could not singly. And it allowed women to participate to an extent otherwise unfathomable in pursuits for the improvement of themselves and the society in which they lived. Women's groups do not appear in court in the ways that men's groups often did; there is no record of a women's society being challenged to defend an expulsion or validate an election. And yet, strikingly, these organizers and joiners did not hesitate to array themselves in formalized, procedure-oriented ways, beginning as early as the turn of the nineteenth century, revealing the depth and pervasiveness of this post-Revolutionary turn toward conceiving of association as something best enacted by describing, in detail, the rights, duties, and expectations of membership.

The next two chapters of the dissertation will carry these themes forward into the antebellum period. Chapter 6 will explore how societies formed for purposes of mutual aid changed over the course of the first third of the nineteenth century. The experience of membership in organizations founded as joint-stock or mutual insurance companies had effects on how an American conceived of the other kinds of groups that he or she might voluntarily join in the first part of the nineteenth century. One critic of Freemasonry, for

instance, pointed out that the chief kind of support a Masonic lodge offered to its members—help in times of distress—was better performed by the mutual aid companies formed in such great numbers after the beginning of the nineteenth century. In those clubs and fire insurance firms, the writer in the *Anti-Masonic Review* noted, a person joined for a set period (not for life) and paid into the coffers. That citizen then had a legal claim for support from the society in case of disaster. He would come “as a freeman should come, demanding his right under guaranty of the laws of the country,” not as an oath-bound member hoping for the charity of his fellow Masons.<sup>41</sup> Such parallels prompted a generation of Americans to set certain kinds of limits to the legitimate bonds of voluntary membership, ones that ultimately made all species of voluntary affiliation increasingly like the experience of membership in a stock-issuing corporation. A large number of internal disputes arising out of Pennsylvania mutual aid societies, many of which wound up in court and in American legal treatises for a century to come, provide an opportunity to explore the changing conceptions of membership in groups held together by both fraternal and pecuniary ties.

Chapter 7 will examine the consequences of the early- to mid-nineteenth-century conceptions of voluntary membership for one kind of voluntary group that, in many ways, came to define the nineteenth-century United States: the labor union. And here the focus will be less upon questions of procedural fairness than on questions of individual autonomy. In the case of labor unions, there were serious debates among contemporary Americans that such groups posed a genuine threat to the autonomy of their members. Labor unions appeared to coerce people into joining and to demand more allegiance of

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<sup>41</sup> *Anti-Masonic Review, and Magazine*, Jan. 1, 1828, 4, 15.

their members than any private group ought to be able to claim. They appeared to demand a level of commitment from their members that limited each member's ability to choose a different path. But growing numbers of American men and women—including most significantly Massachusetts chief justice Lemuel Shaw in the year 1842—came to believe that laborers who organized were simply adopting modes of association that had been safely practiced and superintended for more than a generation, and they ought to be allowed to form journeymen's societies just as others formed political clubs or temperance societies. Americans came to accept certain kinds of private organization by the time Alexis de Tocqueville arrived to witness their “forever forming associations,” but that proliferation of societies rested on the fact that American civil society had taken on a new cast, one best defined as liberal in its reliance upon adversarial legalism and procedural formalities to reconcile conflict, even in these ostensibly private, wholly voluntary groups.

For a revolutionary idea had evolved unsteadily through the practical, day-to-day implementation of the rights and duties of membership, as men and women began to insist upon basic principles of procedural fairness: the idea that people carried rights into every social relationship, rights that merited legal guarantee. And the conflict-driven process of defining voluntary membership helped lead Americans of this period, grudgingly, to accept the pluralist makeup of their society, in which myriad groups pursued divergent ends rather than a singular, public good. They could do so because, internally, most of these groups had begun to look the same, evincing the same sorts of procedural checks and legally protected rights for their participants. Those few associations that did appear to threaten the autonomy of their members, such as the

Freemasons, came to stand out in ways they had not just a generation before. By about 1840, such conceptions of voluntary membership had become so generally accepted that the judicial superintendence of private associations would become less direct, resting on the broadest schema of procedural expectations.

By and large, and with those exceptions that are themselves quite telling, such as the Mormons and utopian communities, by the 1830s this was a nation in which members' commitments, be they as stockholders, union men, fraternity brothers, or fellow reformers, had become quite limited and were fully defined at the outset; people had come to understand these relationships in terms of legalistic, procedural formality; and the American legal system was prepared and willing to act in a supervisory role over private associations. The liberating effects of the American Revolution, so often explored in terms of political society, are evident too within Americans' self-created societies, as American associational life came to evince a clear commitment to a prescriptive ideal of the self-governed individual whose rights in any and all social relationships would have legal guarantee. There was a trend toward more specificity and greater restraints on associational authority, and groups that deviated from that trend became increasingly troubling. In an age that can be characterized as one of pervasive pluralism and associational diversity, how Americans conceived of the appropriate limits on the bonds of voluntary membership reveals a sameness within apparent difference.<sup>42</sup>

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<sup>42</sup> See Robert N. Bellah, "Is There a Common Culture?" *Journal of the American Academy of Religion*, 66 (1998): 612-625.

## Chapter 1

### Religious Associations: The Voluntary Principle Applied

In 1837, in the introductory piece to the new *United States Magazine and Democratic Review*, John O’Sullivan wrote to describe his views on exactly what American republican government ought to look like: it should mirror the churches of America in its reliance on voluntarism, not compulsion. “Its domestic action should be confined to the administration of justice, for the protection of the natural equal rights of the citizen, and the preservation of social order. In all other respects, the VOLUNTARY PRINCIPLE, the principle of FREEDOM, suggested to us by the analogy of the divine government of the Creator, and already recognised by us with perfect success in the great social interest of Religion, affords the true ‘golden rule’ which is alone abundantly competent to work out the best possible general result of order and happiness from that chaos of characters, ideas, motives, and interests—human society.”<sup>1</sup> And O’Sullivan was not alone in seizing upon this concept, the “voluntary principle,” to describe the antebellum American religious environment.

Robert Baird, one of the first historians of American religion, writing in 1844, entitled one chapter in his book *Religion in America* “The Voluntary Principle in America: Its Action and Influence.” There, he argued for the peculiar self-reliance of Americans in supporting their own religious institutions, voluntarily, and found in that very voluntarism a way to explain the country’s fervent religiosity. At about the same time, the author of a book on American demographics said much the same: “When it is

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<sup>1</sup> “Introduction,” *United States Magazine and Democratic Review*, 1 (October 1837): 7.

considered that all these institutions for the support of religion, the exercise of benevolence, and the diffusion of knowledge, are sustained purely and entirely upon the voluntary principle, it is impossible not to be struck with its superior efficacy, as compared with the fruits of any system of compulsory support, especially for religion, in any country whatever.” By the 1840s, when people wrote to describe American religion, they invariably described it as being, in every way, a domain that existed only by individual, voluntary affiliation and support.<sup>2</sup>

In 1833, Massachusetts, the one state that had maintained a formal church-state relationship into the 1820s, would finally amend its constitution and terminate its religious establishment. No longer would tax monies be used to support any church in the United States. From that point forward, no American religious institution could exist but by the voluntary affiliation and support of its adherents. It was not just a legal but a cultural shift. Decades of controversy and tumultuous social change ultimately prompted a turn toward the voluntary principle in every state of the union, until even the Standing Order of Massachusetts would insist that any “legal, religious establishment” was “repugnant...to the rights of conscience.” Our understanding of how Americans conceived of the concept of voluntary joining must begin by examining this shift in early national conceptions of church affiliation.<sup>3</sup>

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<sup>2</sup> Robert Baird, *Religion in America: The Origin, Progress, Relation to the State, and Present Condition of the Evangelical Churches in the United States: With Notices of the Unevangelical Denominations* (New York: Harper and Brothers, 1844), bk. 4; J. S. Buckingham, *America, Historical, Statistic, and Descriptive*, 2 vols. (New York: Harper and Brothers, 1841), 2:364. See Robert T. Handy, “The Voluntary Principle in Religion and Religious Freedom in America,” in D. B. Robertson, ed., *Voluntary Associations: A Study of Groups in Free Societies* (Richmond, Va.: John Knox Press, 1966), 129-139.

<sup>3</sup> *Spirit of the Pilgrims*, 4 (December 1831): 631-635, quoted in Leonard W. Levy, *The Law of the Commonwealth and Chief Justice Shaw* (New York: Oxford University Press, 1957), 41.



This will not be a study of changing theological conceptions of who ought to be admitted into a church, a subject that, since the Reformation, was debated endlessly among and within many Christian churches. A huge portion of the literature produced in seventeenth-century New England, with all its debates about halfway covenants and gathered churches, focused on precisely that question. Rather, this chapter will examine common conceptions about how membership ought to originate as well as what membership, once it existed at all, ought to look like. What rights and duties ought a member to have? What separated members from mere adherents or attendees at religious services? And who should be the final arbiter in cases of moments of conflict between that member and the larger body he or she had joined? Though those questions, too, are intertwined with all sorts of theological debates begun long before the American Revolution, there is something new about post-Revolutionary Americans' attitudes toward the concept of formal church affiliation, beliefs that helped to shape—and in some ways were shaped by—conceptions of voluntary membership in many other kinds of associations.

I argue in this chapter that debates and innovations regarding church membership are a crucial point of departure for understanding the concept of membership in the diverse group life of post-Revolutionary American civil society. And it was in churches that some of the first intimations were made that *all* member-to-group relationships ought to be well defined and governed by procedurally fair systems of internal order. In the recent literature on an early American public sphere, scholars have yet to examine in any depth the nature and limits of individual membership in the groups that people joined, be they churches, reform societies, or profit-seeking businesses. This chapter will examine

conceptions of membership in churches, where schisms, growing religious pluralism, and a drift toward genuine religious diversity all resulted in church membership as a category becoming more, not less, meaningful. Misunderstandings and disputes about membership helped to produce new and culturally resonant ways of talking about the very concept. It was something voluntarily entered and could certainly be voluntarily exited. And in states such as Massachusetts, where there had been a governmentally endorsed, territorial system of church membership, it was a change of great significance when in 1833 all churches came to comprise only those who had chosen to enter. Membership came to mean something different than it had. The voluntary principle had prevailed.

The focus on voluntary affiliation, however, was only one of a number of ways in which church membership helped give shape to ideas of membership in all varieties of voluntary associations being formed in the early national United States. There was also a growing interest in formalizing the member-to-church relationship, better defining the boundaries between who was included and who was not. The result was a system of church-member relationships that came to be described, increasingly often, as a contractual and even constitutional relationship, with the formative documents of the church setting the furthest limits of churchly authority in a way that members could appeal to in cases of internal disputes.

Further, there were recognizably liberal efforts to utilize legislative and, more often, judicial institutions to superintend the exercise of ecclesiological authority over any individual member. Churches and other associations were not to be allowed to have unchecked power over their members. For example, a church could not be permitted to remove, or expel, a trustee without a legitimate, civil cause, even if he had committed a

patent violation of the church's covenant.<sup>4</sup> In this post-Revolutionary era, the concept of church membership was shaped in important ways by conceptions of religious liberty and individual rights of conscience as well as by the ways that Americans were still working out the proper relationship between church and state. But they were shaped too by broader understandings of what personal rights an individual carried into each social relationship. And the consequences would spill over into legal descriptions of the American law of membership in other sorts of formally organized associations.

This chapter will begin by examining one dispute in post-Revolutionary Connecticut between and among the members of a divided church. The following two sections will reveal how the cultural and social changes underway in late-eighteenth- and early-nineteenth-century American society affected perceptions of what churches and church membership ought to look like: recent scholarship has shown that a drift toward well-defined, increasingly formalistic relations was apparent by the very early 1800s, and this section will plumb that literature and several early-nineteenth-century discourses on the nature of church membership to reveal a newly contractual conception of voluntary affiliation with a church. These sections will also examine the limited but still highly influential ways in which, between the 1780s and the 1830s, institutions legitimated by popular sovereignty—the courts and legislatures of the states—set some limits to the sorts and degrees of authority that could be claimed by a private, voluntary religious body over its own members. The cumulative effect of these trends was a conception of church membership that was more akin to citizenship than anything else, including well-

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<sup>4</sup> *Green v. African Methodist Episcopal Society*, 1 Serg. and Rawle (Pa.) 254 (1815).

articulated descriptions of the rights of individual citizen-members in a wide array of denominations by the second third of the nineteenth century.

### The Case of Oliver Dodge: Law, Religious Authority, and the Public Sphere

A great deal of scholarship on the post-Revolutionary decades in the last twenty years has been influenced by the work of Jürgen Habermas and, particularly, his ideas about the nature of the public sphere in a functioning democracy. For Habermas, the public sphere—where private people come together outside of the formal arena of political decision making, often in what he called the “spontaneously emergent associations, organizations, and movements” of civil society—is a thing with a purpose: it is there to allow a democratic government to function well. For many early Americanists, the public sphere has been less functional and more descriptive. They have done this consciously, using his concept in more inclusive ways than he had ever done, thinking of the public sphere less as a means to an end and more as a space, open to the participation of previously neglected social groups (women and African Americans, for example) in previously neglected forms of public expression, from parades to religious prophecy.<sup>5</sup>

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<sup>5</sup> Harold Mah, “Phantasies of the Public Sphere: Rethinking the Habermas of Historians,” *Journal of Modern History*, 72 (2000): 153-182; Jürgen Habermas, *The Structural Transformation of the Public Sphere: An Inquiry into a Category of Bourgeois Society*, trans. Thomas Burger and Frederick Lawrence (Cambridge, Mass.: MIT Press, 1989); Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, trans. William Rehg (Cambridge, Mass.: MIT Press, 1996), 366-367, 369; Simone Chambers, “A Critical Theory of Civil Society,” in Simone Chambers and Will Kymlicka, eds., *Alternatives Conceptions of Civil Society* (Princeton, N.J.: Princeton University Press, 2002), 97. For an incisive examination of the relevant historiography, see John L. Brooke, “Reason and Passion in the Public Sphere: Habermas and the Cultural Historians,” *Journal of Interdisciplinary History*, 29 (1998): 43-67; John L. Brooke, “Consent, Civil Society, and the Public Sphere in the Age of Revolution and the Early American Republic,” in Jeffrey L. Pasley, Andrew W. Robertson, and David Waldstreicher,

In fact, students of the early American republic have too long neglected the study of how authority was allocated between member and group in the various associations, corporations, and churches of the late eighteenth and early nineteenth centuries. With a very few exceptions, there has been only very recently attention paid to the role of the state in helping to delineate the nature of these member-to-society relationships. But a series of episodes in Pomfret, Connecticut, beginning in 1792, reveal that the post-Revolutionary moment was peculiarly conducive to the penetration into civil society—even into churches—of an overarching “culture of legality,” in philosopher Joseph Raz’s phrase, helping to foster the particularistic and plural identities of civil society in bounded, suitably republican ways. In a time and place when many were especially wary of unchecked governing power of any sort, law was brought to bear in conflicts regarding who belonged and who held authority in the associational life of the public sphere, providing the substantive rules according to which men and women could and should join together.

In the wake of a Revolution, many Americans were *very* interested in exactly what Habermas a century and a half later, particularly in his more recent *Between Facts and Norms* but also in his classic *Structural Transformation of the Public Sphere*, attempted to delineate in a normative sense: how do people make secure and effective a

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eds., *Beyond the Founders: New Approaches to the Political History of the Early American Republic* (Chapel Hill: University of North Carolina Press, 2004), 207-250. The works being referred to as expanding the public sphere, though not comprehensive of the increasing breadth of the field, are Joanna Brooks, “The Early American Public Sphere and the Emergence of a Black Print Counterpublic,” *William and Mary Quarterly*, 62 (2005): 67-92; Mary Ryan, “Gender and Public Access: Women’s Politics in Nineteenth-Century America,” in Craig Calhoun, ed., *Habermas and the Public Sphere* (Cambridge, Mass.: MIT Press, 1992), 259-288; Mary Kelley, *Learning to Stand and Speak: Women, Education, and Public Life in America’s Republic* (Chapel Hill: University of North Carolina Press, 2006); David Waldstreicher, *In the Midst of Perpetual Fetes: The Making of American Nationalism, 1776-1820* (Chapel Hill: University of North Carolina Press, 1997); Susan Juster, *Doomsayers: Anglo-American Prophecy in the Age of Revolution* (Philadelphia: University of Pennsylvania Press, 2003).

public sphere that can mediate between the state and citizens in their private capacities? It is outside of the formal arena of political decision making, in the group life of the public sphere, that citizens can identify and interpret the issues facing them individually and collectively, which then allows them, according to Habermas, to participate in an “arena of critical autonomous debate,” thus expanding and protecting democracy. In Nancy Fraser’s terms, from which Habermas explicitly borrows, the groups of civil society are “weak publics” that can then inform the “strong publics,” the institutions of administrative, governmental power. In the post-Revolutionary moment, with the fracturing of old and the drawing of new jurisdictional boundaries between and among groups, people were articulate and creative in their thinking about how a pluralist social reality, an ideally independent citizenry, and the relationship between private authority and public law all fit together in a newly republican political order. Questions quite similar to the ones Habermas posed gave shape, both in law and in practice, to post-Revolutionary civil society.<sup>6</sup>

In 1790s Connecticut, for instance, a period that witnessed a post-Revolutionary profusion of print and association that historians continue to marvel over, there was, not coincidentally, a much contested but growing emphasis on applying legal standards and broader principles of fair treatment born in the political sphere to the smaller associations of civil society, religious and secular. Such insistence was crucial, many such as legal theorist Zephaniah Swift would argue, to ensure that the ways that people came together to act as a public would not imperil the public that mattered most to them: the newly born republican governments of the United States.

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<sup>6</sup> Habermas, *Between Facts and Norms*, 366-367, 369; Nancy Fraser, *Unruly Practices: Power, Discourse, and Gender in Contemporary Social Theory* (Minneapolis: University of Minnesota Press, 1989), 113-190.

A dispute involving a minister actually serves to illustrate these points quite well, for it ultimately became a dispute about who belonged in a particular religious society (that is, who could by their votes control it) and about who was subject to its discipline. Oliver Dodge, a young man in his twenties recently graduated from Harvard College, came to Pomfret, a town of about two thousand people in Windham County, Connecticut, to serve alongside a well liked but ailing minister, Aaron Putnam, who had lost his voice but not his desire to serve his congregation. A short time after Dodge had agreed to settle there as a minister for the First Ecclesiastical Society in Pomfret, a council of ministers came together for his ordination in April 1792, to whom a small number of “aggrieved brethren” appealed for an investigation into some charges against him. Months later, the council finally published their “Result” on such charges as “neglect of study,” “too much time in amusement and dissipation,” and even allegations of improper conduct toward a young woman. The Result determined that he was more-or-less guilty of all those things, but that he showed a willingness to mend his ways. The consociation did not ordain him minister of the society at Pomfret but merely admonished him and left his future unspecified. There were already, the Result noted, “unhappy divisions and animosities” in the congregation, with a large majority standing behind Dodge. His supporters decided to convene another council of ministers to ordain him. The weak-voiced Putnam then stood and, under authority he claimed under the Saybrook Platform (a system of church government adopted in 1708 by many Connecticut Congregational churches), dissolved the meeting. They would not be allowed to proceed. And they all left for good.<sup>7</sup>

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<sup>7</sup> [Zephaniah Swift], *The Correspondent: Containing the Publications in the Windham Herald, Relative to the Result of the Ecclesiastical Council, Holden at Pomfret, in September, 1792...Respecting the Rev. Oliver Dodge...* (Windham, Conn.: John Byrne, 1793), 8-9; Ellen D. Larned, *History of Windham County, Connecticut*, vol. 2 (Worcester, Mass.: Charles Hamilton, 1880), 271-281; Daniel Foster, *The Duty of*

The majority of the First Society in Pomfret decided that same day to form a new church, with Dodge as minister, calling themselves the Reformed Catholic Christian Church of Pomfret.<sup>8</sup> A consociation of ministers from across the region was called, which met on Christmas Day 1792 and were presented by Putnam's much-reduced church with several "complaints" against Dodge. A copy of those were sent to Dodge, who let the council know he had no interest in what the "aggrieved brethren" had to say: this association of ministers had as little authority over him as did the bishop of London. But the council widely printed their findings against him, opting to "leave the public to form their own judgments." They announced to the world, too, their disappointment at those in Pomfret who had "precipitously broken a most solemn covenant" in withdrawing from one church to form another.<sup>9</sup>

It was then that Zephaniah Swift, a young lawyer from Windham who would be sworn into the U.S. House of Representatives that coming March, entered the public prints in defense of Oliver Dodge's reputation and, more consequentially still, to argue for a certain conception of the powers of voluntary groups such as religious societies over their members and over those whom they claimed as members. Oliver Dodge was, said Swift, so completely outside of the jurisdiction of the council that they ought never have even heard charges against him. What could they have done to him? Excommunicate him? He had already left their communion. "The only proper business of the

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*Gospel Ministers, Illustrated, in a Sermon, Preached at the Ordination of the Rev. Oliver Dodge, A.B., to the Pastoral Care of the Catholic Reformed Church and Society, in Pomfret, February 6, 1793* (Windham, Conn.: John Byrne, 1793).

<sup>8</sup> They were part of a 1790s trend in Connecticut to establish churches in a more liberal vein, open to people of any Christian denomination: see William G. McLoughlin, *New England Dissent, 1630-1833: The Baptists and the Separation of Church and State*, 2 vols. (Cambridge, Mass.: Harvard University Press, 1971), 2:916-919.

<sup>9</sup> Swift, *Correspondent*, 12-15.



consociation,” Swift wrote in an essay in the *Windham Herald*, “was to administer spiritual consolation to the aggrieved brethren, who ceasing to be the minority, had become the whole of the first ecclesiastical society. Mr. Dodge and the new-formed society were not amenable to their tribunal, nor subject to their censures.”<sup>10</sup>

The back-and-forth of the pamphlet war that followed over the next three years, chiefly between Swift and one of the ministers, Moses Welch, has been described a few times. Dorothy Lipson uses the affair to open a discussion of an Enlightenment culture coming to replace Connecticut’s “theocratic tradition.” More recently, Christopher Grasso has situated it within his narrative of the lawyer coming to replace the clergyman as the voice of cultural authority in eighteenth-century Connecticut. But the episode should be seen in a different light, one focused on the nature of associational relationships in a newly republican society.<sup>11</sup> For that was the core issue to which Swift and ministers such as Welch and James Cogswell kept returning. In a period in which states north and south were enacting statutes suited to the belief that every individual had a right (and a duty, owed to God) to conform only to his or her own beliefs and to provide financial support only for that church that preached accordingly, the meanings and consequences of voluntary church membership remained uncertain.

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<sup>10</sup> *Ibid.*, 16.

<sup>11</sup> Dorothy Ann Lipson, *Freemasonry in Federalist Connecticut* (Princeton, N.J.: Princeton University Press, 1977), 150-158, quotation on 186; Christopher Grasso, *A Speaking Aristocracy: Transforming Public Discourse in Eighteenth-Century Connecticut* (Chapel Hill: University of North Carolina Press, 1999), 444-448; *Correspondent*; Moses C. Welch, *A Reply to the Correspondent: Containing an Attempt to Point Out Certain Inconsistencies and Misrepresentations in That Publication...* (Norwich, Conn.: Thomas Hubbard, 1794); [Zephaniah Swift], *A Second Address to the Reverend Moses C. Welch, Containing an Answer to His Letter to the Correspondent* (Windham, Conn.: John Byrne, 1796); Moses C. Welch, *The Addressor Addressed; or, A Letter to the Correspondent; Containing Some Free Remarks on His “Address to the Rev. Moses C. Welch”* (Norwich, Conn.: Thomas Hubbard, 1796).

Over whom does any group have judicial or administrative authority? That is a matter of jurisdiction. Asking by what broader standards that authority ought to be exercised is a matter of jurisprudence. Both were at issue in Pomfret in 1792 and 1793, but the most obvious are the debates over jurisdiction, which Swift called the “great question.”<sup>12</sup> Swift wrote that the First Society no longer had any authority over Dodge, prompting a response in the *Herald* by “T.B.” (probably the Reverend Thomas Brockway) arguing that Dodge “had voluntarily put his name to their covenant, entered their fellowship, and subjugated himself, to their laws and discipline. And if he was in no sense amenable, there is an end to all church discipline.”<sup>13</sup> If it were as simple as Swift had it, that religious covenants continue only so long as a person “continues to be of the same opinion,” church discipline was dead.<sup>14</sup> Cogswell, referring to Swift’s reputation as one who avoided churchgoing when at all possible, told him in the *Herald* that “While you are so terrified of despotism in the church, that you keep at the remotest distance from it, your principles and measures, should they prevail, have the directest tendency to exterminate the small remains of discipline which continues in it.”<sup>15</sup>

To Swift, such a notion “would have done honor to the Pope of Rome, in the dark ages”; to Welch, the idea that people could just skip away from any sort of reckoning by their church by announcing a change of opinion was just another way of saying that people may, “innocently, trifle with solemn vows and covenant engagements.”<sup>16</sup> As surely as many Americans were wary about threats to individual autonomy that might be

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<sup>12</sup> Swift, *Correspondent*, 54.

<sup>13</sup> Welch, *Reply to the Correspondent*, 20.

<sup>14</sup> *Ibid.*, 30, 54; Swift, *Correspondent*, 34.

<sup>15</sup> *Windham Herald*, May 11, 1793.

<sup>16</sup> Welch, *Addressor Addressed*, 14.

found if, say, the council of ministers could really exercise authority over Dodge and his supporters, others were anxious about how to make religious societies and other voluntary groups work.

Aside from these jurisdictional questions, there were also broader questions about how churches should function internally. Swift expressed furor that Putnam had by his “solitary voice,” his “*sovereign negative*,” quashed the plans of his congregation: “Are the laity an inferior order of beings, fit only to be slaves and to be governed?”<sup>17</sup> But Swift’s claims were read by his critics as an attempt to unseat God as the head of his church and replace him with the mob rule of the congregants. Dodge had shown himself unwilling to put God first, wrote William Williams, and because a minister was to be, in effect, God’s “ambassador, in a foreign country,” the decision of his fellow ministers to terminate his employment and to censure him was necessary to secure the sovereign rule of the Lord in his own church. Welch was flabbergasted at Swift’s assertion that, because the majority present wanted Dodge as a minister, he ought to be ordained: “Is *vox populi*, in all cases, *vox dei*?”<sup>18</sup>

And these battles were not fought only in the public prints. Dodge pressed criminal charges against the Reverend Eliphalet Lyman when he interrupted one of Dodge’s lectures, giving the pamphleteers something else to write about. Dodge won in the lower court; Lyman won the appeal.<sup>19</sup> Even more scandalously, just weeks after forming their new Reformed Catholic Church and calling Dodge to be their pastor, many

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<sup>17</sup> Swift, *Correspondent*, 42-43.

<sup>18</sup> William Williams to Thomas Grosvenor, Dec. 24, 1792 [Lebanon, Conn.], Williams Family Papers, Connecticut Historical Society, Hartford, Conn.; Welch, *Addressor Addressed*, 9.

<sup>19</sup> Eliphalet Lyman, *Two Discourses: Preached at Woodstock... To Which Is Subjoined an Appendix, Giving an Account of Some Late Extraordinary Transactions in That Place* (Norwich: Thomas Hubbard, 1794), 40-65; Swift, *Address*, 49-53; Welch, *Addressor Addressed*, 35.

of the seceded members convened at the old meetinghouse on December 29, 1792, and claimed a right to vote in their old church's elections. "Twelve voters, being all that were left in said first society," were outvoted by thirty-seven voters belonging to the new church to prevent the appointment of Seth Grosvenor as an agent to prosecute a suit for the church's book of records (one of Dodge's supporters had left with it). The Reformed Catholic Church members claimed that, because they had never filed the requisite certificates to remove themselves, they retained a voting right. The Connecticut Superior Court sitting in Windham heard the case, and a jury decided that, in fact, the members of Dodge's church could still vote in their old church. The court stopped things there and "delivered to the jury their opinion upon the law," contending that there were, in fact, two ways to conscientiously dissent from an established church: individually, by certificate; or collectively, by "associat[ing] themselves into a church state." The jury withdrew, returned with a different verdict—the lonely twelve did indeed constitute the entirety of the First Ecclesiastical Society of Pomfret—and the pro-Dodge faction gave up the book of records in order to avoid paying hefty damages.<sup>20</sup>

In direct and in indirect ways, then, law provided the substructure for the development of American civil society, first and most noticeably by defining jurisdiction. Authority in groups smaller than the state remained encompassed by the legal and political institutions of Connecticut because there were demands for just that sort of check on private governing power. Some were increasingly willing to insist that the standards for legitimate conduct in the political sphere—majority rule, founded on express consent and constrained by the rule of law—were and ought to be the standards

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<sup>20</sup> *Howard v. Waldo*, 1 Root 538 (Conn. 1793).

to which private authority would be held. But, as the voting rights dispute shows, there were also calls for state authority to shelter the group life of the new republic from intrusion by outsiders or nonmembers. Two of the most significant ways that was done can be seen here: by chartering them or giving them de facto corporate status (which Dodge's church received; not coincidentally, the first general incorporation laws, for religious societies and for literary and charitable ones, date from this period); and by stepping in, as happened in the voting rights case, to adjudicate disputes over who belonged where and how authority could and should be exercised.

Why did Zephaniah Swift fight this fight? He can be misread—and he has been—as being anticlerical in sentiment, when in fact this arch-Federalist (later a member of the Hartford Convention) was one of the strongest proponents of a continued religious establishment in Connecticut. It served good, republican ends, he wrote in his seminal *System of the Laws in the State of Connecticut*, published during this very debate: meeting together for religious worship “cultivates and enlivens all the social feelings,” “refines the manners, and liberalizes the sentiments.” Such societies taught people “to treat each other with respect, attention and propriety.” It took this sort of social education in the group life of civil society to develop intelligent, courageous, self-governing citizens out of the people of Windham County, or of any county. This is a familiar idea, echoed more by Tocqueville and Robert Putnam than by Habermas. But it only worked, in the minds of thinkers such as Swift, if the autonomy of the individual (male) member remained intact, if his status as an independent freeman was unimpeded. The certificate system established by law was designed to protect, for “every person, the full liberty to adopt such creed as he pleases,” because, Swift wrote, “perfect liberty of conscience is

found to make men the best of citizens and Christians.” But the story coming out of Pomfret seemed to show a subversion of the well-intentioned plan. Tellingly, Swift appended a footnote to one of his disquisitions describing how the Reverend Eliphalet Lyman had forcibly lifted a man out of his seat to vote against Swift in his election to Congress, and this after Lyman had attempted publicly “to stigmatize and vilify” Swift’s character. The church properly formed was a bastion of popular government; if its leaders exercised authority without bounds, they could be its worst enemies.<sup>21</sup>

As political theorists have long recognized, the political system and the public sphere “presuppose the proper functioning of one another.”<sup>22</sup> Individuals must be free to choose their affiliations, free to enter those groups that fit their beliefs and exit those that no longer do. Swift’s twin concerns—that there was a despotism of ministers in the First Ecclesiastical Society, and that that church claimed a right to control even those who wanted nothing more to do with them—were, ironically enough, mirrored by the somewhat underhanded attempt of the proponents of Dodge to control their former fellow congregants by the tyranny of majority rule. And in a way that paralleled developments in other kinds of groups during this same period—for example, when the Uranian Society of young students and lawyers in New York City expelled John P. Van Ness in 1789 and he told the world that they had violated his rights as a member (discussed in chapter 2)—

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<sup>21</sup> Zephaniah Swift, *A System of the Laws of the State of Connecticut*, 2 vols. (Windham, Conn.: John Byrne, 1796), 1:156, 143-144; Swift, *Correspondent*, 137, 92n. See especially Donald F. Gerardi, “Zephaniah Swift and Connecticut’s Standing Order: Skepticism, Conservatism, and Religious Liberty in the Early Republic,” *New England Quarterly*, 67 (1994): 234-256.

<sup>22</sup> Geert Munichs, “Rational Politics? An Exploration of the Fruitfulness of the Discursive Concept of Democracy,” in René von Schomberg and Kenneth Baynes, eds., *Discourse and Democracy: Essays on Habermas’s Between Facts and Norms* (Albany: State University of New York Press, 2002), 186-187. And, as Michael Walzer has noted, “A state that is “liberal and pluralist more than republican” (in the sense of civic virtue and a shared conception of the good) is “necessary if associations are to flourish.” (Walzer, “The Civil Society Argument,” in Chantal Mouffe, ed., *Dimensions of Radical Democracy: Pluralism, Citizenship, Community* [London and New York: Verso, 1992], 98).

those who believed they had been stepped upon called on outside authority and framed their complaints in legal, rights-based language.<sup>23</sup>

And this, then, is the key point: in an increasingly pluralist civil society of the late eighteenth century, there was a perceived need for what philosopher Joseph Raz has called “a pervasive common culture, bridging the differences between the subcultures of the country.” He aptly calls this “a culture of legality,” “a culture in which people are accustomed to measure their situation, and their relations to others, in legal terms.” It can be seen taking shape, shaped as much by the participants as by the institutions of the state, in the 1790s in contests such as the one in Pomfret.

Consent would come to be seen as the only legitimate basis of any exercise of associational authority. But, still more important, what that associational authority looked like, once consented to, was a much-contested matter in a post-Revolutionary society anxious about the proper functioning of their newborn republican governments. And this last point has, astonishingly, been omitted from our increasingly sophisticated analyses of the early American public sphere, in a way that has obscured our understanding of the period. To rectify this longstanding omission in historical scholarship, we must examine further the evolution of the concept of church membership in the early American republic.

Changes in Post-Revolutionary American Culture and Their Effects on the Concept of the Church, 1780s-1830s

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<sup>23</sup> *New York Daily Advertiser*, Nov. 26, 28, Dec. 1, 3, 1789. See chap. 2 of this dissertation.

The idea that “nothing can be imagined more absurd” than being born a church member, as Isaac Backus put it in 1771, had already made extraordinary headway in the American colonies, largely owing to the pluralistic reality of the American religious environment, to a widely held pietistic emphasis on individual conversion, and to the philosophical work of John Locke. As Michael Zuckert has contended, “the Lockeanization of Protestant politics,” exemplified in the writings of New Englander Elisha Williams in the 1740s, influenced thinking on church membership, stressing a right of private judgment to determine whether and where to worship.<sup>24</sup> By the time of the American Revolution, most Americans would have agreed with the basic proposition that being a church member was something one chose, not something one had thrust upon them.

The first important element in the formation of a new, post-Revolutionary conception of what church membership should mean, then, had a long history: centuries of theological and philosophical debate about the nature of consent and affiliation, in which Locke was but one participant. Indeed, going back as far as the first debates on religious tolerance, as Holly Brewer has begun to make clear, discussions as to what

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<sup>24</sup> Isaac Backus, *A Letter to a Gentleman in the Massachusetts Assembly* (Boston, 1771), 506; Elisha Williams, *The Essential Rights and Liberties of Protestants. A Seasonable Plea for the Liberty of Conscience, and the Right of Private Judgment, in Matters of Religion...* (Philadelphia: S. Kneeland and T. Green, 1744), 1-9, 38-51, 60-65, in Edmund S. Morgan, ed., *Puritan Political Ideas, 1558-1794* (Indianapolis: Bobbs-Merrill, 1965), 280, 287-288; Michael P. Zuckert, *The Natural Rights Republic: Studies in the Foundation of the American Political Tradition* (Notre Dame, Ind.: University of Notre Dame Press, 1996), 159, 195; McLoughlin, *Soul Liberty*, 169, 255. Zuckert spends much time using Williams to connect Locke (whom Williams praises as “the great Locke”) to “engineer a convergence between Locke and Protestantism,” though Ruth Bloch and Naomi Lamoreaux have expressed doubts about Williams’s representativeness: “Defining Public and Private in Early America” (unpublished paper for Columbia Seminar on Early American History, Apr. 13, 2004). Without doubt, by the time of the American Revolution, Locke’s thinking on religious liberty was extraordinarily important with one member of the founding elite, Thomas Jefferson: see his “Notes on Locke and Shaftesbury” [1776], in Julian P. Boyd, ed., *The Papers of Thomas Jefferson*, vol. 1 (Princeton, N.J.: Princeton University Press, 1950), 544-551; Jack N. Rakove, “Beyond Locke, beyond Belief: The Nexus of Free Exercise and Separation of Church and State,” in Robert Fatton, Jr., and R. K. Ramazani, *Religion, State, and Society: Jefferson’s Wall of Separation in Comparative Perspective* (New York: Palgrave Macmillan, 2009), 37-52.



constituted consent in terms of religious affiliation were crucial to how people understood the very ideas of allegiance and dissent. Before the Reformation and the subsequent rise of pietistic churches that emphasized their role as a gathering of only those who shared in the grace of God and could testify to their conversion, children in the Catholic Church were born and baptized as full members. Some Protestants began to question such policies. Thinkers such as John Calvin also opined that baptizing infants of believing members was appropriate, but did not answer what would happen if the child did not become a good church member as an adult. The way was paved for incessant arguments over how to conceive properly of admission into churches. Debates in Puritan New England over the course of the seventeenth century had produced a series of compromise measures over just that issue, creating categories of “partial membership” to justify the inclusion of the children of communing members, culminating in a Half-Way Covenant that attempted to maintain some distinction between those members who had had a conversion experience and those, such as their children and grandchildren, who had not but had been baptized into the church as infants.<sup>25</sup>

Questions about the membership of children, according to Brewer, “would haunt the Reformation over the next two centuries,” and in England and in Puritan settlements in the New World, in particular, the debates would ultimately produce a set of ideas and arguments that would be “transliterated” by later political writers, especially the Whig theorists of the seventeenth century, such as John Locke. There were no easy answers to the questions being posed by Protestant reformers in the sixteenth and seventeenth

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<sup>25</sup> Holly Brewer, *By Birth or Consent: Children, Law, and the Anglo-American Revolution in Authority* (Chapel Hill: University of North Carolina Press, 2005), chap. 2, esp. 57-63; Edmund S. Morgan, *Visible Saints: The History of a Puritan Idea* (New York: New York University Press, 1963); Robert G. Pope, *The Half-Way Covenant: Church Membership in Puritan New England* (Princeton, N.J.: Princeton University Press, 1969).

centuries, but in all the debate there were new emphases on one's "owne consent" and awaiting "discretion," according to Brewer, that help "delineate the origins of modern political theory." The whole concept of consent, she argues, "was forged in the debates during the seventeenth century over church membership." And there were inescapable political consequences for late-seventeenth-century writers such as Locke and Algernon Sidney in the church-membership debates of the preceding century, affecting especially their ideas about consent, such as what it meant and who could give it.<sup>26</sup>

In the American colonies and the new United States in the eighteenth century and the early nineteenth century, ideas about voluntary affiliation and informed consent in churches were developed still further by the demographic and sociopolitical realities of American life. Three such factors—growing religious diversity, disestablishment (and multiple establishments), and westward expansion—were especially important in furthering a particular conception about the role of consent in church membership as well as in encouraging churches to better define all member-to-church relationships.

First, the growing numbers of churches and denominations, particularly of evangelical churches such as Baptists and Methodists, produced an environment in which Americans were, simply put, actively solicited as potential converts. Joyce Appleby has summed up the prevailing view of this shift, noting that "the competing evangelical congregations worked to strengthen the self-importance of their members" by their calls for potential members "to form personal judgments, choose goals, and make their own decisions."<sup>27</sup> Indeed, those newer and rapidly growing evangelical denominations even

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<sup>26</sup> Ibid., 68, 86, 104.

<sup>27</sup> Joyce Appleby, *Inheriting the Revolution: The First Generation of Americans* (Cambridge, Mass: Belknap Press of Harvard University Press, 2000), 236. See also Gordon S. Wood, *The Radicalism of the American Revolution* (New York: Alfred A. Knopf, 1992), 328-329.

competed among themselves and with the older, mainline churches to recruit members. Recent studies of the growth in American religious affiliation in this era have noted that, where there had formerly been something akin to a “gentleman’s agreement” against proselytizing from within the ranks of another church, the early nineteenth century saw newly aggressive attitudes about missions, even attempts to seduce the adherents of one church to join another.<sup>28</sup>

Without doubt, similar trends can be traced back at least as far as the revivals of the early to mid-eighteenth century, popularly known as the Great Awakening, but the post-Revolutionary era witnessed something new. The Reverend Henry Pattillo of North Carolina noted in 1788 that “a change of religious profession has become almost as common, and as little noted, as the variation of the weather.” As Nathan Hatch has argued, the Revolution expanded widely the circle of people who believed themselves to be capable of thinking and acting for themselves “rather than depending upon the mediations of an educated elite.” This was no less true in matters of religion, he argues, than it was true of political affairs. And such attitudes were in part a product of the post-Revolutionary marketplace of religion. All told, the appeals to potential converts by a growing diversity of religious groups in the United States had effects on the ways that many of those people came to conceive of church membership in the abstract. It was something that you chose after having been confronted with multiple options.<sup>29</sup>

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<sup>28</sup> Richard Carwardine, “Unity, Pluralism, and the Spiritual Market-Place: Interdenominational Competition in the Early American Republic,” in R. N. Swanson, ed., *Unity and Diversity in the Church* (Oxford: Blackwell, 1996), 297-335; Roger Finke and Rodney Stark, *The Churching of America, 1776-2005: Winners and Losers in Our Religious Economy* (New Brunswick, N.J.: Rutgers University Press, 2005), 112-113.

<sup>29</sup> Nathan Hatch, *The Democratization of American Christianity* (New Haven, Conn. Yale University Press, 1989), 11, 64; Henry Pattillo, *Sermons &c.* (Wilmington, N.C.: James Adams, 1788), 42.

Additionally, the religious pluralism of the eighteenth century led states north and south to develop legal regimes that allowed dissenters some room to exist, in ways that made concrete this growing importance of the voluntary principle. Some states, such as New York, had at least fourteen kinds of religious bodies in the eighteenth century, and no church was ever established there. And even before those colonies that had an official state religion such as Massachusetts, Connecticut, or Virginia had ended their formal religious establishments, they had each spent a great deal of time discussing and arranging for a certificate system that allowed dissenters to opt out of support for the established church and to have taxes assessed for support of religion to instead be directed to their own church. All three of those states adopted such laws in the eighteenth century. In the post-Revolutionary era, such laws were increasingly common and increasingly lax: the Connecticut certificate law, passed in May 1791, was amended later in that same year to simplify the whole process in a way that underscored the new, post-Revolutionary impulse toward voluntarism: people could write their own certificates (rather than applying to a justice of the peace), with no need for any official to attest to its validity. Vermont passed a similar law in 1801. Though critics asserted that such laws made churches nothing more than “loose flimsy private corporations,” the trend toward such policies—and, ultimately, toward fully voluntary religious societies—appears in hindsight to have been all but inevitable by the turn of the nineteenth century.<sup>30</sup>

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<sup>30</sup> William Warren Sweet, *The American Churches: An Interpretation* (New York: Abingdon-Cokesbury Press, 1947), 63; William G. McLoughlin, *New England Dissent, 1630-1833: The Baptists and the Separation of Church and State*, 2 vols. (Cambridge, Mass.: Harvard University Press, 1971), 2:514-525, 808, 934-937; Michael W. McConnell, “The Origins and Historical Understanding of the Free Exercise Clause,” *Harvard Law Review*, 103 (1990): 1469-1470; [William Smith?], *Some Remarks on the “Toleration Act” of 1819: Addressed to the Hon. John Taylor Gilman by a Friend to the “Public Worship of the Deity”* (Exeter, N.H.: Samuel T. Moses, 1823), 31-32.

For a variety of reasons, the new United States was a land of religious diversity to a degree that the world had never seen. Many of the sects were direct importations from the Old World, but internal division and autochthonous religious innovation caused the numbers to grow still further. “The new democratic air provided a heady atmosphere for religious innovation and schism,” according to Edwin Gaustad and Leigh Eric Schmidt, with no “reliable religious authority to referee the scriptural debates and homegrown theologies.”<sup>31</sup> It would only accelerate: as William Warren Sweet famously noted, the small town of Princeton, Illinois, in the 1850s had eleven different kinds of Presbyterians.<sup>32</sup> African Americans formed a limited number of separate churches in the South before emancipation, but it happened far more commonly in the northern urban centers in the early American republic. Members of black churches such as Richard Allen’s African Methodist Church in Philadelphia numbered in the tens of thousands by the 1820s. Allen emphasized the importance of this racial separation by issuing a public statement in 1794 limiting membership to “descendants of the African race,” highlighting how the continuing fragmentation of American religious denominations only amplified the importance of how the church defined its standards of membership.<sup>33</sup>

A second aspect of life on the North American continent also shaped religious organizations in varied and important ways: westward expansion. Counties that had been virtually uninhabited by white settlers before the American Revolution would contain a

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<sup>31</sup> Edwin S. Gaustad and Leigh E. Schmidt, *The Religious History of America*, rev. ed. (San Francisco, Calif.: HarperSanFrancisco, 2002), 140.

<sup>32</sup> Sweet, *American Churches*, 48.

<sup>33</sup> Hatch, *Democratization of American Christianity*, 102-113, Allen quotation on 109; H. Richard Niebuhr, *The Social Sources of Denominationalism* (1929; rpt., Hamden, Conn.: Shoestring Press, 1954), chap. 9; Stephen Hum, “‘When We Were No People, Then We Were a People’: Evangelical Language and the Free Blacks of Philadelphia in the Early Republic,” in Susan Juster and Lisa MacFarlane, *A Mighty Baptism: Race, Gender, and the Creation of American Protestantism* (Ithaca, N.Y.: Cornell University Press, 1996), 235-258.

third of the young nation's population by 1790, and the westward movement of Americans would not abate until the end of the nineteenth century.<sup>34</sup> Such mobility had been a fact of life for congregations in all colonies of British America, where they "were subject to constant attrition from the removal of their members to new lands nearby," according to Timothy Smith. And "spiritual and moral kinship, rooted in voluntary adherence to a congregation" was vital to replacing the failed efforts of the state "to counter the weaknesses stemming from the diversity and mobility of the membership of the congregations."<sup>35</sup>

One effect of this geographic mobility was the growing strength of the evangelical Baptists and Methodists. The ministers of those two sects were far more willing and able to go out west than were the "well-paid, mainline clergy" of the older churches such as the Congregationalist or Episcopal churches.<sup>36</sup> The rise of the three great frontier faith (Baptists, Methodists, and the homegrown Disciples of Christ) "anticipated the needs of the Western settlers and drew them away from their earlier loyalties one by one rather than in secessionist groups," according to the pioneering work of Richard Niebuhr.<sup>37</sup> Also, the mass population shift westward added to the popular impetus to organize and join churches as a way to form community out of chaotic new settlements.<sup>38</sup> The furthest

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<sup>34</sup> Hatch, *Democratization of American Christianity*, 30; Alan Taylor, "Agrarian Independence: Northern Land Rioters after the Revolution," in Alfred F. Young, ed., *Beyond the American Revolution: Explorations in the History of American Radicalism* (DeKalb: Northern Illinois University Press, 1993), 232-233; Stephen Aron, *How the West Was Lost: The Transformation of Kentucky from Daniel Boone to Henry Clay* (Baltimore: Johns Hopkins University Press, 1996).

<sup>35</sup> Timothy L. Smith, "Congregation, State, and Denomination: The Forming of the American Religious Structure," *William and Mary Quarterly*, 3d ser., 25 (1968): 155-176, quotations on 163, 168.

<sup>36</sup> Finke and Starke, *Churching of America*, 112.

<sup>37</sup> Niebuhr, *Social Sources of Denominationalism*, 165.

<sup>38</sup> See Robert M. Calhoun, "Religion, Moderation, and Regime-Building in Post-Revolutionary America," in Eliga H. Gould and Peter S. Onuf, eds., *Empire and Nation: The American Revolution in the Atlantic World* (Baltimore: Johns Hopkins University Press, 2005), 217-236; Donald G. Mathews, "The Second

extent of those efforts can be found in the attempts of some churches to punish all sorts of actions that threatened the community and not merely matters of faith, something explored in the following section of this chapter.

Third and finally, disestablishment and the accompanying discussions about the nature of religious liberty also shaped popular perceptions of church membership. In the first two decades after Independence, most American states drafted at least one constitution, and the majority of states either put an end to any church establishment or, even if they maintained some sort of tax support for a particular church as in New England, allowed religious bodies to define their own doctrine, membership, and organization without state interference. Those states declared, usually in unequivocal language, that every individual had an inherent right to worship God in his or her own way. Thus, new religious movements did not have to face especially strong, government-supported establishments. Episcopal establishments fell quickly. Congregational establishments in New England lasted into the new century, but with increasingly flexible certificate systems for dissenters. The first inclination in many new states after 1776—Georgia, South Carolina, Maryland, Connecticut, Massachusetts, and New Hampshire—was to create some form of multiple establishment, supporting Christian denominations generally if not entirely equally. Most outlawed blasphemy; many limited state office-holding to Christians or even to Protestants. But particularly after the 1784-1786 debates in Virginia over the issue of the separation of church and state, which involved a powerful combination of evangelicals and rationalists such as Thomas Jefferson and James Madison arguing for the individual rights of conscience as forbidding any

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Great Awakening as an Organizing Process, 1780-1830: An Hypothesis," *American Quarterly* 21 (spring 1969): 43.

governmental preference for one religion over another, the way was paved for a disestablishment across the new United States. Most states had explicit descriptions of an unalienable right of conscience in religious matters in their constitutions, and many admitted after 1790 copied much of Pennsylvania's constitutional clause on religious liberty, which emphasized an individualist reading of religious rights and a "natural and indefeasible right to worship Almighty God" only in the manner that one chose.<sup>39</sup>

And disestablishment only furthered the success of a wide array of Protestant denominations, something that people such as Thomas Jefferson had begun to observe as early as the 1780s. He saw that Pennsylvania and New York had "long subsisted without any establishment at all," and now "they flourish infinitely. Religion is well supported," and "their harmony is unparalleled, and can be ascribed to nothing but their unbounded tolerance."<sup>40</sup> New England's decision to end church-state connections ultimately led even clergymen of the formerly established church to agree. As Connecticut minister Lyman Beecher recounted what he called the "Downfall of the Standing Order," "Originally all were obliged to support the standing order. Every body paid without kicking.... When, however, other denominations began to rise, and complained of their consciences, the laws were modified." He believed at first that the damage done to the church was "irreparable," but he would change his mind. In a famous passage, he noted in his

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<sup>39</sup> Hatch, *Democratization of American Christianity*, 59; Jon Butler, *Awash in a Sea of Faith: Christianizing the American People* (Cambridge, Mass.: Harvard University Press, 1990), 258-260; Gordon S. Wood, *The Creation of the American Republic, 1776-1787* (Chapel Hill: University of North Carolina Press, 1969), 427-428; Thomas E. Buckley, *Church and State in Revolutionary Virginia, 1776-1787* (Charlottesville: University Press of Virginia, 1977). Pennsylvania's article on religious liberty was largely echoed by Kentucky, Missouri, Indiana, Ohio, Tennessee, Arkansas, and Illinois.

<sup>40</sup> Thomas Jefferson, *Notes on the State of Virginia*, ed. William Peden (Chapel Hill: University of North Carolina Press, 1954), 160-161. See also Peter Onuf, "Thomas Jefferson's Christian Nation," in Robert Fatton, Jr., and R. K. Ramazani, *Religion, State, and Society: Jefferson's Wall of Separation in Comparative Perspective* (New York: Palgrave Macmillan, 2009), 17-36.



autobiography that “For several days I suffered what no tongue can tell *for the best thing that ever happened to the State of Connecticut*. It cut the churches loose from dependence on state support. It threw them wholly on their own resources and on God.”<sup>41</sup> Soaring numbers of churches, ministers, and church members in the nineteenth century left most observers convinced that the state of religion in the United States was one of revival and growth: Jon Butler estimates that 10,000 new churches were built between 1780 and 1820, with probably another 40,000 in the next forty years. One in fifteen Americans was a communing church member in 1800; one in eight had joined a church in 1835. Six times that number (40 and 75 percent, respectively) had some connection with a church.<sup>42</sup>

Each state’s withdrawal from a formal relationship with any one church meant the demise of any kind of territorial church membership that allowed churches to compel the financial support of people simply because they were born in a certain geographic area. The Anglican parishes and the parish systems of Congregationalist New England (in which tax support was drawn from an entire parish, though there was also a gathered church of “full” members who had been admitted into fellowship) had meant that one could be born into a church in which neither they nor even their parents had any participatory connection.<sup>43</sup> But this would not last long into the nineteenth century. And churches imported from the Old World, such as Lutherans from the Continent or

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<sup>41</sup> Lyman Beecher, *Autobiography, Correspondence, Etc., of Lyman Beecher, D.D.*, ed., Charles Beecher, 2 vols. (New York: Harper and Brothers, 1865), 344.

<sup>42</sup> Butler, *Awash in a Sea of Faith*, 270; Winthrop S. Hudson, *Religion in America: An Historical Account of the Development of American Religious Life*, 3d ed. (New York: Charles Scribner’s Sons, 1981), 129-130; Finke and Stark, *The Churching of America*, chap. 3; Elizabeth Fox-Genovese and Eugene D. Genovese, *The Mind of the Master Class: History and Faith in the Southern Slaveholders’ Worldview* (New York: Cambridge University Press, 2005), 730-732.

<sup>43</sup> On the distinction between a parish and a congregational system from a sociological point of view, see R. Stephen Warner, “Epilogue: Building Religious Communities at the Turn of the Century,” in Lowell W. Livezy, ed., *Public Religion and Urban Transformation: Faith in the City* (New York: New York University Press, 2000), 295-307.

Presbyterians from the British Isles, also had to deal with a new environment, finding a way to survive in a land where they had to proselytize actively and to drum up support from their own. And, in a very many cases, they succeeded. The astounding, unanticipated success of many churches once voluntary affiliation was the only means of gaining new members or new support has fascinated many students of early American religion. Richard Niebuhr described some of the innovations forced on the immigrant churches, noting especially their new efforts at the “intense cultivation” of loyalty among their own. As will be shown below, such developments were accompanied by greater precision in how the concept of membership itself was defined, on paper and in practice.<sup>44</sup>

#### Law, Formal Procedures, and Mutual Consent in Church Membership, 1780-1833

“The subject of membership in the Church of God, and the rights, privileges and duties of members, are subjects which necessarily require God’s explicit and particular Legislation.—They are subjects that cannot be left to human wisdom, or prudence,” wrote Presbyterian minister John M’Farland in 1828.<sup>45</sup> But divine instruction on the matter was sufficiently open to interpretation that Americans before and after the Revolution spent a great deal of time and energy dealing with questions about “the rights, privileges and duties of members.” And the three trends in post-Revolutionary American society and culture discussed above—growing religious diversity, geographic mobility,

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<sup>44</sup> Niebuhr, *Social Sources of Denominationalism*, 205.

<sup>45</sup> John M’Farland, *A Series of Letters, on the Relation, Rights, Privileges, and Duties of Baptized Children* (Lexington, Ky.: Joseph G. Norwood, 1828), 21.

and disestablishment—compelled many Americans in this era to think differently about church membership. That is, these broad cultural shifts interacted in ways yet poorly understood with post-Revolutionary ideas regarding consent and associational authority that events such as the tumult over Oliver Dodge’s ministry help to reveal. The diversity of religious beliefs and practices as well as of models of church government in the new United States, which would only grow as the eighteenth century gave way to the nineteenth, meant that no one conception of religious membership could possibly prevail among all American church members. But the trends and debates in the 1790s and the first four decades of the nineteenth century ultimately produced something approaching a consensus as to what, in a general sense, it ought to look like in a country where the voluntary principle had come to prevail.

One aspect of this new consensus was apparent to the first historians of American religion: as denominations split apart and new ones formed; as most states ended formal church-state relationships; and as communities were being broken up and new ones formed with the settlement of western territories in the young United States, American Protestants sought a new vision to unite a fragmented Christianity. And they found it in the voluntary principle and the exaltation of individual religious freedom, which could produce a new harmony, a “unity through diversity.” According to many scholars of American religion since the mid-nineteenth century—from Robert Baird to Perry Miller, and many others since—Americans found a unity in their descriptions of the nature of church affiliation: it was to be wholly voluntary, resting on the discernment of the faithful.<sup>46</sup>

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<sup>46</sup> Perry Miller, *The Life of the Mind in America: From the Revolution to the Civil War*, bk. 1 (New York: Harcourt, Brace, & World, 1965), chap. 2; Baird, *Religion in America*, 409; Susan Juster, *Doomsayers:*

There was more to unite Americans in their views of church membership than this growing, post-Revolutionary emphasis on voluntary consent, however. Churches also began to take unprecedented steps to define themselves and the roles to be played by their members, and the consequence was a new emphasis on mutual consent, the idea that both the church and the member had to agree, formally and specifically, to a fairly well defined relationship. Churches' responses to the social shifts underway in the late eighteenth and early nineteenth centuries, the increasing formalities with which they were put into effect, and the direct legal superintendence of some aspects of church membership by legislative and judicial institutions all resulted in wide-ranging similarities in how membership was defined in varied denominations.

Churches began to insulate themselves from the world around them in new, or at least newly emphasized, ways. In part, this was achieved through language. For one thing, religious groups in the late eighteenth century (and not before) began to name themselves, choosing their own nomenclature to define themselves rather than letting others do it (as had, say, the Quakers). Further, churches' creeds and covenants evolved from general statements of commonly held beliefs to something more precise, a way of describing exactly why this group of believers differed from another. Such covenants became "an instrument of group identity," according to Chris Beneke, beginning around the mid-eighteenth century, who called them "a relatively modest means of collective

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*Anglo-American Prophecy in the Age of Revolution* (Philadelphia: University of Pennsylvania Press, 2003), 162; Hatch, *Democratization of American Christianity*, 14; see also Christine Heyrman, *Southern Cross: The Beginnings of the Bible Belt* (Chapel Hill: University of North Carolina Press, 1998); Sidney E. Mead, "The Rise of the Evangelical Conception of the Ministry in America (1607-1850)," in H. Richard Niebuhr and Daniel D. Williams, *The Ministry in Historical Perspective* (New York: Harper and Brothers, 1956); and his "Denominationalism: The Shape of Protestantism in America," *Church History*, 23 (1954), 291-320.

self-definition.”<sup>47</sup> Many Baptist churches began in the late eighteenth century to add to their longstanding use of confessions, or formal creedal statements, a covenant that spelled out how members were to behave toward one another. All such acts, according to Philip Mulder, “established the boundaries of the covenanted community, the line between insider and outsider.” Such perspectives were to be embraced by the individual convert, who then saw himself or herself as having joined something, voluntarily, that would then serve to provide structure for the remainder of his or her life.<sup>48</sup>

In spite of all the late-eighteenth-century talk about individual religious liberty, religious voluntarism “typically bound the individual to the collectivity within the terms of the covenant,” in the words of Ruth Bloch and Naomi Lamoreaux.<sup>49</sup> Leaving aside only the most radical opponents of any ecclesiological authority, such as Thomas Paine, most Americans were sure that, while liberty of conscience was a purely individual matter, it was a freedom exercised, sustained, and made perfect only in a communal context. The post-Revolutionary emphasis on the church covenant was not a great break

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<sup>47</sup> Chris Beneke, *Beyond Toleration: The Religious Origins of American Pluralism* (New York: Oxford University Press, 2006), 106 (on covenants), 177-178 (on names). See also Appleby, *Inheriting the Revolution*, 196-199. Such documents, containing full descriptions not just of the duties of members but also of their rights, e.g., to a certain mode of proceeding in any case affecting their status as member, became increasingly common: see, for example, *The Constitution of the Presbyterian Church in the United States of America: Containing the Confession of Faith, the Catechisms, and the Directory for the Worship of God: Together with the Plan of Government and Discipline as Amended and Ratified by the General Assembly at Their Sessions in May, 1806* (Philadelphia: Jane Aitken, 1806); *Constitution of the Presbyterian Church in the United States of America...as Ratified by the General Assembly, at Their Sessions in May, 1821; and Amended in 1833* (Philadelphia: Presbyterian Board of Publication, 1839); *A Compendium of Church Discipline, Shewing the Qualifications and Duties of the Officers and Members of a Gospel Church: To Which Are Prefixed the Constitution & Principles of Union of the Russell's Creek Association* (Bardstown, Ky.: S. Railey, 1825).

<sup>48</sup> Philip N. Mulder, *A Controversial Spirit: Evangelical Awakenings in the South* (New York: Oxford University Press, 2002), 55-56; Richard D. Birdsall, “The Second Great Awakening and the New England Social Order,” *Church History*, 39 (1970): 357.

<sup>49</sup> Ruth Bloch and Naomi Lamoreaux, “Defining Public and Private in Early America: The General Problem and Evidence mainly from New England” (unpublished paper for the Columbia Seminar on Early American History, April 2004), 43. See also Barry Alan Shain, *The Myth of American Individualism: The Protestant Origins of American Political Thought* (Princeton, N.J.: Princeton University Press, 1994), 200.

from the past. Gregory Wills, in chronicling the nature of Baptist church discipline in the eighteenth and nineteenth centuries, noted that “church covenants were a natural development of the Puritan move to the voluntary church.”<sup>50</sup> But there was a new emphasis on formalizing the bonds connecting members to one another.

Not only covenants but church manuals, lists of members, and a growing level of ecclesiological bureaucracy became far more common. Paul Goodman has noted this of Congregationalist churches, observing that “many churches had become bodies of strangers desperately needing some formal mechanism to identify one another,” and Susan Juster found much the same in the case of New England Baptists.<sup>51</sup> The Reverend Seth Sweetser of the First [Congregational] Church in Worcester, Massachusetts, captured the flux of nineteenth-century church membership when he observed that “only about one third of those whose names were given me on my coming here [fourteen years earlier] remain with us,” and his church brethren formed “Standing Committees” to compile accurate membership rosters.<sup>52</sup> The nineteenth-century historian Robert Baird also noted this trend, casting it as a rational response to the challenges of creating religious community in a society so constantly in motion, both geographically and in terms of its professions of faith. A well-defined membership was, for Baird, a point of

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<sup>50</sup> Gregory A. Wills, *Democratic Religion: Freedom, Authority, and Church Discipline in the Baptist South, 1785-1900* (New York: Oxford University Press, 1997), 20.

<sup>51</sup> Paul Goodman, *Towards a Christian Republic: Antimasonry and the Great Transition in New England, 1826-1836* (New York: Oxford University Press, 1988), 71; Susan Juster, *Disorderly Women: Sexual Politics and Evangelicalism in Revolutionary New England* (Ithaca, N.Y.: Cornell University Press, 1994), 132. The church member’s manual was becoming an increasingly common form of publication: see John Mitchell, *The Practical Church Member: Being a Guide to the Principles and Practice of the Congregational Churches of New England* (New York: Leavitt, Trow, 1835) and his brief discussion in his Preface (vii) of this burgeoning form of literature.

<sup>52</sup> Seth Sweetser, “Review of my ministry for 14 years,” Seth Sweetser Papers, Dec. 19, 1852, American Antiquarian Society, quoted in Carolyn J. Lawes, *Women and Reform in a New England Community, 1815-1860* (Lexington: University Press of Kentucky, 2000), 61.

“inexpressible importance” for those evangelical churches that had come to comprise a majority of churched Christians: “I do not suppose that there is a single evangelical church in the country that does not keep a record of its members; I mean of those whom it has received according to some regular form or other *as members*, and who, as such, are entitled to come to the Lord’s Supper.” In a mobile, even transient society lacking any religious establishment and containing a remarkable diversity of religious sects, churches turned to increasingly formal modes of determining—and then recording—who belonged and who did not. Even Elias Smith’s Christian Church, which eschewed formal covenants as being an unscriptural infringement on the religious liberty of the faithful, kept membership lists and formally expelled the wayward.<sup>53</sup>

One way of capturing this new development in American conceptions of church membership is in the increasingly formal procedures that were created to facilitate the members of one church finding another church family when they moved. They took with them letters of dismissal, which often read as carbon copies with the church merely changing the member’s name. According to T. Scott Miyakawa, “These letters soon became standardized,” usually with preambles including doctrinal statements that “enabled the receiving churches to determine if the applicant had come from a congregation which held the same doctrines they did.” In some cases, they were even printed certificates, with a blank for the name, such as one from an African American Baptist church on Fayette Street in New York City, which read: “This may Certify to all persons whom it may Concern that William Baker is a member of the Baptist Church at

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<sup>53</sup> Baird, *Religion in America*, 183-184 (emphasis in original); Michael G. Kenny, *The Perfect Law of Liberty: Elias Smith and the Providential History of America* (Washington, D.C.: Smithsonian Institution Press, 1994), 81, 139-140; E. Brooks Holifield, *Theology in America: Christian Thought from the Age of the Puritans to the Civil War* (New Haven, Conn.: Yale University Press, 2003), 292-293.

Peekskill in good standing we therefore Recommend him as such to any other Church of the same faith and order. Signed by order of the Church on the 26<sup>th</sup> Day of April 1797, William D. Hall, clerk.”<sup>54</sup> Such documents had the appearance and the form of printed government documents, such as summonses from a court: they were typeset, with blanks for names and signatures. In the fluidity and rootlessness of the early American republic, churches made efforts to deal with the challenges that such geographic mobility posed. The result was a world in which members’ ability to join a church in their new place of residence was facilitated by procedural formalities that helped to make the status of *member* something portable. Baptist churches in the South even required that members not move without requesting a letter of dismissal.<sup>55</sup> Historical study of American religious life in the late eighteenth and early nineteenth centuries, then, reveals a real shift in how church membership was perceived, even if in an ecclesiological or theological sense little had changed: people joined churches that defined what they expected from and offered to their members to a degree of specificity they never had before; members’ names were recorded formally; and their modes of entry and exit were well defined, often in published manuals and guides.

The definition of membership that came to be emphasized most often, however, was not founded on ideas of voluntary affiliation in any simple way. That is, even as

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<sup>54</sup> T. Scott Miyakawa, *Protestants and Pioneers: Individualism and Conformity on the American Frontier* (Chicago: University of Chicago Press, 1964), 42; Certificate of William Baker, Apr. 26, 1797, Letters of Dismission, New York City Papers—Churches, box 31, Manuscript Department, New-York Historical Society. See also First African Baptist Church, in Philadelphia, to their brethren in the Lord, composing the Baptist Church, in Fayette Street New York, Feb. 11, 1812, *ibid.* Some English churches followed the same protocol in the nineteenth century: see the letter from a church in Reading, Berks, England, to a church “in the City of New York, or any other part of the United States of America,” signed by John Dyer et al., May 26, 1816, *ibid.*

<sup>55</sup> Monica Najar, *Evangelizing the South: A Social History of Church and State in Early America* (New York: Oxford University Press, 2008), 8-9, 98.



more and more people emphasized the voluntary principle in describing American religiosity, what it was that men and women were voluntarily joining was still understood as a religious body that demanded the undivided allegiance of its members (as a rule, a person could not be a member of *two* churches) and claimed disciplinary authority over them. As Joseph M'Farland wrote in 1828, churches were not like other corporate bodies: "A man may purchase and hold stock in ten or twenty banks, and have control in them all. And we may say that he and his friends are partly merged in one, and partly in another." But the church of Christ was not so much a corporation as a kingdom, he noted, and "in a kingdom his whole person as subject is merged, and owing allegiance there, he can owe it no where else."<sup>56</sup> Church membership was certainly not like every other kind of voluntary affiliation.

In his observations in this *Series of Letters, on the Relation, Rights, Privileges, and Duties of Baptized Children*, M'Farland went on to defend the idea that children were certainly to be deemed as members of the Presbyterian churches largely by offering a definition of church membership that he assumed all his readers would agree upon. It had two parts: first, to be a member was to be subject to the discipline of the church; second, members could not be arbitrarily dismissed. In both cases, he argued, the logic led inevitably to the conclusion that children of members were certainly members themselves. Children can be and are disciplined by the church. Thus, children must be members. The same logic applied to the second half of his definition of member. Because young children must be members, so too must those individuals have a right to receive

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<sup>56</sup> M'Farland, *Series of Letters*, 24-25. The kingdom metaphor is, of course, biblical and was quite often used in descriptions of churchly authority: see, for example, William Williams to Thomas Grosvenor, Dec. 24, 1792 [Lebanon, Conn.], Williams Family Papers, Connecticut Historical Society, Hartford, Conn., discussed above in the context of the Dodge controversy.

Communion when they come of age. They need not take any additional steps: “They *are* members, and members in good standing until charges are brought, and sentence of condemnation passed. Separate them from their parents at the Lord’s Table, and throw them among the people of the world, and you unchurch them, without a charge or a hearing. This Sir, is a high-handed doing, which certainly requires the high authority of Heaven for its justification.” The definition of *who* was to be regarded a member, then, came directly from his definition of *what* a member was. The important thing is not whether children were admitted as members of the church: denominational differences of opinion over the issue are not relevant here. The logic of the argument is what mattered: if they are not members, the church can have no authority over them, which the minister regards as an absurd conclusion to which to come. And if they are members, they can expect to remain so until the proper steps have been taken to expel them.<sup>57</sup>

By the 1830s, owing in part to public discussions about what offenses might merit expulsion from churches, people could write with some confidence about a concept of church membership that crossed denominational lines. Most famously, many churches debated whether slaveholding was something that might fall within the realm of churchly discipline. And one Quaker abolitionist published a tract on this issue that reveals as much about notions of church membership as it does about 1830s abolitionism. Evan Lewis wrote in 1831: “Let religious Societies exclude from membership all who will not emancipate their slaves—let them make it *sine qua non*, in their admission to communion and church fellowship.” Lewis argued that he was not urging any church or denomination to do anything unusual: “It is not necessary to define the manner of excluding slave

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<sup>57</sup> Ibid., 21, 40, 168.

holders from the advantages of membership in religious Societies. Each Society has its own code of discipline, or form of church government. If the principle should be adopted that the holding of slaves should be a barrier to communion or church fellowship; the mode of acting would be regulated by the same rules as in other cases of admission or exclusion from membership.” Lewis then goes on to describe what Baptists, Methodists, and Presbyterians had accomplished thus far, and in each case he notes that, although “society can only act efficiently by means of individuals,” these debates over church membership reveal one way in which “organised associations may be brought to act efficiently in a collective capacity.” From Lewis’s perspective, it was because so many churches had histories of applying consistent and exacting standards to potential members that they could and should use the category of membership as a way of effecting social change.<sup>58</sup>

There was, without doubt, a consensus among the churches of the young United States that a church was and ought to be a society of “mutual watchfulness, reproof and exhortation,” and according to one Congregationalist minister in 1792 the members “are required to consider and admonish, comfort and encourage one another, as there is occasion; to be all subject to one another, and to be clothed with humility.”<sup>59</sup> The same applied to churches of many denominations, and was especially true of those that grew most remarkably in the early nineteenth century, the Methodists and the Baptists. The same voluntary pledge that originated a person’s membership in a Baptist church,

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<sup>58</sup> [Evan Lewis], *An Address to Christians of All Denominations, on the Inconsistency of Admitting Slave-Holders to Communion and Church Membership* (Philadelphia: S. C. Atkinson, 1831), 14-15, 18-19. See Monica Najar, “‘Meddling with Emancipation’: Baptists, Authority, and the Rift over Slavery in the Upper South,” *Journal of the Early Republic*, 25 (2005): 157-186.

<sup>59</sup> Joseph Lathrop, *A Church of God Described, The Qualifications for Membership Stated, and Christian Fellowship Illustrated, in Two Discourses* (Hartford, Conn.: Hudson and Goodwin, 1792), 36-37.

according to Gregory Wills, “was also the basis of strict discipline.” The Georgia Baptist Association in 1784, for example, drew up a confession later accepted by other associations that defined the church as “a congregation of faithful persons, who have gained christian fellowship with each other, and have given themselves up to the Lord, and to one another, and have agreed to keep up a Godly discipline, agreeably to the rules of the Gospel.”<sup>60</sup> They defined the church, observes Wills, “in terms of its disciplinary function.” Methodists, too, not only made rigorous demands of their members and held them to account judicially but even instituted formal probationary periods for their members, a period the church extended from two months to six months in 1789.<sup>61</sup>

Only in recent years has our understanding of early American church discipline grown beyond the pioneering work of William Warren Sweet, T. Scott Miyakawa, and Richard Beeman, who have each argued that churches helped to create order and community on the American frontier. Beeman described the role of a Baptist church in the Virginia backcountry this way: “The church members were not concerned only with those obvious examples of sinful behavior. Their disciplinary proceedings were aimed at promoting a ‘Christian community,’ and to that end their congregation also acted decisively to promote mutual cooperation and punish ‘unchristian behavior.’ . . . In many cases the congregation acted as a substitute for and supplement to the legal agency of the county court,” even addressing secular conflicts such as the settlement of debts.<sup>62</sup> Such

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<sup>60</sup> Wills, *Democratic Religion*, 20, 30.

<sup>61</sup> James L. Lubach and Thomas L. Shanklin, “Arbitrations and Trials of Members in the Methodist Episcopal Church: 1776-1860,” *Methodist History*, 9, 4 (1971): 36 (on distinctive elements in Methodist trials and discipline); Lester Ruth, *Early Methodist Life and Spirituality: A Reader* (Nashville, Tenn.: Kingswood Books, 2005), chap. 8.

<sup>62</sup> William Warren Sweet, “The Churches as Moral Courts of the Frontier,” *Church History*, 2 (1933): 3-21; Miyakawa, *Protestants and Pioneers*, 31, 37-39, 58; Richard R. Beeman, *The Evolution of the Southern Backcountry: A Case Study of Lunenburg County, Virginia, 1746-1832* (Philadelphia: University of

entities, these historians contended, helped to bring order to the frontier when governmental institutions were incapable of it.

Recently, though, scholars such as Wills, Monica Najjar, and Curtis Johnson have found that evangelical churches served in the same role even in more settled areas of early-nineteenth-century American society. These enclaves of shared religious sentiment had a valuable purpose in the flux of post-Revolutionary American society. They did not merely bring people together by means of shared beliefs, rituals, values, symbols, and ideas, but also by means of institutional structures, hierarchies, and bureaucracies.<sup>63</sup> The New York clergy that Johnson has studied made efforts to separate their church bodies from the worldliness that surrounded them by extending their church discipline to cover more and more of their parishioners' conduct. No longer simply addressing matters of church attendance and doctrinal compliance, he finds that the churches began to punish violations of other, more communal standards, claiming jurisdiction over matters of "neighborliness" and "quarrelsomeness." Members deliberately subordinated their own

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Pennsylvania Press, 1984), 108-113, quotation on 108, writing about the Meherrin Separate Baptist Church, formally established in 1771; Don Harrison Doyle, "Social Theory and New Communities in Nineteenth-Century America," *Western Historical Quarterly*, 8 (1977): 159-160.

<sup>63</sup> Harry S. Stout and D. Scott Cormode, "Institutions and the Story of American Religion: A Sketch of a Synthesis," in N. J. Demerath III, et al., *Sacred Companies: Organizational Aspects of Religion and Religious Aspects of Organizations* (New York: Oxford University Press, 1998), 62-78. Historians, then, have begun to carry backward in time the arguments of Alan Trachtenberg in *The Incorporation of America: Culture and Society in the Gilded Age* (New York: Hill and Wang, 1982), 140-181, finding in actual, quasi-judicial enforcement of collective norms something akin to the unifying effects of shared evangelical worldview contended for by Donald Mathews, "Second Great Awakening as an Organizing Process," and more recently by Daniel Walker Howe, "The Evangelical Movement and Political Culture in the North during the Second Party System," *Journal of American History*, 77 (1991): 1219-1239; and James E. Block, *A Nation of Agents: The American Path to a Modern Self and Society* (Cambridge, Mass.: Belknap Press of Harvard University Press, 2002), esp. 371-380. The sorts of institutional bonds being discussed here, it should be noted, are quite distinct from those described by such scholars as Robert Orsi or Rhys Isaac, who emphasize the communal effects of religious belief as arising, not from formal structures, but from what are called cultural institutions, or routinized symbols that individuals use to make sense of their worlds (*The Madonna of 115<sup>th</sup> Street: Faith and Community in Italian Harlem, 1880-1950* [New Haven, Conn.: Yale University Press, 1985]; Rhys Isaac, *The Transformation of Virginia, 1740-1790* [Chapel Hill: University of North Carolina Press, 1982]).

wills to the authority of the church, creating what he calls “islands of holiness.”<sup>64</sup> Indeed, committed membership, not simply a membership large in numbers, was the goal. And there was no great North-South divide in this matter: antebellum northern and southern Baptists each excommunicated between 1 and 2 percent of their membership (though northerners were closer to 1 percent, southerners closer to 2) every single year. By the time of the Civil War, approximately 40,000 members of Baptist churches had been expelled in the state of Georgia alone.<sup>65</sup>

A consensus was being formed in American society by the 1830s that any and all kinds of church membership ought to originate in consent, but the trends being described here tended toward something best described as mutual consent, including not just the decision to join but also the decision by that church to accept the prospective member. As each and every state ended their establishments after the Revolution, it became well understood that “no person can now become a member of a religious society, until, by his voluntary act, he has united with it.”<sup>66</sup> But the obverse held true, as well: many churches (including especially those that grew fastest in the early nineteenth century, the Baptists and the Methodists) admonished and expelled members almost as routinely as they had admitted them. By the second third of the nineteenth century, church members as well as jurists and political leaders had come to perceive membership in formal, even contractual terms, with the church no less than the member having a say as to who belonged and who did not. Legal scholar Philip Hamburger has recently noted that all denominations in the

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<sup>64</sup> Curtis D. Johnson, *Islands of Holiness: Rural Religion in Upstate New York, 1790-1860* (Ithaca, N.Y.: Cornell University Press, 1989), 22-45. See also the discussion in Mark Douglas McGarvie, *One Nation under Law: America's Early National Struggles to Separate Church and State* (DeKalb: Northern Illinois University Press, 2004), 117-129.

<sup>65</sup> Wills, *Democratic Religion*, 12, 22, 145-46n.36 (according to Wills, northern Baptists expelled 1.18%).

<sup>66</sup> *Jewett v. Thames Bank*, 16 Conn. 511, 516 (1844).

early national period, including those struggling against establishment, “had clergy, structures of authority, and other conventional characteristics of institutional churches,” and they all “vigorously adhered to their congregational authority and discipline.” Formal membership lists and manuals joined with creedal statements and denominational self-definition to make every church a well-delimited entity. And this self-definition was a principle that religious leaders were beginning to defend actively and openly in the early nineteenth century. In part this was because they were forced to do so in the face of public critiques of the creeds of even voluntary religious societies as threats to individual freedom of the mind, such as those voiced by Elias Smith or William Ellery Channing.<sup>67</sup> For example, Samuel Miller took occasion in 1824 in a sermon at Princeton Theological Seminary to argue for the value of creeds, confessions, and demanding membership standards, as people in a religious society had and ought to have the “privilege to judge *for themselves*; to agree upon the plan of *their own association*; to determine upon what principles they will receive other members into their brotherhood.” There was a growing tendency to describe church membership as a contractual relationship, between two discerning parties.<sup>68</sup>

After even Massachusetts had ended its church-state relationship, courts would describe membership as being a matter of offer, acceptance, and consideration, making the parallel to other contractual relationships quite explicit. “The relation of a member to

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<sup>67</sup> William E. Channing, *Remarks on Creeds, Intolerance, and Exclusion* (Boston: James Munroe and Co. for the American Unitarian Association, 1837); Elias Smith, *The Loving Kindness of God Displayed in the Triumph of Republicanism in America: Being a Discourse Delivered at Taunton, Mass., July Fourth, 1809...* (n.p., 1809), 32; Kenny, *Perfect Law of Liberty*, 13-14; Elwyn A. Smith, *Religious Liberty in the United States: The Development of Church-State Thought since the Revolutionary Era* (Philadelphia: Fortress Press, 1972), 96-97; Hamburger, *Separation of Church and State*, 107, chap. 8.

<sup>68</sup> Samuel Miller, *The Utility and Importance of Creeds and Confessions: An Introductory Lecture...* (Princeton, N.J., 1824), 9, 44, quoted in Hamburger, *Separation of Church and State*, 197.

a parish is founded on contract,” wrote Justice Marcus Morton for the Supreme Judicial Court of Massachusetts in 1838, after disestablishment, “and can be created in no way but by the agreement of the parties. Any person wishing to become a member, must express his wish in writing, and the society, by a direct vote or by the act of an authorized agent, must accede to the application. Then the agreement is complete, creates the membership, and gives a right to vote and take part in the proceedings of the society.”<sup>69</sup>

According to Morton, a Baptist and champion of religious liberty, “No person can be made or become a member of any such corporation, without his consent, and that too evidenced by a written application. So on the other hand no person can thrust himself into any such body against its will.”<sup>70</sup> This was, without doubt, the logical conclusion of all the trends being discussed in this chapter regarding conceptions of church membership. As late as 1830, before the end of the Massachusetts establishment, Morton had been compelled to accept a contrary premise—that territorial parishes were obliged to accept members against their will and had to accept their votes, though he could not or would not defend the logic of it.<sup>71</sup> It was, Morton wrote, a decision “adopted reluctantly and only from a clear conviction that the law will admit of no other reasonable construction.” Uriah Oakes had once been a member of the parish at Malden, but he had decided to leave to join a formally organized voluntary religious society called the Congregational Religious Society for the Support of Orthodox Preaching. He changed his mind again

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<sup>69</sup> *First Parish in Sudbury v. Stearns*, 38 Mass. 148, 153 (1838).

<sup>70</sup> *Ibid.*

<sup>71</sup> Those born in a parish in Massachusetts were, not voting members of the church, but they were voting members of the parish or congregation, which, being incorporated, was the only entity that mattered in the eyes of the law. Such was decided finally by *Baker v. Fales*, or the Dedham Case, 16 Mass. 488 (1820), which held that the voters of the parish can choose a minister over the protests of the members of the church. See Carl Zollman, “Classes of American Religious Corporations,” *Michigan Law Review*, 13 (1915): 568; McLoughlin, *New England Dissent*, 2:1193-1197; Neem, *Creating a Nation of Joiners*, 65-68; O’Melinn, “Sanctity of Association,” 137-138; Levy, *Law of the Commonwealth*, 40.



some years later and wanted to be a member of his old church. He asked for and received a certificate to show to the parish in Malden that he was no longer a member of any dissenting church. But it appeared that his old church had no intention of welcoming him back, and when Oakes submitted this certificate to the parish official, the man paid it no mind: according to the attorney writing for the parish, “The plaintiff [Oakes] had no right to join the First Parish without their consent; otherwise the liberty granted to the citizens, of forming themselves into separate associations for religious purposes, would be rendered of little value. If it is said, that it is essential to religious freedom to permit every person to join such society as he may prefer, it may be well replied, that it is equally essential to religious freedom that a society shall not be compelled to unite in worship with any individual, against their will.”<sup>72</sup>

Unfortunately, Morton wrote, such was not the case. The moment that Oakes ceased to be a member of the Congregational Religious Society for the Support of Orthodox Preaching was the moment that “his liability to taxation in the First Parish was revived.” The parish “had no discretionary power to omit him, even had he continued to worship [as a nonmember] with the voluntary society of which he had recently been a member.” Morton hated to have to say it, but “liability to taxation is the criterion of membership,” not shared belief or mutual desire to worship together. And with the growing emphasis on consent-based membership in the nineteenth-century United States, that fact was beginning to bother people of all walks of life in a way that thirty or forty years earlier it had bothered only the members of dissenting evangelical churches. Any kind of membership that did not originate in a conscious decision to join and a formal

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<sup>72</sup> *Oakes v. Hill*, 27 Mass. 333, 345-346 (1830).

acceptance of that member by the church itself appeared to many people to serve no good purpose whatsoever.

It tainted the churches, for one thing. Before disestablishment in Massachusetts, according to a writer in Elias Smith's *Herald of Gospel Liberty*, it was scarcely possible for a person to be expelled from the church except by the hangman or by exile, forcing church members to "hold in their bosom infidels and profane persons."<sup>73</sup> And, of course, it also led to compulsory religious affiliation that infringed upon personal rights to worship God only in his or her own way.<sup>74</sup> The politics behind the 1833 amendment of the state constitution that made official the contractual conception of membership for all religious societies in Massachusetts is, of course, a complicated story of shifting coalitions and antebellum politics that has been told many times. But it is difficult to read the accounts of disputes over church membership in the last days of the Massachusetts establishment without coming to the conclusion that a culturally shared sense of what membership ought to look like—particularly, how it was to be begun and terminated—no longer had much in common with the legal regime that remained in place in Massachusetts as late as 1833.<sup>75</sup>

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<sup>73</sup> *Herald of Gospel Liberty*, June 5, 1812.

<sup>74</sup> John Mansfield makes the point that, only once one could depart from the established church without joining a dissenting church could membership in any church, even a dissenting church, be said to be wholly voluntary. See John H. Mansfield, "Review of *New England Dissent, 1630-1833: The Baptists and the Separation of Church and State*, by William G. McLoughlin," *American Journal of Legal History*, 17 (1973): 195-196.

<sup>75</sup> McLoughlin's *New England Dissent* remains the most comprehensive treatment. See also William G. McLoughlin, *Soul Liberty: The Baptists' Struggle in New England, 1630-1833* (Hanover, N.H.: University Press of New England, 1991); Jonathan D. Sassi, *A Republic of Righteousness: The Public Christianity of the Post-Revolutionary New England Clergy* (New York: Oxford University Press, 2001), 161-162; John D. Cushing, "Notes on Disestablishment in Massachusetts, 1780-1833," *William and Mary Quarterly*, 26 (1969): 186; Johann N. Neem, "The Elusive Common Good: Religion and Civil Society in Massachusetts, 1780-1833," *Journal of the Early Republic*, 24 (2004): 381-417; Neem, *Creating a Nation of Joiners*, chaps. 1-2; Levy, *Law of the Commonwealth*, chap. 3; William E. Nelson, *Americanization of the Common*

A third way of understanding the shifts toward formalized understandings of church membership in the early nineteenth century is to explore the ways in which the organization and government of churches was conceived of almost constitutionally. After 1800, there was a growing tendency among the American church members and leaders to see churches' organic documents as charters of liberty for their members. M'Farland, for instance, certainly described matters in just that way: "So long as I am in the Presbyterian church," he wrote, "I shall hold to the Confession of Faith, because I have read it, and I hope in some measure understand its nature and use. I value it not only for the doctrine it contains, but because I consider it a charter securing me, as a member of the Presbyterian church, against all ecclesiastical tyranny."<sup>76</sup> One of the first things that happened when a Presbyterian church received new members—and in this they paralleled Baptist and Congregationalist churches—was that a minister would "read them our confession of faith and church-covenant."<sup>77</sup> That approach, when coupled with a church's "insistence on their own jurisdiction over disputes of all kinds between their members," according to Monica Najar, "allowed churches to offer a form of 'citizenship' to their members," including women and African Americans.<sup>78</sup> Though decisions as to who belonged and who ought to have voting privileges did of course vary by denomination and, in the case of decentralized denominations such as the Baptists, even among individual churches, some churches declared "that ecclesiastical power resided in every member," and thus in the South "antebellum Baptist churches usually granted female members—and often

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*Law: The Impact of Legal Change on Massachusetts Society, 1760-1830* (Athens: University of Georgia Press, 1994), 104-109, 127-129.

<sup>76</sup> M'Farland, *Series of Letters*, 14.

<sup>77</sup> Joshua Leonard, *An Address, Presented to the Presbytery of Onondaga, at Homer, December 30, 1812, by Appointment* (Homer, N.Y.: John W. Osborn, 1813), 9.

<sup>78</sup> Najar, *Evangelizing the South*, 8, 110.

granted slaves—voting privileges.”<sup>79</sup> And a view such as that expressed by Presbyterian John Rice, who in 1816 described the “Introduction” to the published Presbyterian constitution as “our *Declaration of Rights*,” was becoming more and more common in the nineteenth century. Churches were expected to formally declare the rights and obligations of their members.<sup>80</sup>

This constitutional conception of church organization was furthered by the legal and political institutions of the state governments, even in places such as Pennsylvania that had nothing resembling an establishment of religion. The direct influence of governments played a role in how people thought about church membership in the early American republic, in two ways: incorporation or other laws passed by legislatures to enable particular kinds of religious collective action and to prohibit others; and judicial review of church activities. In the course of events such as the Oliver Dodge controversy, many became concerned that churches might potentially infringe upon personal rights of conscience and might have negative effects on the autonomy requisite for the proper functioning of a republican government. Thus, many in the post-Revolutionary era believed the member-to-group relationship, even in religious institutions, ought to fall within parameters established by law—both law as a conceptual means of ordering interpersonal relationships, and law as a system of constitutional institutions and common-law rules and procedures.

There was no consistent policy toward the incorporation of churches in the early American republic: New York and Pennsylvania, on the one hand, moved quickly to

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<sup>79</sup> Wills, *Democratic Religion*, 51. Many of the churches that excluded women from voting on government matters such as the election of officers allowed them to vote in disciplinary cases.

<sup>80</sup> John H. Rice, *An Illustration of the Character & Conduct of the Presbyterian Church in Virginia* (Richmond, Va.: Du-Val and Burke, 1816), 8-9.

allow the incorporation of churches by simple application (1784 and 1791, respectively). Virginia, Kentucky, and Missouri in 1820, on the other hand, prohibited any and all churches from being incorporated. Most states fell somewhere in the middle, incorporating churches by special legislative act until midcentury. As early as 1784, the New York assembly believed that religious liberty would be protected by passing a general incorporation statute to “enable every religious Denomination to provide for the Decent and Honorable support of Divine Worship” by permitting them to incorporate and thus inherit money and land. Virginia steadfastly refused to allow similar privileges to religious bodies. While historian Thomas Buckley has attributed the Virginia refusal to incorporate to “a conservative planter class” that was jealously guarding their power and skeptical of anything that might allow churches to function autonomously, a more compelling explanation appears to be an unwillingness to meddle too closely with internal church affairs.<sup>81</sup> James Madison, for example, endorsed some kinds of church incorporation statutes, but while president he famously vetoed the act of incorporation for the Alexandria Episcopalian Church in 1811, because the bill “enacts into and establishes into law sundry rules and proceedings relative purely to the organization and the polity of the church incorporated, and comprehending even the election and removal of the minister of the same.”<sup>82</sup>

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<sup>81</sup> Thomas E. Buckley, “After Disestablishment: Thomas Jefferson’s Wall of Separation in Antebellum Virginia,” *Journal of Southern History*, 61 (1995): 445-480; Paul G. Kauper and Stephen C. Ellis, “Religious Corporations and the Law,” *Michigan Law Review*, 71 (1973): 1500-1574 (New York Act of Apr. 6, 1784, quoted on 1510). In the late nineteenth century, long after every other state had permitted religious associations to incorporate, though often with strict parameters, notes Buckley, “churches and religious groups were less free in the Old Dominion than anywhere else in the Union” (480).

<sup>82</sup> *Annals of Congress*, 22: 351-982-983, quoted and discussed in David P. Currie, *The Constitution in Congress: The Jeffersonians, 1801-1829* (Chicago: University of Chicago Press, 2000), 352-354; Philip Hamburger, *Separation of Church and State* (Cambridge, Mass.: Harvard University Press, 2002), 182n. 66.

Madison's observation, however, would also have accurately described how other states actually did utilize acts of incorporation to delineate with some precision how churches operated internally: New York's 1784 statute, revised in 1801, described who could be a voting member (a male over eighteen years, attending worship for at least one year and having "contributed to the support of said church, congregation, or society according to the usages and customs thereof"); specified how elections were to be announced ("at least fifteen days before"); and even had slightly different rules for Episcopal churches, Dutch Reformed churches, and all "other religious societies."<sup>83</sup> Such rules were not exactly intrusive, but they evince an interest by early American state governments in setting minimum standards of democratic practices in incorporated religious societies. Many church leaders in states lacking such incorporation laws, however, looked favorably on the innovations of New York and Pennsylvania—Virginia Presbyterian John Rice noted in 1816 that under the 1791 Pennsylvania act "very many religious societies have been incorporated; and no discrimination is known as to the tenets or opinions of those who apply for charter privileges"—and such liberal, general incorporation laws would become more and more common over the course of the nineteenth century.<sup>84</sup>

The experiences of American Catholics in the early national period are a useful way of understanding the consequences of these legislative and judicial involvements in the organization of religious societies for early national conceptions of the member-to-church relationship. The dominant theme for historians of American Catholicism in this

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<sup>83</sup> *Laws of the State of New York*, 2 vols. (Albany: Charles K. and George Webster, 1802), chap. LXXIX, 336-343.

<sup>84</sup> Rice, *Illustration of the Character*, 55-56.

era is to focus on what Perry Dane has called “a profound battle between lay and clerical control, sometimes referred to in histories of the American Church as the crisis over ‘trusteeism.’” In the 1780s and 1790s, Catholic churches were incorporated in the United States in ways that emphasized the control of local congregations via elected trustees.<sup>85</sup> And the laity of some congregations, such as St. Mary’s Church in Philadelphia whose struggles will be described below, clearly desired exactly this distribution of authority, because it appeared to give them and not the bishops of the Catholic Church control over their own church property and local church affairs. Indeed, some church historians have described the establishment by law of a lay-trustee system in places such as Philadelphia “as an heretical and rebellious attempt by lay and clerical trustees to control the temporal and sometimes spiritual welfare of the local congregation.”<sup>86</sup> Before the nineteenth century was out, most states had passed laws allowing the Catholic Church hierarchy to administer its churches and its property as it saw fit (for example, New York passed a law in 1863 allowing Catholic parish churches to “incorporate accordingly as may be most suitable to their discipline”), but the post-Revolutionary period witnessed a different attitude toward Catholic church organization. States were less willing to tolerate Catholic

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<sup>85</sup> Perry Dane, “The Corporation Sole and the Encounter of Law and Church,” in N. J. Demerath III, et al., *Sacred Companies: Organizational Aspects of Religion and Religious Aspects of Organizations* (New York: Oxford University Press, 1998), 57.

<sup>86</sup> Patrick Carey, “The Laity’s Understanding of the Trustee System, 1785-1855,” *Catholic Historical Review*, 64 (1978): 357-358 (quotation on 357); Jay P. Dolan, *The American Catholic Experience: A History from Colonial Times to the Present* (Garden City, N.Y.: Doubleday and Company, 1985), 110-118; Peter Guilday, *History of the Councils of Baltimore, 1791-1884* (New York: Macmillan, 1932), 88; Thomas Timothy McAvoy, *A History of the Catholic Church in the United States* (Notre Dame, Ind.: University of Notre Dame, 1969).

hierarchical structures: as one scholar has noted, “in many states Catholic Churches were allowed to incorporate, but only according to Protestant rules.”<sup>87</sup>

More revealing still, American Catholics themselves not only believed but actively waged battles inside and outside the Church for the ideas that, as Patrick Carey has written, “the people themselves were sovereign; liberty was an ecclesiastical as well as a civil prerogative; ecclesiastical elections were the means of realizing their sovereignty; and written constitutions—balancing powers, duties, and rights of all—provided accountability in ecclesiastical as well as civil governments.”<sup>88</sup> And state involvement in church affairs, especially the modes of incorporation they were willing to extend to churches, helped to further a particular, republican view of what rights church members ought to have vis-à-vis the religious bodies they had joined.

There were occasions, however, where internal church disputes wound up in court in a way that helped to shape member-to-church relationships by underscoring the role of law and legal institutions in the allocation of the respective rights of members and church authorities. From a lawyer’s perspective, perhaps the most consequential cases involving the internal affairs of a Catholic church came about when the Reverend William Hogan was hired as a pastor in Philadelphia’s St. Mary’s Church in 1820 against the wishes of the Catholic hierarchy. St. Mary’s had been incorporated by special statute in 1788, and in 1821 the congregation assembled and voted to amend their charter but was forced to

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<sup>87</sup> Patrick J. Dignan, *A History of the Legal Incorporation of Catholic Church Property in the United States (1784-1932)* (Washington, D.C.: Catholic University of America, 1933), 207; Liam Séamus O’Melinn, “The Sanctity of Association: The Corporation and Individualism in American Law,” *San Diego Law Review*, 37 (2000): 139.

<sup>88</sup> Patrick W. Carey, “Republicanism within American Catholicism, 1785-1860,” *Journal of the Early Republic*, 3 (1983): 418-419. See Dale B. Light, *Rome and the New Republic: Conflict and Community in Philadelphia Catholicism between the Revolution and the Civil War* (Notre Dame, Ind.: University of Notre Dame Press, 1996).



go to the Supreme Court of Pennsylvania to compel, by writ of mandamus, the affixing of the corporate seal by the trustees. Those trustees, however, “protested against these proceedings as illegal and unconstitutional,” according to Chief Justice William Tilghman, and he agreed: in the words of the charter, the trustees had been given the sole authority to amend it, and their authority could not be circumvented, even if the whole congregation wanted to amend the document over their objections. It was a case that the authors of the first corporate law treatise in American history, Joseph K. Angell and Samuel Ames, cited on multiple occasions as helping to establish a rule that is now known as the “business judgment rule,” or the discretionary authority of directors (be they called trustees, as was the rule for religious societies, or a board of directors, as became standard for profit-seeking companies) within their delegated sphere. When Angell and Ames described how, in private corporations, “the whole management of their affairs is usually vested by charter in certain officers in boards” who cannot be compelled by members or courts to act contrary to their own judgment, they explicitly drew from the St. Mary’s controversy.<sup>89</sup>

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<sup>89</sup> Joseph K. Angell and Samuel Ames, *Treatise on the Law of Private Corporations, Aggregate* (Boston: Hilliard, Gray, Little, and Wilkins, 1832; rpt., New York: Arno Press, 1972), 112, 151, 440, 447; *Commonwealth v. Trustees of St. Mary’s*, 6 Serg. and Rawle 508, 509 (1821). See Francis E. Tourscher, *The Hogan Schism and Trustee Troubles in St. Mary’s Church, Philadelphia, 1820-1829* (Philadelphia: Peter Reilly Company, 1930), chap. 8; James F. Connelly, ed., *The History of the Archdiocese of Philadelphia* (Philadelphia: Archdiocese of Philadelphia, 1976), 96; Richard H. Bayard, “Remarks on the Case of the Corporation, styled ‘The Trustees of the Roman Catholic Society, worshipping at the Church of St. Mary, in the City of Philadelphia,’” *United States Law Journal, and Civilian’s Magazine*, 1 (1822): 294. Both in terms of corporate law and of associational experience, religious groups and religiously affiliated charitable organizations, which were massive and even national in scope long before business corporations were (Peter Dobkin Hall, “Religion and the Origin of Voluntary Associations in the United States,” working paper 213 [New Haven, Conn.: Program on Non-Profit Organizations, 1994], 43-44), helped establish a conceptual means by which authority could be centralized in the corporation. Already present in Angell and Ames’s description of boards of directors was the idea, famously expressed more than eighty years later in *Manson v. Curtis*, 223 N.Y. 313, 322 (1918), that the board’s powers were “original and undelegated.” Going even beyond Angell and Ames’s 1832 description of undelegated board authority was Chief Justice Lemuel Shaw’s opinion in *Burrill v. Nahant Bank*, 43 Mass. 163 (1840). See also Stephen M. Bainbridge, “Response to Increasing Shareholder Power: Director Primacy and Shareholder Disempowerment,” *Harvard Law Review*, 119 (2006): 1745-1746.

Although the result of that 1821 case and a follow-up 1822 decision regarding an election of a new board of trustees (the new board voted to request a charter amendment but only after excluding unwilling clerical members: the court would not acknowledge the acts of the board subsequent to the expulsion of the clerical members) might appear antidemocratic, they actually helped to encompass matters of church governance within a larger jurisprudence regarding associational authority and corporate power. First, they helped to ensure the sacred, inviolable character of charters for churches: the Supreme Court in Pennsylvania preserved the integrity of the incorporated board of trustees from a democratic assault, contending that it was not the church that had created an indispensable position for the clerical members of the board of trustees; it was the charter, which derived directly from the sovereign people of Pennsylvania. Joseph Hiester, the governor of Pennsylvania, wrote in March 1823 that he was obliged to veto a legislative effort to amend St. Mary's charter because it would "impair the rights of individuals as granted to them by the charter," an act he was "unwilling to join."<sup>90</sup>

Second, the court extended certain common-law principles to their superintendence of these internal church procedures: in the latter case, Chief Justice Tilghman wrote that, "not only has every member [of the board] a right to be present, but every member should have explicit notice, that the subject of amendment was to be acted on." Such a rule was nowhere guaranteed explicitly by the charter, but it was a long-established precedent in corporate law. In sum, courts did much to reinforce the notion that a church's formative documents *and* certain procedural rules derived from the

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<sup>90</sup> Joseph Hiester, Veto Message of the "Catholic Bill," Mar. 27, 1823, reprinted in Tourscher, *Hogan Schism*, 100-101. See also *A Republication of Two Addresses, Lately Published in Philadelphia, the First by a Committee of St. Mary's Church on Reform of Church Discipline, the Second by a Layman of St. Mary's Congregation, in Reply to the Same, with Introductory Remarks, by a Laymen of New York* (New York, 1821), 8, quoted in Carey, "Republicanism within American Catholicism," 427.

common law delineated the rights of members and the practices of internal government even in religious societies, formally and finally. Even an overwhelming majority of the members could not act contrary to those established forms of corporate governance.<sup>91</sup>

Justice John Bannister Gibson powerfully defended the idea that the exclusion of even a single voter in the latter *St. Mary's Case* was enough to merit the court's intervention. Gibson believed that, while there are occasions in the political world in which a man's vote is wrongly withheld and yet he remains bound by the results of an election, that is only because there is "no superior superintending power to correct abuses from the very root; nor could there be, for the exigencies of society require that the business of government should not in the meantime stand still: the right of the citizen, must, therefore, yield to considerations of necessity." But in this case a church had been incorporated by law, which, Gibson noted, made the courts of Pennsylvania a "superintending power" over their practices.<sup>92</sup> Not only had churches begun to mirror political society in their constitutionalism and their descriptions of members' rights and duties, but governmental and legal institutions showed little hesitance in monitoring the interpersonal relationships produced by membership. And this was not limited to incorporated churches: in an 1840 case involving a church divided by schism, Justice Thomas Sergeant of Pennsylvania noted that the German Lutheran and German Reformed Congregations of the Dry Lands were not incorporated, but their "articles of agreement form the fundamental rules and regulations, and are in the nature of a

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<sup>91</sup> *The Case of St. Mary's*, 7 Serg. and Rawle 517, 536 (1822); Angell and Ames, *Treatise on the Law of Private Corporations, Aggregate*, 53, 115, 280, 283, 287, 289.

<sup>92</sup> *St. Mary's Case*, 7 Serg. and Rawle (Pa.) 517, 544 (1822)

constitution, under which the congregations jointly and severally enjoy certain temporal and religious rights.”<sup>93</sup>

In the court’s efforts to understand what rights could be claimed by which members, they took a view that churches had guaranteed certain rights and privileges to their own, which then merited legal protection. Membership mattered and created a new regime of rights and duties, and in the early republic institutions legitimated by popular sovereignty—the courts, the legislatures, and popular opinion as formed in public debate—would come to play roles in ensuring that individual choice defined the limit of associational authority over any person. And more and more people came to hold the view that there were certain minimal standards of procedural fairness that needed to be adhered to, in both secular and religious societies, in any matter that might touch on a person’s civil rights.

Take, for example, the dispute between Robert Carson and the St. George’s Methodist Episcopal Church in Philadelphia, which was incorporated in 1789. Carson had been a contributing member for twenty-four years, and he was a trustee in November 1833 when he received notice that a fellow member had “preferred charges against him” for “falsehood,” slander, and “disobedience to the order and discipline of the church.” Carson challenged the authority and regularity of the committee that heard these charges against him, but he was expelled on December 11, 1833. Though we do not know what came of the attempt, Carson filed for a writ of mandamus from the Supreme Court of Pennsylvania to restore him “to his Membership and Trusteeship in the said church” the following February. His petition, though, reveals the degree to which at least Carson

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<sup>93</sup> *Unangst v. Shortz*, 5 Whart. (Pa.) 506, 519 (1840).

believed the Methodist church ought to be held accountable to certain standards of justice and fair procedure. Carson had been prevented from speaking in his own defense “by an overweening assumption of authority on the part of the Preacher in charge,” which was an act “incompatible, not only with the practice, but with the express doctrine, discipline and laws of the Methodist Episcopale Church,” which he then quoted by chapter and section. Again, there is no evidence of what came of the case—suggesting strongly that Robert Carson’s appeal for mandamus was denied—but Carson’s efforts to ask a court to hold his church to its own professed standards of discipline and procedural fairness are evidence of a new attitude in nineteenth-century American conceptions of church membership.<sup>94</sup> To again evoke Joseph Raz’s phrase, there was a “culture of legality” that pervaded institutions large and small, public and private, by the 1830s.

A nearly contemporaneous New Hampshire dispute reveals a remarkably similar rights-based appeal, with the expelled man arguing that a culturally shared sense of justice ought to be applied to internal church disputes. Nathaniel Couch, a longstanding member of the Second Congregational Church in Boscawen, New Hampshire, had become an outspoken critic of two causes in which the church was actively engaging: the temperance movement, and the formation of Sunday schools. He defended himself against the charges of unchristian conduct by letter to Deacon George T. Pillsbury, but the matter was brought to the whole church for a decision regarding Couch’s proposed expulsion. Two things stand out in the debates. First, the whole episode centered on a dispute about the alleged use of the word “belong.” The charges against Couch rested

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<sup>94</sup> *Commonwealth ex. rel. Robert Carson v. St. George’s Methodist Church in the City of Philadelphia* (1834), petition for mandamus, Feb. 3, 1834, Supreme Court of Pennsylvania, Eastern District, RG-33, Pennsylvania State Archives, Harrisburg, Pa. See also affidavit and return for mandamus challenging the expulsion of David Aaron Phillips from the House of Israel in 1844: RG-33, folder 9, carton 7, G-1289, mandamus and quo warranto, Pennsylvania State Archives.

heavily on his having declared during a meeting about making temperance a church matter that he “did not wish to belong to such a church” (according to Pillsbury’s recollection). Couch responded, that, no, “What I had said had reference to joining a church. Such proceedings as were then contemplated, and which I supposed, tended in my opinion to place a barrier and obstacle to the entrance of many whom we should desire to have with us.... This is all the meaning I intended to convey by the expression I used; and if you would substitute the word *join* for the word *belong*, and which I believe I used, and certainly intended to use, I think you will justify me.” Couch believed strongly that his church was overstepping its bounds in dictating to its members what opinions they ought to hold regarding the temperance movement, but his objections were read by others in the church as amounting almost to an oral withdrawal.<sup>95</sup>

More important for our understanding of the changing conceptions of church membership in the nineteenth-century United States were the criticisms made by Couch and the publisher of a pamphlet that sided with Couch against the Second Congregational Church. They argued that the authority of all churches in the American republic ought to be exercised according to the constitutional order in which they exist. “The only ecclesiastical tribunals by law or custom permitted in this free country, are councils and church meetings,” wrote Couch’s defender, the Unitarian and outspoken critic of the efforts of the Orthodoxy in New England to enforce their will on others, Henry B. Brewster. “Their powers are extremely limited and circumscribed, lest they should lead to ecclesiastical tyranny.” Not just the extent of church power, but the manner in which it was to be practiced, should mirror the republican governments in which the church

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<sup>95</sup> *A Report of the Proceedings of an Ecclesiastical Council, Held in Boscowen, N.H., in the Trial and Expulsion of a Member of the Second Congregational Church* (Concord, N.H.: H. B. Brewster, 1833), 8-9.

building stood. Brewster noted that Couch had not been allowed to have counsel in the church trial, even though the “constitutions of the United States and of New-Hampshire, and the Bill of Rights, secure to every citizen the right of being heard by counsel,—nor does any tribunal possess the authority to interfere in the selection or appointment of counsel. Yet here it was determined that Mr. Couch should have none unless such as they should dictate!! It was pretended that the By-laws, or constitution of this church, contained an article which gave them this authority, and an article was read, which it was pretended so declared.—*But it carried no such construction.* If it had, was it paramount to the Constitution—the supreme law of the land? Can every small parish thus possess the ample power of nullification?”<sup>96</sup> In sum, Couch and Brewster were contending for what political theorist Nancy Rosenblum has called the logic of congruence, or the idea that the smaller societies of a democratic republic ought to adhere to common norms that reach all the way down from government through the institutions of civil society. In many ways, though Rosenblum is critical of the idea from a normative standpoint, such a perspective was crucial to the historical definitions and redefinitions in the decades following the Revolution of what voluntary membership ought to look like and what rights ought to accompany the status of member.<sup>97</sup>

Hyperbolically, Brewster called Couch’s expulsion trial “the most direct usurpation on the rights of the people by ecclesiastical authority ever attempted in this country,” but his rhetoric was powerful: “If the By-laws of particular churches are

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<sup>96</sup> Ibid., 16; A Friend to Evangelical Truth [Henry Bennet Brewster], *An Appeal to the Christian Public in Defence of Reason and Rational Christianity...* (Concord, N.H.: Henry B. Brewster, 1833).

<sup>97</sup> Nancy L. Rosenblum, *Membership and Morals: The Personal Uses of Pluralism in America* (Princeton, N.J.: Princeton University Press, 1998); Nancy L. Rosenblum and Robert C. Post, “Introduction,” in Nancy L. Rosenblum and Robert C. Post, eds., *Civil Society and Government* (Princeton, N.J.: Princeton University Press, 2002), 13; Joshua Cohen and Joel Rogers, “Secondary Associations and Democratic Governance,” *Politics and Society*, 20 (1992): 393-472.

*superior* to the Laws and Constitution of our free country, as well as natural rights of its citizens, we shall soon see the *Holy* Inquisition fostered and rivetted upon us.” The very idea of repugnancy (most often seen in clauses in charters, constitutions, and bylaws that declared that nothing contained therein could be contrary to the law of the land) was to prohibit the creation of legal regimes within the republic that acted without accountability by their own standards.<sup>98</sup>

Something that Americans within and without the churches of the early United States could agree on was that religious societies ought never be allowed to do anything that infringed on a civil right. Chief Justice William Tilghman summed up that belief in an 1816 case that was cited again and again by jurists in the years to come. He began by emphasizing that a church had and ought to have authority over its members: “Every church has a discipline of its own. It is necessary, that it should be so: because, without rules and discipline no body composed of numerous individuals can be governed.” He went on to describe the limits of that power, in a way that staked out a position for judicial institutions to monitor any excesses of religious authority: “But this discipline is confined to spiritual affairs. It operates on the mind and conscience, without pretending to temporal authority,” for “under these restrictions religious discipline may produce much good, without infringing on civil liberty.”<sup>99</sup>

Such de jure limitations were accompanied by a widely held belief that churches ought never go so far as to infringe on the rights of anyone: the furthest extent of their authority should be expulsion. Members of Catholic churches in the early-nineteenth-century United States, for instance, made that point clearly, in a manner obviously

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<sup>98</sup> *Report of the Proceedings of an Ecclesiastical Council*, 16.

<sup>99</sup> *Riddle et al. v. Stevens*, 2 Serg. and Rawle (Pa.) 537, 543 (1816).



intended to obviate criticism from Protestant skeptics of churchly power but which nonetheless accorded with their actions. While the “Catholic Bill” mentioned above (ultimately vetoed by Hiester) was being debated by the Pennsylvania House and Senate, for instance, a group of Catholics in New York published a series of declarations that emphasized the distinction between civil and religious authority. They noted that “the spiritual jurisdiction of the Pope cannot affect our civil liberties. For whilst we acknowledge him to be the successor of St. Peter, etc. etc., like Our Divine Master, his kingdom is not of this world.”<sup>100</sup> Members of Protestant churches took the same approach to their descriptions of church authority, as was shown in detail with the case of Oliver Dodge, above. His resolution to the problem of apparently overzealous claims to religious power was to remove himself, a response that only became more common in the 1820s and 1830s, according to Mary Ryan in her study of upstate New York. A defiant individualism within the churches negated many efforts at admonition and group authority, to the point that in Utica, according to Ryan’s comprehensive study of church records, “church trials all but disappeared,” with only an occasional inquiry into a member’s “neglect of public worship.” A high-profile trial in 1834-1835 of a wealthy banker by the First Presbyterian Church of Utica ended this way, she writes: “He simply failed to appear to his church trial and left the fold for a more liberal congregation.”<sup>101</sup> The pattern would be repeated again and again.

Americans of the early national period were committed to defining and sharply delimiting bonds of membership in a wide array of associations. The increasing

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<sup>100</sup> Declarations of Feb. 26, 1823, Robert P. Donahoe, Chairman, reprinted in Tourscher, *Hogan Schism*, 104-105.

<sup>101</sup> Mary P. Ryan, *Cradle of the Middle Class: The Family in Oneida County, New York, 1790-1865* (New York: Cambridge University Press, 1981), 115-116.

fragmentation of American religion, among other factors, helped to prompt a newfound emphasis on the individual conscience. Historians of early America have made the trend toward liberal individualism the focus of their narratives for decades, tracing “the travail of a traditional, corporatist ‘mentality’ slowly yielding to the forces of individualism.”<sup>102</sup> But this chapter has focused upon a long-neglected aspect of that transformation: the unsteady importation of ideas of personal rights and formally, well-defined descriptions of personal duties into Americans’ conceptions of what church membership should look like. It was an ideal of personal sovereignty that prompted the exaltation of the voluntary principle by the mid-nineteenth century, which then also served to bolster the belief that no *one* associational commitment should be totalizing, cultic. The effect by the 1820s and the 1830s was the increasingly common expectation that churches ought to be governed by those same standards of fair treatment and constitutionally defined powers that circumscribed the institutions of the state. Church membership was increasingly seen as originating in contract and producing a relationship more akin to citizenship in a republican state than subjecthood in a kingdom. One Unitarian writer made the key distinction in 1827: a church is “a kind of corporation” if one means by that “a number of Christians have a right to go off, and communicate by themselves, and draw up rules and regulations for the government of the association.” According to James Walker, who

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<sup>102</sup> Stephen Foster, “British North America in the Seventeenth and Eighteenth Centuries,” in Robin W. Winks, ed., *The Oxford History of the British Empire*, vol. 5, *Historiography* (New York: Oxford University Press, 1999), quotation on 83. Churches have been integrally connected to this broader turn in the historiography: as Gordon Wood notes, competing denominations began “concentrating on the saving of individual souls” and abandoning “their traditional institutional and churchly responsibilities.” According to Michael Zuckerman, Americans “came to aspire to a character they had previously scorned, as free individuals rather than as virtuous communards.” Gordon S. Wood, *The Radicalism of the American Revolution* (New York: Alfred A. Knopf, 1993), 333; Michael Zuckerman, “A Different Thermidor: The Revolution beyond the American Revolution,” in James A. Henretta, Michael Kammen, and Stanley N. Katz, eds., *The Transformation of Early American History: Society, Authority, and Ideology* (New York: Alfred A. Knopf, 1991), 185.

would later become president of Harvard University, the true church, “the whole body of believers, all who are entitled to the christian name and privileges,” is of course something quite different than a corporation. No human being has the “authority to decree the terms, on which new members shall be admitted; for these terms are prescribed by a higher power.” But, again, wrote James Walker, any *individual* church has and ought to have precisely such power, just as any individuals ought to have a right to decide for themselves whether they want to join.<sup>103</sup>

#### The Legal Encompassment of the Churches of the New Republic, 1780-1840: An Important Caveat

Each of these efforts to better define who belonged, why they belonged, and what obligations each member had vis-à-vis the church body produced a world in which church members had laid out in front of them, with relative precision, the rights and duties of membership. Coupled with the increasingly frequent appeals to prospective members that, as many scholars such as Joyce Appleby have argued, instilled in them a sense of choice and self-confidence new to post-Revolutionary America, such descriptions of internal church affairs produced something that the leaders of many churches would not have purposefully intended: not simply a description, but an *emphasis* on the individual members’ rights, duties, and expectations.

This chapter has described how the rights and duties of membership were defined internally, with the mutual consent of church and member describing in detail what their

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<sup>103</sup> James Walker, *The Exclusive System: A Discourse Delivered in Groton, Massachusetts, at the Installation of Rev. Charles Robinson, November 1, 1826* (Boston: Bowles and Dearborn, 1827), 30-31.

relationship ought to consist of. Though scholars have largely neglected the role of the state in monitoring member-to-group relationships, the early national public sphere was defined in important ways by external superintendence over the exact limits of individual submission to any associational authority, religious or secular. Because this was both actually true in some ways and perceived to be so in others in the early decades of the nineteenth century, the study of the evolution of the concept of voluntary membership in the post-Revolutionary United States quite reasonably begins here, with a study of religious societies.

An important caveat, however, needs to be made, one that helps to chart the course of the chapters to come. Simply put, churches were not as closely governed by legislative and judicial institutions in the late eighteenth and early nineteenth centuries as were other kinds of voluntary associations. As Supreme Court Justice William Strong noted in an 1875 series of lectures on the subject, “the law recognizes the right of every church to determine finally who are, and who are not its members. Herein is a marked difference between churches and other organizations.” Strong described how, “in regard to membership of private corporations generally, such as benevolent, beneficial, or literary societies, as well as those which are pecuniary, rights to membership are subjects of legal cognizance, and there is a remedy provided for irregular amotion. Such corporations may be compelled to restore to membership one who has been expelled without regular trial according to the established forms of the corporate organization, and indeed those forms must be strictly complied with, or a court of law will interfere. It will review the proceeding, and insist upon its perfect regularity.” But churches were another matter, for they could construe their “own organic rules, whether a member has been cut

off; and no civil court will inquire whether the motion was regularly made, or issue a mandamus to compel a restoration. It accepts the decisions of church courts upon questions of membership as not subject to civil law review.” The sort of review in nonreligious societies that Strong is describing as a matter of course in the 1870s was a product of much contest in the early national period, and the struggles and innovations that produced the jurisprudential standards that he mentioned have yet to have their first scholarly treatment: such is the work of the chapters to come. But, importantly, debates about how churches ought to treat their own members—though such bodies were treated differently at law for establishment reasons—were a crucial component in the creation of a culture of voluntary membership in the post-Revolutionary United States.<sup>104</sup>

The belief that churches ought to have the right to define their own doctrine and standards of membership kept states from intervening in a way that they would in other kinds of voluntary associations, ways that are charted in chapters 2 through 7. Governmental involvement raised serious questions in the era of disestablishment in the new United States, for state participation in internal disputes in religious societies ran risks of a potential infringement on the liberty of conscience. Many believed that liberty of conscience might well mean joining a church or religious community that asked a very great deal of its members. To be free to follow one’s conscience was to be free to commit oneself almost fully to a certain mode of worship or living. As Maine’s chief justice noted in 1826 in a case involving the Shakers, “The very formation and subscription of

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<sup>104</sup> William Strong, *Two Lectures upon the Relations of Civil Law to Church Polity, Discipline, and Property* (New York: Dodd and Mead, 1875), 38-39. See also Kent S. Bernard, “Churches, Members, and the Role of the Courts: Toward a Contractual Analysis,” *Notre Dame Lawyer*, 51 (1975): 545-573, esp. note 76 on the furthest extent of churchly authority; and the “Dismal Swamp” argument by Zechariah Chafee, Jr., “The Internal Affairs of Associations Not for Profit,” *Harvard Law Review*, 43 (1930): 993-1029.

this covenant [to join a Shaker community] is an exercise of the inalienable right of liberty of conscience.”<sup>105</sup> As Carol Weisbrod has shown, such a perspective was almost universally held among jurists in nineteenth-century America, a product of the increasingly contractual way of understanding church membership described above.<sup>106</sup>

That contractual way of thinking about membership, however, opened up all kinds of possibilities for associational authority that was patently undemocratic and that even, in the words of Chris Beneke, “demanded such a rigorous internal conformity that it seemed to subordinate the common principles and practices that bound the larger society together,” such as the Shaker communities of New England, Kentucky, and Ohio. Beneke went on: “In these early years of the nation’s history, few things were more suspect than a group whose demands radically exceeded the fundamentals of the Christian faith and, by extension, paid scant attention to the essentials of good citizenship.”<sup>107</sup> Although such groups were seen by some as dangerous because they subverted shared principles upon which a republican community can hold itself together, however, that fear was not as often acted upon as it was expressed. Weisbrod’s conclusion that such groups were acceptable in nineteenth-century America as long as those outside of them were confident that everyone had entered voluntarily—and, importantly, could leave any time they wanted to—remains persuasive. State authority and broadly applicable legal principles served to mark the furthest limits of associational authority, but it often did so in a way that only reinforced the authority of churches over

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<sup>105</sup> *Waite v. Merrill*, 4 Me. 102, 119-120 (1826).

<sup>106</sup> Carol Weisbrod, *The Boundaries of Utopia* (New York: Pantheon, 1980).

<sup>107</sup> Beneke, *Beyond Toleration*, 190-191; Rosabeth Moss Kanter, *Commitment and Community: Communes and Utopia in Sociological Perspective* (Cambridge, Mass.: Harvard University Press, 1972); William R. Hutchison, *Religious Pluralism in America: The Contentious History of a Founding Ideal* (New Haven, Conn.: Yale University Press, 2003), chap. 2.

their own, those who chose to stay. As the Shakers themselves noted repeatedly in the 1820s and 1830s, their members were duty bound to obey so long as they remained members: they were “required by the rules of the Society to do this, or withdraw.” Obedience was “a matter of free choice.” The legal regimes of the early United States, though not without much contestation and occasional legislative interventions, ultimately supported the Shakers’ efforts to create a community of “subordination and obedience” that nonetheless rested on the voluntary assent to what they called, interchangeably, their “Covenant or Constitution.”<sup>108</sup> Sui juris individuals could join a Shaker society, giving up their property and living in a communistic community, and as long as they were able to depart at will the law of contracts secured their ability to join on predetermined terms. Hence the importance of the terms “covenant” and “constitution” in the Shaker literature: it was a product of decades of trial and error in creating a legal regime governing church-to-member relationships described increasingly often as being contractual and even constitutional in nature. The formative documents of the church set limits to churchly authority in a way that members could appeal to in cases of internal disputes.

As much as questions about consent mattered, then, so did anxieties about what, precisely, the relationship between the church and each individual believer really ought to look like. This chapter has charted the ways that Americans made efforts to define the details of church membership so that each person could understand the ways that he or she was obligated, bound. As a result, governmental institutions acted in certain ways

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<sup>108</sup> *A Brief Exposition of the Established Principles, and Regulations of the United Society of Believers Called Shakers* (Albany, N.Y., 1830), 8, quoted in Weisbrod, *Boundaries of Utopia*, 73; *An Improved Edition of the Church Covenant, or Constitution of the United Societies Called Shakers* (Dayton, Ohio, 1833), 49. See also the legal materials compiled in *Investigator; or, A Defence of the Order, Government, and Economy of the United Society Called Shakers, against Sundry Charges and Legislative Proceedings: Addressed to the Political World* (Lexington, Ky.: Smith and Palmer, 1828).

toward churches, even after disestablishment, because there came to be a cultural consensus that, in the words of Justice John Gibson in the *St. Mary's Case* of 1822, governmental institutions ought to act as a “superintending power” over the smaller associations of the early American public sphere. How post-Revolutionary Americans defined the relationship between the churches of God and the governments of men hinged in no small way upon how they understood the nature of individual membership in a church. Misunderstandings about membership produced new and culturally resonant ways of talking about the very concept, ways that informed how Americans conceived of the member-to-society in a multitude of other kinds of associations. In chapter 2, we will interrogate the ways that membership was defined and redefined in fraternal associations and political societies.



## Chapter 2

### Fraternal Societies: Brotherhood and Political Autonomy

In the early American republic, disputes over the meaning and limits to the bonds of voluntary membership reveal people, both in their individual experiences and in the discourses and institutions of law and politics, feeling their way toward a conception of voluntary belonging suitable in a republic. In a post-Revolutionary society committed to ideals of popular sovereignty and of personal sovereignty—that is, committed to two quite different meanings of the term *self-government*, each of which coexisted uneasily with the whole idea of private, nongovernmental associations—this was no easy matter. And people in the early American republic became acutely aware of these issues as new kinds of fraternal societies came to prominence in the late eighteenth and early nineteenth centuries.

In what has been a neglected factor in previous studies of early American civil society, state authority was called upon to constrain the potential abuse of power by voluntary societies, either over their own members, over nonmembers, or in ways contrary to the common good. But it was concerns over the well-being of members, in particular, that most prompted attention in the early republic to attempts to define the appropriate role of legal authorities in delimiting the powers of groups. Indeed, in what was a mutually reinforcing development, as more joiners in early national fraternal groups came to conceive of their participation as one of well-defined rights and obligations, legal institutions occupied an increasingly important position in the monitoring of those internal relationships. By the 1830s, courts would become more

hesitant to involve themselves in the interior world of voluntary associations, as we will see in chapter 6, but their withdrawal from direct engagement with disputes between members and the societies they had joined was in part a consequence of the fact that joiners and organizers had by that time come to agree upon the basic standards of associational commitments. People had come to think differently about what it was that could and should hold such groups together. Rather than bonds of affection, they saw association as a product of individual, voluntary decisions to bind oneself on known and definite terms. Conflicts large and small over the course of the preceding decades—and some appeared to be nothing more than petty disputes over a lone member’s expulsion—all played a part in the contested, unsteady formation of a new way of thinking about voluntary membership: it would become increasingly formal, attenuated, and legalistic, and no member’s autonomy as a political actor was to be constrained. This chapter will examine the first three decades of this evolution, the 1790s through the 1810s, by focusing on how Americans came to conceive of membership in a species of association that prompted a profound anxiety in the post-Revolutionary era: the politically oriented fraternal society.

Even in groups that had no professed political aims, there were disputes between members of fraternities in the years immediately following the Revolution that were cast in terms very much shaped by revolutionary ideology. One early dispute illustrates the uneasiness with which Americans would seek to resolve disputes within their voluntary societies. In 1789, a nineteen-year-old John Peter Van Ness was dismissed for repeated, unexcused absences from the Uranian Society, a literary club of students and alumni of Columbia College and young law students and clerks in Manhattan. On being informed

that he had been kicked out, the recent Columbia graduate, who had been the society's librarian, decided to hold onto the books. He would do so until he had a chance "to convince them of their error," a hearing "demanded as a right, not solicited as a favor," he told the readers of the *New York Daily Advertiser*, "but the motion was most pompously negated." Some days later, around the time that five members of the Uranian Society were "seen lurking about the house," Van Ness's trunk containing the books was "forced open by persons unknown" and its contents seized, including a few books belonging to him. Van Ness began running advertisements implying the club's culpability, and members of the Uranian Society decided to make a formal announcement of his expulsion and their seizure of the society's property. Van Ness responded. If the Uranian Society would not give him a chance to speak in his own defense, he declared, he would present his case to the people of New York.<sup>1</sup>

And the Uranian Society would meet him there, also putting their case "before the tribunal of the public." Just weeks after the first session of the First Federal Congress came to a close in New York City, residents were treated to a debate about the rights and duties of individuals who had willingly engaged themselves to abide by certain rules and to respect a particular voice of authority. Van Ness had been absent too many times, a writer for the society told the readers of the *Daily Advertiser*, and he was, according to a bylaw, dismissed. It was nothing personal: "A decision different from this could not have

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<sup>1</sup> *New York Daily Advertiser*, Nov. 26, 28, Dec. 1, 3, 1789; John F. Roche, "The Uranian Society: Gentlemen and Scholars in Federal New York," *New York History*, 52 (1971): 121-132; James McLachlan, "The Choice of Hercules: American Student Societies in the Early 19<sup>th</sup> Century," in Lawrence Stone, ed., *The University in Society*, vol. 2, *Europe, Scotland, and the United States from the 16<sup>th</sup> to the 20<sup>th</sup> Century* (Princeton, N.J.: Princeton University Press, 1974), 449-494; Thomas Bender, *New York Intellect: A History of Intellectual Life in New York City, from 1750 to the Beginnings of Our Own Time* (New York: Alfred A. Knopf, 1987), 28, 52; Thomas S. Harding, *College Literary Societies: Their Contribution to Higher Education in the United States, 1815-1876* (New York: Pageant Press, 1971).

been passed, without directly contradicting the letter and spirit of the law, and shewing the most unjustifiable partiality.” Several men had met the same fate, and “did they pelter the Society with their demands and with their threats? No; they acted like gentlemen, and had Mr. Van Ness followed their example, he would have given us no trouble, and have saved his own reputation.”

Van Ness’s public assault on the Uranian Society’s conduct was threefold. They had, first, damaged his reputation without basis by publishing that he had been “expelled.” No, he wrote. The bylaw merely notes that excessive absences mean that the member has “*withdrawn* his name from the Society.” Can this be expulsion, he asked? “Because I chuse to *avoid* the society of any man or set of men, am I therefore expelled therefrom?” Second, and perhaps most memorably, Van Ness did what he could to paint his “adversaries” as a bunch of petty children, listing all seventeen of them by their diminutive names—Charly Haight, Jemmy Cochran, Dicky Hicks. The Uranian Society, for its part, would not comment on Van Ness’s “puerile metamorphosis of names.”

It was Van Ness’s third critique that pointed the way to the future of American conceptions of voluntary membership. He had, of course, “engaged to subscribe and obey the laws” of the society. But he asked, “Was I obliged to submit blindly and implicitly to the society, when one of its *fundamental* laws, and consequently a condition of the contract between us was supposed violated, and I in vain sought an opportunity of redress?” Was he to have no chance to state his case? He felt confident that he knew how such clubs should operate (Van Ness also served as president of the College Society for Progress in Letters, for example), and he was sure that he had been misused.<sup>2</sup>

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<sup>2</sup> Eleanor Bryce Scott, “Early Literary Clubs in New York City,” *American Literature*, 5 (1933): 6.

The Uranian Society would survive into the mid-1790s, compiling an impressive roster of young men of diverse political persuasions, including a young DeWitt Clinton. They described themselves as “a Society of Gentlemen whose main object is the promotion of Literature.” With an active membership that ranged from twenty to thirty young men, they met weekly, on Tuesday evenings, often at City Hall, and debated a topic that had been agreed upon the previous week. Prospective members were nominated one week and voted in the next. They were, in every way, typical of early American fraternal and literary societies. In New York alone that same year, eight Masonic lodges met, four national societies (St. George’s, St. Patrick’s, St. Andrew’s, and the German Society), as well as a smattering of other social and literary clubs.<sup>3</sup> And in the decades to come, such associations would proliferate beyond belief. But the first generation of Americans remained unsure how to conceive of the bonds between member and society. Were members of such groups merely compatriots who had drawn up a *leges convivales*, a set of rules by which to get along? Was there to be a check on any abuses of those rules? Were they to be held to higher, extra-associational standards? In other words, should the calls of a Van Ness that he had been the victim of unfair and unjust treatment be taken seriously?

With the dismissal of John Peter Van Ness, a man who later in life would serve in Congress and as mayor of Washington, D.C., the men of the Uranian Society were forced to describe, in greater precision than they might have liked, the interior workings of their club. Anxiety about reputation hangs all about the arguments on both sides of this little dispute, and when Van Ness responded to the society’s attempts at “wounding my

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<sup>3</sup> Thomas E. V. Smith, *The City of New York, in the Year of Washington’s Inauguration, 1789* (1889; rpt., Riverside, Conn.: Chatham Press, 1972), 113-116, 194, 200; Roche, “Uranian Society,” 121-127.

character” in the press, he took them to task for, quite simply, not treating him fairly. “It illy became a society,” he wrote, “to dispense with those laws by which the general society of mankind is supported.” They could have “suspended the ordinary business, and granted this request [for a hearing] to one who they say, had been ‘so much esteemed.’” They should have treated a friend better. But they did not, and Van Ness made sure that the world knew it. The question remained to be answered, in the new American republic, whether anyone should care.

The very existence of the Uranian Society, and many similar college literary societies throughout the universities of the British American colonies and new United States, indicate a desire by young men to come together in more-or-less organized forums for conversation and fellowship.<sup>4</sup> And this was an impulse in no way limited to the college man. In the late seventeenth century, English and Scottish thinkers began to develop a set of ideas that would shape Anglo-American views of social life for more than a century. Anthony Ashley Cooper, the third earl of Shaftesbury and a student of John Locke, was among a number of these influential writers who described an innate moral sense that was present in all human beings. This sympathy meant that all people were, by nature, sociable. That concept, especially as delineated in the works of Adam Smith, Dugald Stewart, and Francis Hutcheson, would echo in the political thought of the American Revolutionary generation and for decades to come. Even as they became anxious about the fate of “the social principle” by the mid-nineteenth century, orators and

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<sup>4</sup> Thomas S. Harding, *College Literary Societies: Their Contribution to Higher Education in the United States, 1815-1876* (New York: Pageant Press International, 1971); McLachlan, “*Choice of Hercules*”; J. Jefferson Looney, “Useful without Attracting Attention: The Cliosophic and American Whig Societies of the College of New Jersey, 1765-1896,” *Princeton University Library Chronicle*, 64 (2003): 389-423; J. Jefferson Looney, *Nurseries of Letters and Republicanism: A Brief History of the American Whig-Cliosophic Society, 1765-1941* (Princeton, N.J.: American Whig-Cliosophic Society, 1996).

essayists continued to expound upon the “sacred tie of sympathy” that “binds man to his fellow man.” That sensibility, in both the eighteenth and nineteenth centuries, was seen as something that, although innate, must be nurtured and should be educated and improved. The stakes, indeed, were large, as fostering sympathetic social bonds was seen to be crucial to holding the society at large together. The matter was not merely psychological, but intensely political.<sup>5</sup>

And organized groups were crucial. In a 1709 essay, “Sensus Communis,” Shaftesbury emphasized the value of the club or conversation circle as an intimate community of shared interest and fellow feeling that gave men and women an opportunity to speak freely and to sharpen their wits. They could cordon themselves off from the world outside “and grow better reasoners, by reasoning pleasantly, and at our ease,” in these private societies of friends. It was shared tastes that would bring people together, often just a common interest “to furnish a rational amusement for the length of one Winter evening in a week,” as one club in Annapolis described their goal in 1770. Beginning in the seventeenth century and in still greater numbers in the eighteenth, clubs of this sort spread throughout urban settings in England and British America. Before large numbers of outwardly oriented societies came into being—and they were notably called “projecting” societies by Daniel Defoe, meaning groups designed to offer

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<sup>5</sup> Caleb Crain, *American Sympathy: Men, Friendship, and Literature in the New Nation* (New Haven, Conn.: Yale University Press, 2001); Andrew Burstein, *Sentimental Democracy: The Evolution of America's Romantic Self-Image* (New York: Hill and Wang, 1999); David S. Shields, *Civil Tongues and Polite Letters in British America* (Chapel Hill: University of North Carolina Press, 1997); G. J. Barker-Benfield, *The Culture of Sensibility: Sex and Society in Eighteenth-Century Britain* (Chicago: University of Chicago Press, 1992); Lawrence E. Klein, *Shaftesbury and the Culture of Politeness: Moral Discourse and Cultural Politics in Early Eighteenth-Century England* (Cambridge: Cambridge University Press, 1994); Richard Godbeer, *The Overflowing of Friendship: Love Between Men and the Creation of the American Republic* (Baltimore: The Johns Hopkins University Press, 2009); Charles Janeway Stillé, *The Social Spirit: A Valedictory Oration, Pronounced at the Departure of the Senior Class from the Society of Brothers in Unity, Yale College, June 28, 1839* (New Haven, Conn.: B. L. Hamlen, 1839), quotation on 6.

something to those who were not members—private societies modeled on ideals of Shaftesburian sociability attracted educated men and women to fellowship throughout the English-speaking world. And these gentlemen’s clubs, college fraternities, and coffeehouse gatherings of the colonial period, even if almost wholly founded on play and seeking little more than fellowship, served important discursive roles in the eighteenth century, as shown in the work of David Shields and others who since the late 1990s have taken a Habermasian tack in analyzing colonial and Revolutionary group life.<sup>6</sup>

This is not the place to reexamine the Shaftesburian fellowships of the eighteenth century or to reopen the question of the effect of the Revolution on the communal bonds of the colonial era. The relevance of the recent profusion of work on British American civility and sociability for this study rests on the question of how much influence such notions of belonging would have after the American Revolution, and into the nineteenth century, as Americans began to form and join increasingly diverse kinds of voluntary societies. That is, how did post-Revolutionary Americans think that affection and formal association fit together? How were their ideas of about membership shaped by these older ideals of affectionate harmony?

Catherine O’Donnell has shown some of the ways that even those “traditional institutions of Anglo-American civil society” such as conversation circles and belletristic clubs were transformed by the twin processes of winning independence and of building a

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<sup>6</sup> Anthony Ashley Cooper, third earl of Shaftesbury, “Sensus Communis,” in *Characteristics of Men, Manners, Opinions, Times, Etc.*, ed. John M. Robertson, 2 vols. (London: Grant Richards, 1900), 1:54; Shields, *Civil Tongues and Polite Letters*, 97-98, 175-208 (198 for quotation from Homony Club, Dec. 22, 1770); David S. Shields, “Anglo-American Clubs: Their Wit, Their Heterodoxy, Their Seditious,” *William and Mary Quarterly*, 51 (1994): 293-304; Peter Clark, *British Clubs and Societies, 1580-1800: The Origins of an Associational World* (Oxford: Clarendon Press, 2000); Daniel Defoe, *An Essay upon Projects*, ed. Joyce D. Kennedy, Michael Seidel, and Maximillian E. Novak (New York: AMS Press, 1999). On the terminology of emotion in use in the eighteenth century, see Nicole Eustace, *Passion is the Gale: Emotion, Power, and the Coming of the American Revolution* (Chapel Hill: University of North Carolina Press, 2008), appendix.



nation in the decades that followed. During the Revolution, participants in the correspondence societies and other revolutionary groups met in private and forged strong relationships but acted directly to transform American politics in a way that had not, generally speaking, been the practice in British American associational life. In the Revolution's wake, many associations continued their direct engagement with the world around them, seeking social and political reform in ways undreamed of in colonial society. Moreover, in a second shift that Kaplan traces, the horizontal, "egalitarian bonds of small voluntary societies...no longer differentiated them from the world outside" after 1776. Such groups had to figure out where and how they fit into a republican, American culture. Could the nation as a whole be held together through the sorts of sentimental bonds seen in these Shaftesburian clubs, some asked? Others, however, wondered whether those kinds of bonds were unrealistic beyond the most intimate of friendships. But, if not ties of affection to hold people together, what was there? By looking specifically at changing conceptions of individual membership, there is an opportunity to understand how Americans of the post-Revolutionary generations came to answer to such questions.<sup>7</sup>

The first heated debate over the meanings and consequences of membership, exclusivity, and formal association came at about the same time that the American Revolution finally ended with the Treaty of Paris. When the public learned about the institution of the Society of the Cincinnati by officers of the Continental Army on the Hudson River in May 1783, they engaged in some of the first explicit discussions of the rights of citizens to form private societies and to decide among themselves the

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<sup>7</sup> Catherine O'Donnell Kaplan, *Men of Letters in the Early Republic: Cultivating Forums of Citizenship* (Chapel Hill: University of North Carolina Press, 2008), quotations on 1-2.

requirements and the consequences of membership. Conspiracy theories and published criticisms of the Cincinnati would continue for years, but between the fall of 1783 and the following summer some of the nation's most influential figures debated the implications of private societies and certain kinds of exclusivity in a new American republic.<sup>8</sup>

The Society of the Cincinnati was named for the Roman general Cincinnatus who, rather than seeking power, had returned to his farm after military triumph. The framers of the Cincinnati, led by General Henry Knox, conceived of it as a veteran's organization for officers that had served in the American Revolution. It was to be a "Society of Friends, to endure so long as they shall endure, or any of their eldest male posterity," or, if not their sons, then collateral heirs, "who may be judged worthy of becoming its supporters and Members." By signing a copy of the parchment "institution," or constitution, of the Cincinnati, more than a thousand Revolutionary War officers had joined by the summer of 1784.<sup>9</sup>

Two aspects of the society most alarmed the critics of the Cincinnati. The hereditary aspect of membership led some to believe that the club might result in the creation of an American peerage, even if the organizers had had no such intention. And, second, in a period when there was hardly any organization other than Congress that was truly national in scope, people could see the Cincinnati—with its federal structure, with

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<sup>8</sup> Minor Myers, Jr., *Liberty without Anarchy: A History of the Society of the Cincinnati* (Charlottesville: University Press of Virginia, 1983), 1-90; Markus Hünemörder, *The Society of the Cincinnati: Conspiracy and Distrust in Early America* (New York: Berghahn Books, 2006), 5-56; Marc L. Harris, "Cement to the Union": The Society of the Cincinnati and the Limits of Fraternal Sociability," *Massachusetts Historical Society, Proceedings*, 107 (1995): 115-140.

<sup>9</sup> Edgar Erskine Hume, comp., *Society of the Cincinnati: Rules of the State Societies for Admission to Membership* (Washington, D.C.: Society of the Cincinnati, 1934), 3; Bryce Metcalf, *Original Members and Other Officers Eligible to the Society of the Cincinnati, 1783-1938: With the Institutions, Rules of Admission, and Lists of the Officers of the General and State Societies* (1938; rpt., Beverly Hills, Calif.: Historic Trust Eastwood Publishing, 1995); Myers, *Liberty without Anarchy*, chap. 2 and appendix; Edgar Erskine Hume, *Sesquicentennial History and Roster of the Society of the Cincinnati in the State of Virginia, 1783-1933* (Richmond, Va.: Published for the Society of the Cincinnati, 1934), 26-27.

plans for national, state, and, in some places, district-level meetings—as potentially subversive of popular sovereignty, as nothing less than a parallel government.<sup>10</sup>

Critics made much of the twin facts that the Cincinnati had established *themselves*, and that they had made themselves a *perpetually exclusive* institution. As a convention of concerned citizens in Rhode Island noted in April 1784, the men had “formed themselves into an Order or Society Called the Cincinnati, and appointed Officers &c Distinguishing themselves from Citizens at Large by a Badge to be by them Worn and making the Same Hereditary amongst the greatest part of them.” In doing so, the Rhode Islanders noted, the Cincinnati were “endeavouring to create themselves and their Male Heirs patricians or Noblemen Which institution is of a most dangerous nature incompatible with a Republican Government and tending to a Desolution thereof.” It was a deeply felt anxiety, one heard north and south, from South Carolina judge Aedanus Burke’s much-reprinted pamphlet to newspaper commentaries across New England.<sup>11</sup>

One Boston newspaper, for instance, decided to compare directly the Cincinnati to the much less threatening Freemasons, who were long established in British North America. Members of the Society of the Cincinnati themselves had made that

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<sup>10</sup> Hünemörder, *Society of the Cincinnati*, 25-56; Myers, *Liberty without Anarchy*, 48-69; Wallace Evan Davies, “The Society of the Cincinnati in New England 1783-1800,” *William and Mary Quarterly*, 5 (1948): 3-25; Edgar Erskine Hume, “Early Opposition to the Cincinnati,” *Americana*, 30 (1936): 597-638; Johann N. Neem, *Creating a Nation of Joiners: Democracy and Civil Society in Early National Massachusetts* (Cambridge, Mass.: Harvard University Press, 2008), 40-42; Charles William Janson, *The Stranger in America: Containing Observations Made during a Long Residence in That Country...* (London: Albion Press, 1807), 284-296.

<sup>11</sup> “Convention of Members Chosen by the Towns of Westerly, North Kingston, South Kingston, Charleston, Exeter, Richmond, and Hopkinton,” Apr. 1, 1784, Rhode Island Historical Society Manuscripts, Box 14, Folder 369, Rhode Island Historical Society; Cassius [Aedanus Burke], *Considerations on the Society or Order of the Cincinnati; Lately Instituted by the Major-Generals, Brigadier-Generals, and Other Officers of the American Army...* (Philadelphia: Robert Bell, 1783). See Kerby A. Miller et al., eds., *Irish Immigrants in the Land of Canaan* (New York: Oxford University Press, 2003), 576-585; John C. Meleney, *The Public Life of Aedanus Burke: Revolutionary Republican in Post-Revolutionary South Carolina* (Columbia: University of South Carolina Press, 1989), chap. 4.

comparison, hoping to persuade others that the Cincinnati served much the same charitable purposes as did the many Masonic lodges. (Indeed, the parallels caught the eye owing to their overlapping membership: 40 percent of Connecticut members of the Cincinnati, for example, were also Masons.) The writer in the *Boston Independent Chronicle*, however, noted what was to him an important difference: the Masons are “composed of members taken from any or every class of men, exclusive of no one of good character, from the highest to the lowest in the community.” Indeed, Masonic lodges comprised men “so variant, if not opposite to each other in their political sentiments, interests, views and connections” that they could never hope “to form a dangerous combination against the government.” The Cincinnati, on the other hand, “consist of one order of men, viz. *Military Officers*,” and “any honors or privileges distinct from their fellow-citizens” that the Cincinnati might claim would not “with their respective natural bodies, be laid in the dust,” as was the case with the nonhereditary Freemasonry, but would continue in the male bloodline, “tending rapidly to the introduction of an American nobility.” It was, in fact, the way the Cincinnati defined the requirements to join that first struck alarm bells for many Americans.<sup>12</sup>

One of those standards of membership—limiting membership to those who shared the common bond of military service—seemed fairly reasonable to many (and would seem wholly ordinary to most Americans within just a decade or two), though it was not universally accepted. A second element, the hereditary aspect, most concerned the Cincinnati’s critics, and it is on those anxieties that modern historical appraisals of the mid-1780s uproar have focused.

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<sup>12</sup> *Boston Independent Chronicle*, Mar. 18, 1784; Hünemörder, *Society of the Cincinnati*, 85. For the Cincinnati’s defenders use of the Masonic parallel, see *Connecticut Courant*, Apr. 13, 1784.

There was, however, a third line of discussion about the Society of the Cincinnati, one apparent in the words of its formative document, that merits study, for it shows that post-Revolutionary Americans were, quite early, beginning to draw a line of distinction between friendship and association. The Cincinnati was to be a “Society of Friends,” and yet men such as Thomas Jefferson, who was not a member, and George Washington, who was, gave serious thought to the idea that the very act of organizing might threaten that goal. Nothing corrupted friendship, they apparently believed, like formal association.

After Washington had solicited his opinion, Jefferson laid out his views in a letter to Washington in April 1784. The Society of the Cincinnati, in its granting of men “honorary instalments into the order” and granting their progeny “preeminence by birth,” was “against the letter of some of our constitutions; against the spirit of them all.” It was this worry, the potential that the Cincinnati might be a first step toward a subversion of the Revolution’s accomplishments, that most worried Jefferson, and, indeed, such worries were enough to prompt Washington to attempt to abolish the society at its first meeting and, when that effort failed, to propose the elimination of hereditary membership.<sup>13</sup>

Of all the passages in Jefferson’s letter, however, it was his musings on the destructive effects of the association on friendships that Washington would borrow directly in his speech to the first meeting of the Cincinnati. Jefferson was sure that the society was formed for innocuous reasons, that “it was natural for men who had accompanied each other through so many scenes of hardship” to “seize with fondness any proposition which promised to bring them together at certain times & regular periods.” But the men would attend the meetings “no longer to encounter a common enemy, but to

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<sup>13</sup> Thomas Jefferson to George Washington, Apr. 16, 1784, in W. W. Abbot, ed., *The Papers of George Washington: Confederation Series* (Charlottesville: University of Virginia Press, 1992), 1:287-292.

encounter one another in debate & sentiment.” He, somewhat snidely, told Washington that, though the Cincinnati may have little to do at their gatherings, “something I suppose is to be done,” and “however unimportant, it will suffice to produce difference of opinion, contradiction & irritation.” And nothing, Washington would later quote him to say, “loosens the bands of private friendship more, than for friends to pit themselves agst each other in public debate.” To have meetings, Washington said, “might be productive of more dissention than harmony.” This was, to him, a very real concern.<sup>14</sup>

In a society formed, according to its constitution, “to render permanent the cordial affection subsisting among the officers,” to institutionalize affection, Jefferson and Washington thought it would tend to do exactly the opposite. Because it was an organization, an association of formalities and deliberation, the friendships forged in war were put at risk. The creation of voluntary societies aimed at preserving fraternal bonds raised questions for post-Revolutionary Americans whether formal association and good friendship were at all similar. Jefferson would later observe that “an association of men who will not quarrel is a thing which never yet existed, from the greatest confederacy of nations down to a town meeting or vestry,” and he very clearly took the position with Washington that creating a formal organization to nourish the memories of the Revolutionary War might be the very best way of tarnishing them.<sup>15</sup> That criticism, and others, would continue for much of the remainder of the decade. After seeing life in

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<sup>14</sup> George Washington, “Observations on the Society of the Cincinnati,” [May 4, 1784] in *ibid.*, 330-332; Hünemörder, *Society of the Cincinnati*, 91-101; Nathanael Greene to George Washington in Roger N. Parks, ed., *The Papers of Nathanael Greene*, vol. 13 (Chapel Hill: University of North Carolina Press, 2005), 382-384. On Washington’s comments at the first general meeting, see William Moultrie, “Proceedings of the General Societe of the Cincinaty,” b.v. Moultrie, Manuscript Department, New-York Historical Society; and Winthrop Sargent’s Journal, May 4-18, 1784, reprinted in Abbot, ed., *Papers of George Washington: Confederation Series*, 1:332-354.

<sup>15</sup> Thomas Jefferson to John Taylor, June 4, 1798, in Barbara B. Oberg, ed., *The Papers of Thomas Jefferson*, vol. 30 (Princeton, N.J.: Princeton University Press, 2003), 389.

monarchical France and discussing the Cincinnati with some of his friends there, for example, Jefferson began to conceive of potential dangers of the Cincinnati that, he told Washington, he could not see “while I had American ideas only.” And others on the home front continued their assaults, making Washington uneasy about attending their meetings in Philadelphia in the summer of 1787. So why exactly was the Society of the Cincinnati able to persevere? Two reasons stand out, each informative of a different aspect of the immediately post-Revolutionary sentiment regarding voluntary societies.<sup>16</sup>

First, there was a strong belief that the popularly instituted governments both should and, indeed, could serve as checks on the Cincinnati’s potential power. An observer in Boston noted that, “When the Society shall be guilty of any overt act that is cognizable by law, the law will punish it and the Legislature will always have power to annihilate the Order; but till that time the shrewdest genius will have some difficulty in finding which side to attack the Institution.” A pamphleteer writing in response to Aedanus Burke in 1784 argued, “*The arm of civil authority surrounds it—only to will its destruction would be instant annihilation.*” Such reassurances went a long way toward alleviating the public’s wariness about the Cincinnati, evidence of an early belief in the idea of public superintendence of voluntary groups.<sup>17</sup>

A second reason the Cincinnati was able to withstand the tests of the 1780s had nothing to do with its critics or the shifting priorities of those keeping a vigilant eye out for threats to the union. Rather, it was a matter of the steadfast resolve of the members

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<sup>16</sup> Thomas Jefferson to George Washington, Nov. 14, 1786, in Abbot, ed., *Papers of George Washington: Confederation Series*, 4:363-366.

<sup>17</sup> *Boston Independent Chronicle*, May 6, 1784; An Obscure Individual [Stephen Moylan], *Observations on a Late Pamphlet Entitled “Considerations on the Society or Order of Cincinnati,” Clearly Evincing the Innocence and Propriety of That Honourable and Respectable Institution* (Hartford, Conn.: Hudson and Goodwin, 1784), 13.

themselves, particularly those in the state societies north of Pennsylvania, none of which endorsed any proposed revisions of the group's constitution. Sullivan in New Hampshire pointedly told Washington, "We became Members of the Cincinnati upon the original plan & cannot conceive ourselves bound by Articles to which we never subscribed." If a new system was contrived "we shall Individually claim a right to determine for ourselves whether we will become members or we will not," but he and others were sure they had a right to form the society upon the terms they had chosen, just as did "Joint merchants free masons or the Members of any other society." They had determined that their purposes were pure, their society a good means of preserving friendships made in a time of war, and their place in the thirteen republics innocent, even beneficial. Such men stuck to their original plans long enough for the attention of their critics to drift to other worries, long enough for most observers to see how innocuous the Cincinnati were. But they did so for a reason that would become an oft-repeated declaration over the coming decades: *this* was the society they had consented to join, and they were not willing to see that association yanked from underneath them and turned into something essentially different.<sup>18</sup>

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<sup>18</sup> Sullivan to Washington, Feb. 3, 1785, in Abbott, ed., *Papers of George Washington: Confederation Series*, 2:320-323; Gerald D. Foss, *Three Centuries of Freemasonry in New Hampshire* (Concord, N.H.: Grand Lodge of New Hampshire, 1972), 180-183. Washington had pushed publicly for reforms at the 1784 meeting that would have calmed the anxieties of almost any critic. He sought to abolish hereditary and honorary memberships, to "strike out every word, sentence, and clause which has a political tendency," and to place the funds of each state society in the hands of the state legislature (a proposal amended by committee to a call for state-by-state charters of incorporation). Though the reforms ultimately failed ratification by each state society—like the Articles of Confederation, the Cincinnati's Institution could only be amended by unanimous consent among the state societies—extensive newspaper coverage of the reform efforts led many to await results rather than continue their assaults. Dragged out over three years, between 1784 and 1787, some simply lost interest or were distracted by other, apparently greater threats to the new republic, such as Shays's Rebellion in 1786. See Washington, "Observations on the Society of the Cincinnati," [May 4, 1784] in *Papers of George Washington: Confederation Series*, 1:330-332; Hünemörder, *Society of the Cincinnati*, 94-101; Myers, *Liberty without Anarchy*, 76-79; Henry Hobart Bellas, *A History of the Delaware State Society of the Cincinnati: From Its Organization to the Present Time...* (Wilmington: Historical Society of Delaware, 1895), 12-16; Winslow Warren, *The Society of the*



New Hampshire's John Sullivan, a general in the Continental army, thought the society the best means to keep him and his fellow officers from "parting with friends of Approved Virtue, whose friendship commenced with the contest increased through every danger and had so often been cemented with our blood." As Sullivan wrote in a letter circulated among his fellow Cincinnati, "The Institution of Societies, establishing funds, and Wearing the badges of the respective orders, will readily be acknowledged a right claimed and exercised by the Citizens of this and every other free Country." Sure of their own innocent motives, and hopeful that the Cincinnati would be a way to maintain ties of affection and brotherhood produced by shared struggle, the Cincinnati aimed to preserve their association against the charges of their critics. Alexander Hamilton and others wondered how it could possibly "appear criminal, that a class of citizens, who have had so conspicuous an agency in the American Revolution, as those who compose the Society of the Cincinnati, should pledge themselves to each other, in a voluntary association, to support, by all means consistent with the laws, that noble fabric of *United Independence*."<sup>19</sup> The Cincinnati held fast to their own appraisal of their worth as an institution, reminding those Americans skeptical of their intentions that the society was always to remain under the watchful eye of state authority.

Throughout the 1780s, then, as fraternal societies such as the Cincinnati or John Van Ness's Uranian Society formed in the uncertain terrain of a nation just emerging from a successful revolution, there was an apparent tension between ideals of genuine

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*Cincinnati: A History of the General Society of Cincinnati with the Institution of the Order* (n.p.: Massachusetts Society of the Cincinnati, 1929), 3-9.

<sup>19</sup> John Sullivan to George Washington, Feb. 3, 1785, in Abbott, ed., *Papers of George Washington: Confederation Series*, 2:320-323; circular letter of Gen Sullivan of Exeter, N.H., Feb. 3, 1785; and circular letter of Alexander Hamilton, James Duane, and William Duer of the New York State Society of the Cincinnati, Nov. 1, 1786, both in *Papers of the Connecticut State Society of the Cincinnati, 1783-1807* (Hartford: Connecticut Historical Society, 1916).

friendship and the challenges of association, both in terms of internal organization and the group's role in the larger society. Some of those things that seemed necessary to preserving fraternity in a voluntary society, such as limiting membership to those who shared the bond of wartime service, could be seen as the very things that made a particular society appear threatening. But the 1780s also gave Americans their first opportunities to think about the power of private associations vis-à-vis governmental authority. Other anxieties about voluntary associations in the republic, beginning in the 1790s when fraternal societies formed with explicitly political aims began to appear across the nation, further shaped the developing ideas about membership, citizenship, and the relationship between the two.

That decade witnessed two periods of intense debate about the role of voluntary, or “self-created,” societies in the post-Revolutionary public sphere. In both cases, popular perceptions of the groups in question hinged in important but hitherto neglected ways on what people knew—and thought they knew—about the nature of individual participation in them.

In 1793, societies of men opposed to the Federalist policies of George Washington and Alexander Hamilton began to form throughout the nation. Probably more than fifty societies were formed in the 1790s, in the nation's largest cities and far outside them, such as in Kentucky and in the backcountry of South Carolina. Members saw themselves as serving the indispensable purpose of observing the government, mutually informing and improving one another, and disseminating true and helpful information to their fellow citizens. They insisted they did nothing illegal or inappropriate: they came together for good, republican purposes, “for deliberating, for

thinking, for exercising the faculties of the mind,” one writer noted. “What statute has deprived us of the right?” To a certain extent, they had initially modeled themselves after the Sons of Liberty, groups organized to resist the injustices of British colonial government in the Revolution, but their purposes were not to end tyranny but rather merely to prevent a turn in that direction, by sharing information and keeping an eye on governmental authorities.<sup>20</sup>

The Democratic-Republican societies set themselves up according to what were rapidly becoming “the standard procedures of associational life,” according to Albrecht Koschnik in his description of the Democratic Society of Pennsylvania. They met in regularly scheduled, well advertised meetings. Their officers were elected annually; prospective members were proposed and voted in, often swearing an oath and signing the club’s constitution.<sup>21</sup> Outside of the cities, meetings were held monthly in county courthouses, and in both urban and rural areas “the principles underlying their organization were the same.<sup>22</sup> In at least one case, the Massachusetts Constitutional Society, members were required to hold in hand a copy of the society’s “articles and

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<sup>20</sup> Eugene P. Link, *Democratic-Republican Societies, 1790-1800* (New York: Columbia University Press, 1942); Philip S. Foner, ed., *The Democratic-Republican Societies, 1790-1800: A Documentary Sourcebook of Constitutions, Declarations, Addresses, Resolutions, and Toasts* (Westport, Conn.: Greenwood Press, 1976), quotation on 34, from *New York Journal*, Jan. 17 1795; Ronald P. Formisano, *For the People: American Populist Movements from the Revolution to the 1850s* (Chapel Hill: University of North Carolina Press, 2008), 53-57; Todd Estes, *The Jay Treaty Debate, Public Opinion, and the Evolution of Early American Political Culture* (Amherst: University of Massachusetts Press, 2006), 53-68; Matthew Schoenbachler, “Republicanism in the Age of Democratic Revolution: The Democratic-Republican Societies of the 1790s,” *Journal of the Early Republic*, 18 (1998): 237-261; David Waldstreicher, *In the Midst of Perpetual Fetes: The Making of American Nationalism, 1776-1820* (Chapel Hill: University of North Carolina Press, 1997), 131-133.

<sup>21</sup> Albrecht Koschnik, *“Let a Common Interest Bind Us Together”: Associations, Partisanship, and Culture in Philadelphia, 1775-1840* (Charlottesville: University of Virginia Press, 2007), quotation on 26; Albrecht Koschnik, “The Democratic Societies of Philadelphia and the Limits of the American Public Sphere, circa 1793-1795,” *William and Mary Quarterly*, 3d ser., 58 (2001): 626-627.

<sup>22</sup> George D. Luetscher, *Early Political Machinery in the United States* (1902; rpt., New York: Da Capo Press, 1971), 41.

regulations,” and, in most cases, those men who strayed from the proper set of beliefs could be expelled by a vote of two thirds of the members present. Debate, resolutions, and the reading and discussion of correspondence from similar societies around the country constituted much of their regular agendas. Bylaws called for the open participation of all members, and members were called upon to do their part individually in defense of good government. Those in Portland, Maine, were asked to do more than most when the club resolved “that every member of this society arm themselves as speedily as possible with every implement of war.” All of their materials teemed with references to the natural rights of man—to such an extent that some called for martial action in defense of those rights—and the Democratic-Republican societies apparently extended those rights to their own membership in a way that shaped their internal policies. They went out of their way to describe their members as fellow “citizens,” each engaged in a common goal, and all were actively to participate.<sup>23</sup>

For some, these societies were a danger to republican government, and the critiques echoed those made about the Society of the Cincinnati<sup>24</sup>: the clubs were “self-created,” that is, not created by the people through constitutional means and thus “unknown to the laws of the country.” George Washington was only the most prominent person to so label the societies. Recent historical work on the political turmoil

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<sup>23</sup>Massachusetts Constitutional Society, “Rules and Regulations and Declaration, Jan. 13, 1794,” in Foner, ed., *Democratic-Republican Societies*, 256;

<sup>24</sup> The parallels were drawn explicitly by Thomas Jefferson in a letter to James Madison, Dec. 28, 1794: “It must be a matter of rare curiosity to get at the modifications of these rights proposed by them, and to see what line their ingenuity would draw between democratical societies, whose avowed object is the nourishment of the republican principles of our constitution, and the society of the Cincinnati, a *self-created* one, carving out for itself hereditary distinctions, lowering over our constitution eternally, meeting together in all parts of the Union periodically, with closed doors, accumulating a capital in their separate treasury, corresponding secretly and regularly, and of which society the very persons denouncing the democrats are themselves the fathers, founders or high officers.” John Catanzariti, ed., *Papers of Thomas Jefferson*, vol. 28, *1 January 1794 to 29 February 1796* (Princeton, N.J.: Princeton University Press, 2000), 228-229.

surrounding the clubs has focused on one set of criticisms—that they had no legitimacy in their claims to speak for “the people” when there were other, constitutional entities that did so—to the near exclusion of another criticism: the associations themselves turned their members into bad citizens. The first set of concerns was no doubt important. Though their aims were expressly democratic, observed Noah Webster in 1794, “Every club therefore formed for political purposes, is an *aristocracy* established over their brethren.” But the point that really struck home with one of Webster’s more prominent readers, the Reverend David Osgood, who quoted Webster at length in an often-reprinted address he gave in Medford, Massachusetts, was a second point made by Webster: “The moment a man is attached to club, his mind is not free.” A man who had been “an *independent freeman*,” Osgood summarized, “is converted into a mere walking machine.” These voluntary societies posed a real threat to the republic by sapping the autonomy of their members. It appeared they might subvert the independence of thought required for the American experiment in free government to succeed.<sup>25</sup>

When farmers in western Pennsylvania convened and even armed themselves in resistance to a federal excise tax on whiskey in 1794, members of the Democratic-Republican societies were widely blamed as instigators. Many in those groups chose to differentiate their societies from the patently subversive “Whiskey Rebels,” as Johann Neem has shown. They disavowed those rebellious farmers, emphasizing that what made their own groups different was that they operated within, and not against, the law. “Forced to distance themselves from the action of the people for whom they earlier claimed to speak [the disgruntled Pennsylvania farmers],” Neem writes, “Republican

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<sup>25</sup> An American [Noah Webster], *The Revolution in France, Considered in Respect to Its Progress and Effects* (New York: George Bunce and Co., 1794), 47-50; *Columbian Centinel*, Dec. 27, 1794.

leaders moved toward a pluralistic definition of civil society,” one predicated on the idea that even groups formed in opposition to the existing government should fall within the purview of the law.<sup>26</sup>

There was, in this disavowal, a continuation of a theme first sounded by the defenders of the Cincinnati regarding the relationship between law and voluntary affiliation, one peculiarly post-Revolutionary in its content and in its tone. The Democratic-Republican societies’ efforts to reassure their critics that they had pure, civic motives meant that even associations that had positioned themselves as watchdogs of the government had begun to insist that all groups must act within the law, pursuing lawful ends by lawful means. All groups, then, were thought to be bounded by the same constraints in what they could and could not do in this republic of citizens. In looking specifically at discussions of the obligations of membership it becomes apparent that this superintendence was taken still further, toward the idea that even the interior spaces of these groups fell within the purview of the law and expectations of democratic, fair process. Though, as Sean Wilentz has observed, the Democratic-Republican societies were “models of democratic decorum,” conjectural skepticism about their internal affairs—about the ways in which they might make automatons out of their members—would echo for years to come.<sup>27</sup>

Take, for example, the second period of unrest over voluntary societies of the 1790s, the Illuminati scare, where there were tales of binding oaths and impenetrable

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<sup>26</sup> Johann N. Neem, “Freedom of Association in the Early Republic: The Republican Party, the Whiskey Rebellion, and the Philadelphia and New York Cordwainers’ Cases,” *Pennsylvania Magazine of History and Biography*, 128 (2003): 259-290, quotation on 275; Neem, *Creating a Nation of Joiners*, 44-48; Thomas P. Slaughter, *The Whiskey Rebellion: Frontier Epilogue to the American Revolution* (New York: Oxford University Press, 1986).

<sup>27</sup> Sean Wilentz, *The Rise of American Democracy: Jefferson to Lincoln* (New York: W. W. Norton, 2005), 56.

veils of secrecy surrounding anarchistic and antireligious “Illuminated” Masonic lodges, which had allegedly spread from Bavaria across Europe, encouraged a Revolution in France, and moved into the Western Hemisphere. A much-read exposé by Englishman John Robison went on at length about initiations (where a drawn sword and threats of “unavoidable vengeance” for disobedience accompanied the ceremony for a new “Illuminatus Minor”), secrecy, and potent oaths of allegiance. Similarly, when William Cobbett, as Peter Porcupine, announced the *Detection of a Conspiracy Formed by the United Irishmen* the same year that Robison’s book was first published in the United States, he revealed at length their “constitution,” outlining for his readers their oaths, secrecy, and designs against the nation by detailing what commitments each member made to the cause. When Judge Alexander Addison pounded the drum against the Illuminati in 1801, he too called attention to how the members of the secret society “were absolutely under it’s control; and it’s dominion over their minds was above any other dominion of God or man.” Every member must “obey *all* the commands of the society” or face “instant vengeance.” Within and surrounding every diatribe against subversive, conspiratorial groups around the turn of the nineteenth century—a literature that has received its share of historians’ attention, for the good reason that the pamphlets, sermons, and tell-all books were so often reprinted, so much discussed in the press, and so popular a subject of conversation throughout the nation—were discussions of the bonds of membership, discussions that could not help but shape popular perceptions of what membership *should* look like.<sup>28</sup>

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<sup>28</sup> John Robison, *Proofs of a Conspiracy against All the Religions and Governments of Europe Carried on in the Secret Meetings of the Freemasons, Illuminati, and Reading Societies* (Philadelphia: T. Dobson, 1798), 125; Peter Porcupine [William Cobbett], *Detection of a Conspiracy Formed by the United Irishmen, with the Evident Intention of Aiding the Tyrants of France in Subverting the Government of the United*

Indeed, much has been made of the differences between the Democratic-Republican societies of the 1790s and the political societies formed after 1800. The latter, it is said, made no claims to speak for “the people” but rather “only represented and spoke for their members and allowed them to organize as partisans,” as Koschnik has described the distinction. All this is true. But more important still for public perceptions of the politically oriented fraternities of the nineteenth century were the intentional efforts of such societies to encompass their private associational life within the legal apparatus of the state. As has been noted, the role of the state in early American associational life is an emphasis of a reasonably large portion of twenty-first-century scholarship on the subject. But a crucial point has been neglected: the significance of the state in assuring *individual autonomy* and the protection of individuals’ rights within these private societies, in a way that reassured those who worried about the threat such groups could pose to the independence of their members. The uneasiness of the 1790s had its effects on the law of associations, for a commitment to the rule of law within and surrounding such groups came to be seen as the best way for the burgeoning number of fraternal organizations to find their place in the young United States. At the same time, the people who joined and managed such associations were feeling their way, unsteadily and unevenly, toward a way to conceptualize the bonds of membership. They came to settle

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*States of America* (Philadelphia: William Cobbett, 1798); Alexander Addison, *Charge to the Grand Juries of the County Courts of the Fifth Circuit of the State of Pennsylvania, at December Session, 1800* (Philadelphia: William Young, 1801), 20; John L. Brooke, “Ancient Lodges and Self-Created Societies: Voluntary Association and the Public Sphere in the Early Republic,” in Ronald Hoffman and Peter J. Albert, eds., *Launching the “Extended Republic”: The Federalist Era* (Charlottesville: University of Virginia Press, 1996), 318-322. See also David A. Wilson, *United Irishmen, Unites States: Immigrant Radicals in the Early Republic* (Ithaca, N.Y.: Cornell University Press, 1998), chaps. 1-2; Gordon S. Wood, “Conspiracy and the Paranoid Style: Causality and Deceit in the Eighteenth Century,” *William and Mary Quarterly*, 39 (1982): 431-432; Waterman, *Republic of Intellect*, 72-76; Michael Lienesch, “The Illusion of the Illuminati: The Counterconspiratorial Origins of Post-Revolutionary Conservatism,” in W. M. Verhoeven, ed., *Revolutionary Histories: Transatlantic Cultural Nationalism, 1775-1815* (New York: Palgrave, 2002), 152-165.



upon increasingly precise, detailed, and rule-based modes of organization that, in moments of contest in which discontented people would compel adjudication, would ultimately fall within a larger framework of legal superintendence. Imperatives toward a legalistic way of thinking about voluntary membership, then, came from within and from without.<sup>29</sup>

An ideal entry point to examine those themes can be found in 1807. William Duane had a competing Philadelphia newspaper editor, John Binns, expelled from the St. Patrick Benevolent Society, which had been incorporated by the state of Pennsylvania, and from four other, unchartered associations. Binns took none of those expulsions lying down. He told the world of the tyrannies and injustices on display in each and every expulsion, and, in the case of the chartered Irishmen's society, he won a court-ordered readmission to the club in 1810. How these particular events played out, within the clubs, in the court of public opinion, and in one expulsion's ultimate adjudication at law, reveal a post-Revolutionary society working to define the nature of voluntary membership and thereby lay a substructure for the development of American civil society.<sup>30</sup>

John Binns migrated from Dublin to London to Northumberland, Pennsylvania, where he arrived in 1801 and renewed an acquaintance with William Duane, whom he

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<sup>29</sup> Koschnik, "*Let a Common Interest Bind Us Together*," 42.

<sup>30</sup> The literature on the American proclivity for associating begins with Arthur M. Schlesinger, "Biography of a Nation of Joiners," *American Historical Review*, 50 (1944): 1-25. The work of Richard Brown, particularly, brought a new depth to the field of study: Richard D. Brown, "The Emergence of Urban Society in Rural Massachusetts, 1760-1820," *Journal of American History*, 61 (1974): 29-51; and his "Emergence of Voluntary Associations in Massachusetts, 1760-1830," *Journal of Voluntary Action Research*, 2 (1973): 64-73. In the past three decades it has become too vast to summarize here. It has swelled in recent years, owing to the influence of social capital theorists, students of American Political Development, and interest in the early American public sphere, e.g., Gerald Gamm and Robert D. Putnam, "The Growth of Voluntary Associations in America, 1840-1940," *Journal of Interdisciplinary History*, 29 (1999): 511-557; Jason Mazzone, "Organizing the Republic: Civic Associations and American Constitutionalism, 1780-1830" (J.D. diss., Yale Law School, 2004); Theda Skocpol, *Diminished Democracy: From Membership to Management in American Civic Life* (Norman: University of Oklahoma Press, 2003).

had come to know in the radical movement in London in the 1790s. Soon Binns was publishing the *Northumberland Republican Argus* and was deeply involved in Pennsylvania politics as a Republican at a time when, owing to the weakened Federalist party, Republicanism in Pennsylvania was increasingly factious. In 1807, Binns came to Philadelphia to set up a newspaper there, one intended to aid William Duane's *Aurora* in its political efforts. Initially supportive, Duane invited Binns into the clubs at the core of the city's party organization, including the Tammany Society, at which Binns even gave the Long Talk in May 1807, private militia units such as the Republican Greens, and the St. Patrick Benevolent Society, a group seeking "the relief of distressed Irishmen emigrating to these United States." As recent work such as Koschnik's has shown, his membership in these clubs as an entry into local politics should come as no surprise.<sup>31</sup>

For reasons coming out of that year's elections and the always tenuous relationship between the urban radicals whom Duane spoke for and the rural democrats of Simon Snyder, for whom Binns printed the party line, they very soon had a falling out. Duane had Binns expelled from the Tammany Society (a club Duane, his son, and Michael Leib, according to a moderate Republican newspaper, ran with a tyranny "unexampled in the most despotic governments of the world"), from another political

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<sup>31</sup> Andrew Shankman, *Crucible of American Democracy: The Struggle to Fuse Egalitarianism and Capitalism in Jeffersonian Pennsylvania* (Lawrence: University Press of Kansas, 2004), 92-94, 173-174; Sanford W. Higginbotham, *The Keystone in the Democratic Arch: Pennsylvania Politics, 1800-1816* (Harrisburg, Pa.: Pennsylvania Historical and Museum Commission, 1952), 136-139; Kim Tousley Phillips, "William Duane, Revolutionary Editor" (Ph.D. diss., University of California, Berkeley, 1968), 228-234; Kim T. Phillips, "William Duane, Philadelphia's Democratic Republicans, and the Origins of Modern Politics," *Pennsylvania Magazine of History and Biography*, 101 (1977): 365-387; Richard J. Twomey, *Jacobins and Jeffersonians: Anglo-American Radicalism and the United States, 1790-1820* (New York: Garland Publishing, 1989), 24-29, 54-56, 68-69, 108-111; Jeffrey L. Pasley, *"The Tyranny of Printers": Newspaper Politics in the Early American Republic* (Charlottesville: University of Virginia Press, 2001), 314-319; Worthington C. Ford, ed., "Letters of William Duane," *Proceedings of the Massachusetts Historical Society*, 2d ser., 20 (1907): 257-394; *The Constitution of the St. Patrick Benevolent Society* (Philadelphia, 1804), 1; James Mease, *The Picture of Philadelphia* (1811; rpt., New York: Arno Press, 1970), 287.

organization called the Society of Friends of the People, from two private militia corps, and from the St. Patrick Benevolent Society.<sup>32</sup>

The strife had begun in late August 1807, when Binns began running a series of letters signed “Veritas” in which he attacked Michael Leib’s political practices, including an angry letter on September 2 discussing Leib’s tactics as president of the Society of Friends of the People: “Will you permit me sir, to ask, with what propriety did you as chairman of a public society, refuse to give the health of Simon Snyder when it was regularly drawn up and handed by one of the company? How did it happen that after reading it over, you put it in your pocket without taking any public notice of it?” Duane responded, and it did not take long for two men with nearly identical political views, who had struggled together for democracy on both sides of the Atlantic for more than a decade, to become bitter rivals. Two days later, Binns ran a piece entitled “Aurora vs. Democratic Press,” though he tried to hold the high ground as long as he could, on September 25 calling Duane “a man of talents, who has rendered important services to the democratic cause,” who was simply far too attached to the conniving Leib.<sup>33</sup>

That same edition of Binns’s *Democratic Press* began telling the saga of his expulsion from those clubs he had joined on first arriving in Philadelphia. The night before, at a meeting of the Society of Friends of the People, Duane had denounced Binns (“in substance the same as his denunciation of this paper, but particularly distinguished by vulgar epithets and indecent allusions,” Binns wrote). When Binns and others had left

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<sup>32</sup> *Freeman’s Journal*, Apr. 10, 1805, quoted in Francis von A. Cabeen, “The Society of the Sons of Saint Tammany of Philadelphia,” *Pennsylvania Magazine of History and Biography*, 27 (1903); 29-48.

<sup>33</sup> *Aurora*, Oct. 20, 1807, quoted in David A. Wilson, *United Irishmen, Unites States: Immigrant Radicals in the Early Republic* (Ithaca, N.Y.: Cornell University Press, 1998), 73; *Democratic Press*, Aug. 26, Sept. 2, Sept. 4, Sept. 25, 1807.

the room after their committee had reported, “under the impression that no other business would then be submitted,” Duane acted. “A motion was made that John Binns be expelled the society, without a hearing; which motion was carried!!!” The next day, Binns published the report of John Jennings, who had remained in the room and recalled that he “sat just before Dr. *Leib*,” who held the chair, “and loudly said *no*.” Many others, too, “spoke against the injustice of condemning without hearing.” But, Jennings recounted, “the minority saw it was folly to contend against *the train[ed] bands*, and they silently gave up the business to be done as best suited the instigators, in the belief that such proceeding would have a different effect upon the public mind, from what was intended.” Binns made sure of it.<sup>34</sup>

In early October, a month before the St. Patrick Benevolent Society would vote to expel Binns, Duane’s *Aurora* announced that Binns had been expelled from four organizations. Those dismissals were testimony that he “must be considered...a *public disturber*.” Binns, in his own newspaper, responded point by point. As far as the militia companies went, Duane was factually wrong: Binns remained a member of one and never had been a member of the other. For the Society of Friends of the People, from which he was expelled “*without a hearing*,” he asked the public, “Is such a proceeding as this, more a reproach to the society, to the cowardly prevaricator, who was the cause of it, or to me?” A letter was printed on October 9, just a few days before the state election, signed “No Body,” which observed that such an expulsion ran “contrary not only to the fundamental principles of democracy, but even contrary to the laws and statutes of monarchical and aristocratic governments. John Binns is the fourth person expelled in

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<sup>34</sup> *Democratic Press*, Sept. 25, 1807.

this anti-democratic manner, by the Friends of the People.” Though “No Body” is not at all explicit about what he thought those “fundamental principles of democracy” were, his declaration that the procedural unfairness experienced by Binns was decidedly undemocratic is telling, and it is indicative of the broader push in the early nineteenth century to envelop nongovernmental institutions within a broader framework of personal rights and interpersonal duties. Indeed, the parallel was made explicit when the writer, probably Binns, asked, “What Laws would be enacted if the rulers of that Society, held the reins of government?” Any man’s authority over other citizens, either in public office or in private club, was to be exercised fairly, justly, democratically.<sup>35</sup>

Binns made a similar but distinct critique of his expulsion from the Tammany Society. There, Binns noted, Duane’s offense was not just against legitimate and fair procedure (although in Tammany, too, Binns had had no hearing before he was booted out) but, in a move especially dishonorable, Duane’s tactic ran contrary to the society’s own constitution and its prohibition that “the accusation and vote both take place at the same stated meeting” whenever a member was brought up for expulsion. Not having an opportunity to be heard only compounded the greater offense, their violation of “the provisions of the constitution, and the solemn manner in which the members have pledged *their most sacred honor* to support it.” Binns, quite pointedly, used such arguments to turn the tables on Duane: “After such a proceeding as this, Wm. Duane has the unblushing effrontery to publish it *as a reproach* to me,” Binns wrote. Indeed, the affair did not reflect well on Duane and, perhaps, played some role in his humiliating loss (besides being a party spokesman, Duane was also a candidate for state senate) and the

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<sup>35</sup> *Aurora*, Oct. 3, 1807; *Democratic Press*, Oct. 5, Oct. 9, 1807.

narrow reelection of Leib in a safe district when Election Day came a few days later, on October 13.<sup>36</sup>

Before that election, Binns had made the most of each expulsion as evidence of the despotism and oppression Pennsylvanians would face if Duane or Leib ever held elective office. Duane, too, had continued his assault, telling the world that Binns was a man “without any thing but arrogance, vanity, egotism, and impudence to sustain him.” Their rivalry would continue past that election, even years later. In his famous 1809 “tyranny of printers” letter, Alexander Dallas went on to write that the only issue left in Philadelphia was “the question whether Binns or Duane shall be the dictator.”<sup>37</sup>

In the St. Patrick Benevolent Society, however, there was no question. When Duane sought Binns’s expulsion, he got it, with 70 votes out of 71. The charges brought against him in November 1807 were that he had broken a bylaw making “villifying any of its members” a “crime against the society,” as Duane put it. Duane, as president, ensured this time that the proper procedures were followed, and with seven days’ notice and a hearing, Binns was expelled. Five weeks after that expulsion, Binns, through his attorney Walter Franklin, approached the Supreme Court of Pennsylvania and told them the society had “deprived him of the rights of Membership in which this Deponent has a beneficial interest—and that this Deponent has not to the best of his knowledge and belief any adequate and specific mode of redress or Relief in the premises other than by Mandamus” to “restore him to his right of Membership.” A few days later, Binns entered

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<sup>36</sup> *Democratic Press*, Oct. 5, Oct. 8, 1807; Shankman, *Crucible of American Democracy*, 179-180.

<sup>37</sup> *Aurora*, Oct. 3, 1807; Alexander J. Dallas to Caesar A. Rodney, Feb. 6, 1809, Caesar A. Rodney Papers, Library of Congress, quoted in Shankman, *Crucible of American Democracy*, 181.

into evidence a pamphlet copy of the club's constitution, with the relevant passages underlined.<sup>38</sup>

Binns seized upon the fact that the society held a charter from the state as a way that he might legally hold them to the standards to which, it was clear, he believed all voluntary associations should adhere. The court listened, and William Duane as president was ordered on New Year's Eve 1807 to either readmit Binns or show cause for his expulsion. Duane chose the latter course (no one expected him to do otherwise), describing for the court how Binns had printed allegations about Duane's improper conduct toward the widow of a man who died in the Irish cause. Such accusations, "besides having no foundation or any shape in truth, had no relation to American politics," and for insulting the reputation of a fellow member Binns was charged with "violating his obligation to the said Society." He could not be restored to membership.<sup>39</sup>

Binns's argument in court began with the fact that the St. Patrick Benevolent Society was incorporated in 1804 under the 1791 general incorporation statute. The attorney for the commonwealth—a writ of mandamus had the state prosecuting the society in the name of John Binns—insisted that Binns's case began there: for a bylaw to be valid, it must "assist the charitable design," but this bylaw was "merely political." It did nothing for the "good government" of the group but rather "controls the external conduct of members to each other, and might by the same principle regulate their behavior to the rest of the world." Last, the state's attorney cited *Rex v. Richardson*, for

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<sup>38</sup> Binns's vote may have been the solitary dissent, but no records exist to confirm this. John Binns, petition for mandamus, Dec. 24, 1807, and deposition, Dec. 29, 1807, Mandamus and Quo Warranto Proceedings, Supreme Court of Pennsylvania, Eastern District, RG-33, Pennsylvania State Archives.

<sup>39</sup> William Duane, return to mandamus, undated, *ibid.* Binns would later recall that he was certain his expulsion "was in itself absolutely null and void as it was contrary to the Constitution and Laws of the State, and the article of incorporation." *Democratic Press*, Apr. 2, 1810.

the first time in an American courtroom, a precedent from Lord Mansfield that held that the power to expel was indeed an incidental power of all corporations, but that it was reviewable and was valid only in certain, clearly defined situations. Four things stand out in Binns's effort to restore himself to membership: his emphasis on what he called "the right of membership," as something of value; close attention to the charter-derived powers of the society; fear that excessive associational authority could "regulate [members'] behavior to the rest of the world" and thus infringe on the personal independence requisite in any model of republican citizenship; and a turn to the common law for solution.<sup>40</sup>

When Duane's attorney spoke, he emphasized a Shaftesburian model of association. "This is the case of a private charitable institution" were the first words out of his mouth, and a society such as this depends "for its existence upon the admission of new members, and upon the contribution of such as voluntarily continue to be members." He put the point bluntly: "It lives by union and co-operation. Whatever destroys these, goes to the destruction of the corporation," and thus a bylaw prohibiting the vilification of fellow members—and he was sure to note that the rule "does not interfere with the intercourse between members and strangers"—is absolutely "needful" to prevent the society's demise. Duane's emphasis on society, on a union of sentiment, as giving vitality to the association, stands in contrast to the prosecution's argument resting on the act of assembly, the charter, and the common law. Duane's view, which emphasized the

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<sup>40</sup> Laws of Pennsylvania, Apr. 6, 1791; *Commonwealth v. St. Patrick Benevolent Society*, 2 Binn. (Penn.) 441, 443-445 (1810). For an interpretation of the act of 1791, see *Case of the Medical College of Philadelphia*, 3 Wharton 445 (1838). For incorporations in Pennsylvania, see "Communication of the Secretary of the Commonwealth to the Constitutional Convention, June 29, 1837, listing all acts of incorporation since 1776," in *Journal of the Convention*, 2 vols. (Harrisburg, 1837-1838), 1:339-496; J. Alton Burdine, *Governmental Regulation of Industry in Pennsylvania, 1776-1860* (Ph.D. diss., Harvard University, 1939).



association's need for affection and mutuality as evidence that a bylaw against besmirching a fellow member's reputation was perfectly legitimate, fell flat in court. Principles derived of the common law, not notions of affinity or sociability, would be invoked by the Pennsylvania Supreme Court as it sought to define the rights and obligations of association members. To do otherwise, as the "No Body" essayist had argued, would be "anti-democratic."<sup>41</sup>

One obvious question, however, remains to be addressed: why did Binns petition for reinstatement? As Judith Shklar has observed, pluralism is a safeguard against the injury of permanent exclusion, and Binns had no shortage of other groups he could and did join. He became a member of the Hibernian Society, an older and relatively conservative Philadelphia club for Irishmen, in 1809, and he joined and even helped organize other political associations. And it was not as if Duane had bested him in the newspaper wars: between the 1807 expulsion and the 1810 reinstatement, Binns's man won the governorship, and Binns was able to announce to his readers that, owing to greater printing demands, he would be taking up new quarters at what had formerly been Duane's offices. But all that was, for John Binns, quite beside the point. He saw an injustice—and an opportunity to attack a political opponent for being a despot though he held no office—and he acted. And where the other expulsions, from the unincorporated Society of Friends of the People and from the Tammany Society, merely symbolized his estrangement from a school of political thought (one he had already walked away from), the loss of membership in the St. Patrick's society represented an attempt to separate Binns from Philadelphia's Irish community, a threat to his Irish identity. Regardless of

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<sup>41</sup> *Commonwealth v. St. Patrick Benevolent Society*, 2 Binn. (Penn.) 441, 445-447 (1810).

Binns's motives, the chief justice of the Pennsylvania Supreme Court, the Federalist William Tilghman, sided with him. A peremptory mandamus was issued to restore Binns to "the right of membership," which was "valuable, and not to be taken away without an authority fairly derived either from the charter, or the nature of corporate bodies."<sup>42</sup>

Binns had insisted—with the weight of Anglo-American jurisprudence behind him—that anything the St. Patrick Benevolent Society did was legitimately reviewable by the commonwealth. As Mary Sarah Bilder has recently argued, compellingly, the doctrine of judicial review grew out of the English practice of voiding corporate bylaws "repugnant" to the laws of the land, which practice "subsequently became a transatlantic constitution binding American colonial law by a similar standard." "Over a century later," she writes, "this practice gained a new name: judicial review." But the significance of that area of jurisprudence extends still further. It created a means by which much of the associational activity that, for foreign-born observers such as Alexis de Tocqueville and Francis Lieber was a defining feature of American society, could be superintended by legal and political institutions whose authority rested on popular sovereignty.<sup>43</sup>

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<sup>42</sup> Judith N. Shklar, *Ordinary Vices* (Cambridge, Mass.: Belknap Press of Harvard University Press, 1984), 101, 136; John H. Campbell, *History of the Friendly Sons of St. Patrick and of the Hibernian Society for the Relief of Immigrants from Ireland, March 17, 1771-March 17, 1892* (Philadelphia: Hibernian Society, 1892), 177-178, 349-350; Higginbotham, *Keystone in the Democratic Arch*, 214-216; Margaret H. McAleer, "In Defense of Civil Society: Irish Radicals in Philadelphia during the 1790s," *Early American Studies*, 1 (2003): 176-197.

<sup>43</sup> Mary Sarah Bilder, "The Corporate Origins of Judicial Review," *Yale Law Journal*, 116 (2006): 502-566, quotation on 504; Mary Sarah Bilder, *The Transatlantic Constitution: Colonial Legal Culture and the Empire* (Cambridge, Mass.: Harvard University Press, 2004); Philip Hamburger, "Law and Judicial Duty," *George Washington Law Review*, 72 (2003-2004): 1-41; Philip Hamburger, *Law and Judicial Duty* (Cambridge, Mass.: Harvard University Press, 2008); William J. Novak, "The American Law of Association: The Legal-Political Construction of Civil Society," *Studies in American Political Development*, 15 (2001): 163-188; William J. Novak, "The Legal Transformation of Citizenship in Nineteenth-Century America," in Meg Jacobs, William J. Novak, and Julian E. Zelizer, eds., *The Democratic Experiment: New Directions in American Political History* (Princeton, N.J.: Princeton University Press, 2003), 85-119; Theda Skocpol, "The Tocqueville Problem: Civic Engagement in American Democracy," *Social Science History*, 21 (1997): 455-479; Theda Skocpol, Marshall Ganz, and

But there is more here than the concession theory of corporate existence, the idea that any and all powers are derived from the charter because the corporation is a creature of the state. Broader concerns about the nature of membership and of voluntary, informed affiliation became expressed in how Americans treated their incorporated as well as their unchartered organizations. In disputes between stockholders and business corporations, particularly the mass of adjudications regarding assessments of shareholders before the fully paid share was common, judges and juries found themselves constantly evaluating what individuals had consented to and upon what information as well as closely construing the corporation's statutory origins. Disputes involving churches, mutual insurance societies, business corporations, and labor unions all provide similar stories of people attempting to understand precisely what voluntary membership was, and what rights and duties accompanied it, issues examined in chapters 1, 3, 4, and 7, respectively. Such jurisprudence reflects broader trends in American voluntary associations, even where there was no corporate charter to turn to (and thus courts were less likely to involve themselves directly, though not entirely so<sup>44</sup>) and played a formative role as Americans came, with increasing precision and forthrightness, to declare what the rights and obligations of membership were and what they ought to be. Such views were deeply implicated in broader developments in American corporate law, which are examined in detail in chapter 4.

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Ziad Munson, "A Nation of Organizers: The Institutional Origins of Civic Voluntarism in the United States," *American Political Science Review*, 94 (2000): 527-546.

<sup>44</sup> For instances, see Scott Gregory Lien, "Contested Solidarities: Philanthropy, Justice, and the Reconstitution of Public Authority in the United States, 1790-1860" (Ph.D. diss., University of Chicago, 2006); Carol Weisbrod, *The Boundaries of Utopia* (New York: Pantheon, 1980); *Babb v. Reed*, 5 Rawle (Pa.) 151 (1835); *Duke v. Fuller*, 9 N.H. 536 (1838). The most articulate opinion on the incorporated/unincorporated distinction is *Hess v. Werts*, 4 Serg. and Rawle (Pa.) 356 (1818).

The superintendence of private groups by those institutions legitimated by popular sovereignty was central, a point made expressly in *Commonwealth v. St. Patrick Benevolent Society*. In America's first corporate law treatise, published in 1832, Tilghman's opinion ordering that Binns be readmitted is described at length. The authors describe the case as having imported into the American common law the principle that it is "a tacit condition annexed to the franchise of a member, that he will not oppose or injure the interests of the corporate body." But the member's expulsion can be evaluated, on the merits, based on the court's judgment of "the nature of the corporation."<sup>45</sup>

The court's reasoning deserves examination, for in his opinion Chief Justice Tilghman directly addressed the rival visions of association offered by the two printers. Tilghman emphasized "the benevolent purposes of this society, and many others which have been lately incorporated on similar principles," giving him, he said, "a mind strongly disposed to give a liberal construction" to the society's powers. Duane's attorney had emphasized the imperative of a union of sentiment in the society: "the instant that personal abuse and vilification of the members are permitted, that instant the society decays." Duane held an affective—as opposed to legalistic or contractual—understanding of the St. Patrick Benevolent Society. That perception of the whole affair was reaffirmed in the weeks leading up to the court's mandamus hearing. Duane's *Aurora* published the proceedings of the society on May 17, 1810, including the announcement, "The Members of the St. Patrick Benevolent Society have proven their virtue by expelling from their confidence the reputed betrayer of Quigley, and proven apostate of moral principle." The allegation that Binns had betrayed a fellow Irish nationalist in 1798, who was then

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<sup>45</sup> Joseph K. Angell and Samuel Ames, *A Treatise on the Law of Private Corporations, Aggregate* (Boston: Hilliard, Gray, Little, and Wilkins, 1832), 239-243.

hanged, was invoked in their expulsion of Binns, not only from the club, but from the confidence of its members. No court order, Duane appeared to be suggesting, could alter that.<sup>46</sup>

Tilghman, however, took such assertions that sentimental bonds were the basis for effective association to help craft a liberal and legalistic principle on which to organize civil society in the early United States, and it became an influential legal precedent. He stated clearly that “the great and single point” in the case was whether Binns was the victim of a due process violation of the terms of the charter. The society was authorized by charter to pass only bylaws that were “necessary for the good government and support of the affairs of the corporation,” and Binns was penalized for a violation of a bylaw that, in Tilghman’s view, did not meet that test. Indeed, the bylaw would only hamper the ability of the club to function smoothly at all. “Taking cognizance of such offenses” as vilifying a fellow member will, he said, “have the pernicious effect of introducing private feuds into the bosom of the society, and interrupting the transaction of business.” In a post-Revolutionary age that increasingly saw association as an effective means to improve the human condition, that was not to be allowed. Adherence to rules legitimately passed was a means to accomplish good ends. And this was not to be an isolated position, relevant only to Binns and Duane, but rather a decision on which American private governing power was to be founded. “I consider it as a point of very great importance, in which thousands of persons are, or very soon will be interested; for the members of these corporations are increasing rapidly and daily.” The Pennsylvania judiciary as well as

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<sup>46</sup> *Aurora*, Mar. 20, 1810. On the betrayal of James O’Coigley, see Wilson, *United Irishmen, Unites States*, 73-74; E. P. Thompson, *The Making of the English Working Class* (New York: Vintage Books, 1966), 169-174; [John Binns], *Trial of Edward Lyon, (of Northumberland) for Subornation of False Swearing...* (Philadelphia, 1816).

jurists around the country seized on this principle, if we are to judge from the number of times the case was cited in years to come, in later cases and in treatises. As Justice John Bannister Gibson would put it in 1822, the courts of the commonwealth had come to stand as a “superintending power” over all the “inferior associations” of American civic life.<sup>47</sup>

That development and the broader trend it reflects of how Americans were beginning to conceive of membership and authority in any private group, incorporated or not, can open new possibilities for understanding the formation of a liberalism peculiar to American political culture. It was a liberalism founded, not on a sharp division between legal authority and a private realm of association, but rather on a newfound, post-Revolutionary commitment to the principle that civil rights and fair procedure should be brought to bear in increasingly diverse areas of social activity. Regimes of legal and political rights were created, embodied in charters and in a common law of membership, that ultimately defined the nature of American civil society, developed in practice more than in theory, in the organization of new societies and in moments of conflict between members and associations.<sup>48</sup>

The struggles within an Irishmen’s society help to uncover some of the ways in which anxieties about partisanship and ethnic division were partially determinative of the

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<sup>47</sup> *Commonwealth v. St. Patrick Benevolent Society*, 2 Binn. (Penn.) 441, 445-447 (1810); *Case of the Corporation of St. Mary’s Church*, 7 Serg. and Rawle (Pa.) 517, 544 (1822); *Commonwealth ex rel. Clements v. Arrison*, 15 Serg. and Rawle (Pa.) 127, 132 (1827).

<sup>48</sup> One common feature in descriptions of a liberal political philosophy, a clear separation between the public and the private, has come under fire not only by political theorists but also by literary critics, e.g., Elizabeth Maddock Dillon, *The Gender of Freedom: Fictions of Liberalism and the Literary Public Sphere* (Stanford, Calif.: Stanford University Press, 2004). Attention to the internal allocations of authority within early national voluntary societies and, particularly, the jurisprudence regarding membership and association extends these critiques from a new vantage by coupling such theoretical critiques with recent insights regarding the role of the state in early American society (for a review of this literature, see William J. Novak, “The Myth of the ‘Weak’ American State,” *American Historical Review*, 113 [2008]: 752-772).

shape of civil society. Where scholars have quite recently made us aware of the role of formally organized associations, ranging from militias to banking companies, as structures around which American partisanship could develop, I want to suggest the obverse: that as some groups appeared to embody the excesses of factionalism (challenging notions of popular sovereignty) and of overly strong or corrupt private government (challenging notions of personal sovereignty important to republican government), Americans responded. Where they could be, political and legal institutions were called upon in ways that helped to give American civil society a recognizably liberal cast, one that was also apparent quite early in unchartered associations, in the form and content of their constitutions and rules and in the way many members doggedly held to them and, thus, emphasized broad standards of procedural fairness and even personal rights.<sup>49</sup>

The court-ordered membership of John Binns in the Irish benevolent society reflected both broader post-Revolutionary notions of legitimate associational activity and the willingness of jurists to bring common-law principles of members' rights and duties to bear in internal operations. And this was a liberal note sounded again and again in the jurisprudence regarding early national voluntary associations. That is, liberalism, according to political theorist Nancy Rosenblum, "asks men and women to ignore all the other things they are in order to treat one another fairly in certain contexts and for certain purposes." Here, John Binns, a rude club member unwanted by a vote of 70 out of 71, was declared by the court to be a man improperly stripped by "the uncertain will of a

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<sup>49</sup> For the role of associations as points around which a party system developed, see Brian Phillips Murphy, "'A Very Convenient Instrument': The Manhattan Company, Aaron Burr, and the Election of 1800," *William and Mary Quarterly*, 3d ser., 65 (2008): 233-266; Koschnik, "Democratic Societies of Philadelphia"; Koschnik, "*Let a Common Interest Bind Us Together*"; Neem, *Creating a Nation of Joiners*; Brooke, "Ancient Lodges and Self-Created Societies," 273-377.

majority of the members” of “the right of membership.” By emphasizing the legal origins of associational authority rather than a rival, affective vision of concerted action that saw the powers of voluntary associations as deriving from the mutual agreement and, indeed, camaraderie of its members, the Pennsylvania Supreme Court proved willing to bring the St. Patrick Benevolent Society within the embrace of a larger regime of civil rights.<sup>50</sup>

Even in that vast majority of cases in which courts were not asked to become involved, in the first decade of the nineteenth century there can be seen arguments similar to those made by Binns and Duane. An Irishmen’s society in New York City, for example, provoked many of the same kinds of allegations and anxieties on display in Philadelphia, and at exactly the same time.

On March 17, 1802, a Hibernian Provident Society was formed by Irish political exiles in New York, for the purpose of providing relief for suffering members by collecting fees each month from the current membership. Two political criteria were set forth in their initial printed constitution: all members must be Democratic Republicans, and they must be opposed to the “dominion of Great-Britain over Ireland.” They put in place a higher-than-usual barrier for prospective members: each was to be approved by seven-eighths of the current membership in order to be admitted. The Hibernian Society would remain relatively secure from opposition, though, until later in the decade, and the club was even chartered in April 1807.<sup>51</sup> That year, though, in the run-up to an

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<sup>50</sup> Nancy L. Rosenblum, *Another Liberalism: Romanticism and the Reconstruction of Liberal Thought* (Cambridge, Mass.: Harvard University Press, 1987), 162. The pioneering work on notions of private governing power is Grant McConnell’s. See his *Private Power and American Democracy* (New York: Alfred A. Knopf, 1966); McConnell, “The Spirit of Private Government,” *American Political Science Review*, 52 (1958): 754-770; J. David Greenstone, “The Public, the Private, and American Democracy: Reflections on Grant McConnell’s Political Science” and “The Transient and the Permanent in American Politics: Standards, Interest, and the Concept of ‘Public,’” in J. David Greenstone, ed., *Public Values and Private Power in American Politics* (Chicago: University of Chicago Press, 1982), ix-xiv, 3-33

<sup>51</sup> *New York Statutes*, 30<sup>th</sup> sess., chap. 92 (1807).



extraordinarily contested election—just as had been the case in Binns’s and Duane’s Philadelphia—the way the mutual-aid society appeared to govern itself was cast by outsiders as a potential threat to republican government in the State of New York. The society had been “wickedly converted into an electioneering engine,” it was alleged, at a meeting at the Union Hotel in early April, where “a formal resolution was proposed and carried”: that any member “*who should be convicted of voting for Mr. Andrew Morris [candidate for state assembly], should be expelled and forfeit all his claims on the Society.*” A meeting of voters in the Fifth Ward quickly published a resolution in response, describing the affairs of the Hibernian Society as being driven by a very recent Irish immigrant, Thomas Addis Emmet, “before he has a right to vote in our elections.” It was, they said, “a species of tyranny, hitherto unknown in America,” and only a “stranger to the principles of our government” could have conceived of it.<sup>52</sup>

That was, of course, not entirely true. More and more fraternal groups that made a point to limit their membership to those who shared a particular political vision were coming into being in the 1790s and 1800s. Tammany in New York, for instance, famously became a Republican stronghold by the first decade of the nineteenth century, in part because, in 1794, many of its Federalist members quit in protest of a resolution condemning George Washington’s attack on the “self-created societies” of Democratic Republicans. Such groups spread across northern states and westward into Ohio in the years to come.<sup>53</sup> The key aspect here was not that people of likeminded political hopes

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<sup>52</sup> *New York Evening Post*, Apr. 14, 1807; *Morning Chronicle*, Apr. 9, 1807.

<sup>53</sup> Oliver E. Allen, *The Tiger: The Rise and Fall of Tammany Hall* (Reading, Mass.: Addison-Wesley Publishing, 1993); Jerome Mushkat, *Tammany: The Evolution of a Political Machine, 1789-1865* (Syracuse, N.Y.: Syracuse University Press, 1971), chaps. 1-2; Noble E. Cunningham, Jr., *The Jeffersonian Republicans: The Formation of Party Organization, 1789-1801* (Chapel Hill: University of North Carolina

had come together, but the way in which they had done it. The Irishmen had “unite[d] themselves into a separate body” and had “presumed *collectively* to interfere with the ensuing election; that it has proscribed such of its members as shall dare to think and act for themselves.” It was the impositions being made on the autonomy of the members that alarmed so many, especially, of course, those who saw in that unity a threat to their own chances at election.

And the potential threat was terrifying. As New York Federalist (and federal district attorney through the Washington and Adams administrations) Richard Harison observed concerning New York’s Hibernians, “no mode more effectual or infamous could be devised, for directing, controlling, and overawing the constituted authorities, than by making their election depend upon the joint ballot of a numerous and influential society, enforcing the concurrence of all its members, under the penalty of expulsion, and the personal inconveniences attached to it.” This would be “reprehensible” even among “native citizens” but was especially so among those who lacked “the warm glow of affection which nature has implanted towards our native soil.” The “personal inconveniences” that Harison noted would attend expulsion were, in part, financial: according to their published constitution, each man had paid admission fees and an additional 12 ½ cents each month to support those among them who needed a hand, fully in the hopes that, if misfortune befell him, the society would come to his aid as well. When the resolution put the continued availability of the funds to him at risk if he was found to have voted the wrong way—in this, an age before the ubiquity of the secret

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Press, 1957), 181; William L. Utter, “Saint Tammany in Ohio: A Study in Frontier Politics,” *Mississippi Valley Historical Review*, 15 (1928): 321-340.

ballot—it should not surprise anyone that some commentators, especially Federalists such as Harison, were outraged.<sup>54</sup>

The fact that these were foreigners, cordoning themselves off from those around them and joining together to act politically with unity and purpose, was, of course, an important element in how outsiders viewed the Hibernian Provident Society and their aims in 1807. Indeed, nothing shows the point more clearly than the fact that the local Federalists, who had only recently begun calling themselves Federal Republicans, changed their name once again to run their candidates on the “American ticket.” The recent influx of Irishmen into the state, their quick adherence to the party of DeWitt Clinton, and the shape their political activism took exacerbated the already tumultuous political environment of early-nineteenth-century New York. A meeting of Federalists in Albany that April, shortly after news of the Hibernian Society’s resolution broke, declared that the idea of national societies forming in the cities of the republic was not the problem. If Welshmen, Irishmen, or any other national group opted to form and incorporate a society for their mutual aid, such aims “are salutary for purposes of relief and charity.” Such groups had a long history in North America, even before the Revolution. But the risk was large that “such societies, when perverted from the purposes of their institution to the purposes of intrigue,” when they became “political clubs and party cabals,” would pose a more serious threat to the republic than any other group, for the simple reason that foreigners lacked the instincts and habits of resistance to tyrannical authority that groups of the native-born were supposed to have. The recently arrived were “little accustomed to our peculiar principles, habits and public discipline, and imperfectly

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<sup>54</sup> *Weekly Inspector*, May 2, 1807; *Balance and Columbian Repository*, May 19, 1807.

acquainted with our constitution and laws.” Organizers of voluntary groups for the foreign-born, then, could manipulate their membership, and their club could in turn be manipulated by a powerful faction in the state of New York, all because the men who composed it lacked the “principles,” the “habits,” and the knowledge of how such groups should and should not act vis-à-vis their members.<sup>55</sup>

Debates such as this one, splashed across the papers as an election approached, played a role in the subsequent development of American civil society. That is, by articulating exactly how one group could form a “phalanx” to capture one election, the critics of the Hibernian Provident Society and critics of other groups of its sort helped to inscribe in the minds of many an expectation that fraternal societies could, with little effort, exercise illegitimate and abusive power over their members in a way that was unhealthy for the republic. And, indeed, because the association at issue was made up of Irishmen, each of whom appeared to native-born Americans to lack the fortitude to preserve their personal autonomy in the face of associational pressures, another solution appeared to be necessary. To limit the discretionary power of the group over its members, to ensure that the individual participants could enter into the post-Revolutionary public sphere as autonomous citizens and as good republicans, the groups needed to be fully and effectively encompassed by republican institutions and legal constraints. It appears that the critics of the Hibernians failed in their effort to limit the power of the group over its members by calling public attention to it: there is no record that the group lifted its rule (though there is also no evidence that any member was punished for its breach). The

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<sup>55</sup> *Report of the Trials of the Causes of Elisha Jenkins vs. Solomon Van Renssalaer... before Arbitrators, at Albany, August 16<sup>th</sup>, 17<sup>th</sup>, and 18<sup>th</sup>, 1808* (n.p.: Crowell and Frary, 1808), 13-16. When a meeting of Republicans responded to the Federalists’ resolutions, they did not even attempt to defend the Hibernian Society’s decision to make membership hinge upon how each man voted (16-18).

American Party ticket failed miserably at the polls, though there was little likelihood that members of the Hibernian society would have voted for Andrew Morris with or without the resolution. But the important point is that these sorts of popular debates about the tensions between membership and citizenship affected popular perceptions, associational practices, and the legal constructions of membership in important ways over the coming years.<sup>56</sup>

When Stephen Dempsey was expelled from the Hibernians just a couple of years later, for example, his story garnered attention in the New York press. Dempsey was a medical doctor and member of the Hibernian Provident Society when, in the wake of the spring election in New York in 1809, he publicly objected when it appeared that some resolutions approved by the society had been unilaterally altered by the club's leadership *after* their adoption by the club. According to an account of Dempsey's story in the *American Citizen*, he "publicly withdrew his membership, and assigned his reasons for so doing" when a "self-created committee" took charge and amended and greatly sharpened a series of resolutions drafted to rebut an address recently published by some political opponents, who also happened to Irish. For Dempsey, this was evidence that the Hibernians now were no longer "dealing out charity" but rather "dealt out nothing but proscription and blood." Those men "who boast that they can govern the Hibernian Provident Society as they please, and who have an eye to their own personal aggrandizement," were not fazed by Dempsey's withdrawal: "No member as he was, the leaders proceeded in form *to expel him*, and he was accordingly expelled with more than usual solemnity!" Dempsey had other members certify his version of the story, and the

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<sup>56</sup> Harvey Strum, "Federalist Hibernophobes in New York, 1807," *Éire-Ireland: A Journal of Irish Studies*, 16 (1981): 7-13; Jason K. Duncan, *Citizens or Papists: The Politics of Anti-Catholicism in New York, 1685-1821* (New York: Fordham University Press, 2005), 144-146.

story told in the *American Citizen* made a powerful case that the “expelling Junto” had taken the Hibernian Provident Society far astray from its original purposes and that its self-appointed leaders sought “universal thralldom, not emancipation.” They had made public Dempsey’s expulsion and denominated him a liar. The editor of the *American Citizen* concluded, “Editors who publish the expulsion, as it is ludicrously termed, are respectfully requested to publish the above.” He had withdrawn himself, and he wanted that fact known.<sup>57</sup>

Public criticisms in the first decade of the nineteenth century of efforts by Irishmen’s societies to control their rank-and-file membership had important consequences. First, the Binns-Duane affair provided an impetus to bring into the United States certain common law principles regarding corporate membership and associational authority. Second, the partisan bickering helped to make public a series of apparent abuses of private governing power. There is a tendency, however, to read these discussions, these debates about what membership ought to look like, as distinctly partisan in nature. In many recent works on contemporary visions of American associations, differing views about the value of such groups have been divvied up, neatly, along partisan lines. And, certainly, the oppositional nature of public discourse in the period meant that much of the discussion of associational authority and the ostensibly antagonistic relationship between club membership and public citizenship came from those writing in support of a rival political faction.<sup>58</sup>

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<sup>57</sup> *American Citizen*, May 10, 1809. For Dempsey’s occupation, see Longworth’s *American Almanac, New-York Register, and City Directory: For the Thirty-Fourth Year of American Independence* (New York: David Longworth, 1809), 156.

<sup>58</sup> For example, Neem, *Creating a Nation of Joiners*; Lawrence Frederick Kohl, *The Politics of Individualism: Parties and the American Character in the Jacksonian Era* (New York: Oxford University Press, 1989).

But this was more than conservative reaction to the organization of the recently immigrated and the potentially radical. Similar critiques were made by Republicans about the formation of Washington Benevolent Societies by the Federalist faithful in the years leading up to the War of 1812, and it is apparent that the critiques tapped into more widely held beliefs about legitimate association. There was an important difference in the sorts of charges levied by Republicans against Federalist political fraternities, but it was a distinction that had more to do with chronology than with political philosophy. By the time that Federalists had begun creating organizations of the sort that Republicans had been forming since the 1790s, there had emerged a general consensus—one that stretched across party lines—on how such political fraternities ought to be organized.

Going as far back as the Federalist/Antifederalist division in the late 1780s George Washington had stood firmly opposed to self-formed voluntary associations because they created opportunities for abuses of private power. When his nephew Bushrod Washington proposed to form a Federalist Patriotic Society, Washington noted that there were inherent risks in that kind of political club, even one in whose purposes he personally believed: “May not a few members of this society direct the measures of it to private views of their own?”<sup>59</sup> These sorts of appraisals of the risks associated with voluntary affiliation into organized political societies, then, had less to do with the principles being espoused than with the forms the societies took, the powerlessness of their members, and the lack of accountability for oligarchic control.

There would be opportunities for men of diverse political beliefs to confront the challenges posed by the tensions between membership and citizenship, for Federalists in

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<sup>59</sup> George Washington to Bushrod Washington, quoted in Brooke, “Ancient Lodges and Self-Created Societies,” 323.

the first decade of the nineteenth century wasted little time in beginning to organize fraternal societies that mimicked the clubs of their opponents. No less a figure than Alexander Hamilton proposed to his friend James Bayard a “Christian Constitutional Society” in 1802, a society that he described at length in a letter. Hamilton described it as having two objects: to support the Christian religion and to support the federal Constitution. Its “means” were the “diffusion of information” by pamphlets and newspapers and the creation of groups that mirrored such societies as the St. Patrick Benevolent Society, the Hibernian Provident Society, or any number of ethnic societies formed in cities that, thus far, had been almost wholly Jeffersonian in persuasion.<sup>60</sup>

The plan was recognizably Republican in method. He wrote to Bayard that one goal should be “the promoting of institutions of a charitable & useful nature in the management of Foederalists.” Hamilton went on: “The populous cities ought particularly to be attended to. Perhaps it will be well to institute in such places 1<sup>st</sup> Societies for the relief of Emigrants—2<sup>nd</sup>. Academies each with one professor for instructing the different Classes of Mechanics in the principles of Mechanics & Elements of Chemistry.” Such clubs would have “an act of association” that “need only designate the ‘name’ ‘objects’ & contain an engagement to promote the objects by all lawful means, and particularly by the diffusion of Information. This act to be signed by every member.” Hamilton appeared to be well versed in how these kinds of clubs looked from the perspective of their members and prospective members. His proposal began with the “objects” of the

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<sup>60</sup> Alexander Hamilton to James A. Bayard, Apr. 16-21, 1802, in Harold C. Syrett, ed., *The Papers of Alexander Hamilton*, vol. 25 (New York: Columbia University Press, 1977), 605-610; Colleen A. Sheehan, “Madison versus Hamilton,” in Douglas Ambrose and Robert W. T. Martin, eds., *The Many Faces of Alexander Hamilton: The Life and Legacy of America’s Most Elusive Founding Father* (New York: New York University Press, 2006), 196-197; Allan McClane Hamilton, *The Intimate Life of Alexander Hamilton* (New York: Charles Scriber’s Sons, 1911), 334-335.



institution, moved on to describe its officers and federal structure, and closed with a description of the duties and benefits of membership. What he proposed was, in all ways, a perfectly ordinary political fraternity.<sup>61</sup>

Bayard was not a proponent of the idea, and Hamilton did not have time to turn his plan into a reality before he fell to a shot from Aaron Burr. In the meantime, Republicans continued to organize political societies. “*Combinations*” that “exactly resemble the French *jacobin* clubs,” according to one Federalist writer in New Jersey in 1803, were “the settled Democratic plan” for electoral success. Federalists, excepting Hamilton’s unfulfilled proposal, were late to that game. One of those New Jersey societies of Republicans, calling itself the Democratic-Federalist Society of Cumberland, emphasized its invaluable role in helping to keep citizens informed. The need for men to be educated as to matters of the public interest, they announced, should be enough to justify the joiners “at the tribunal of heaven, by our own consciences, and by the unprejudiced world, in this Association.” They announced that “the powers of individual man are very limited.” It took association to make anyone a good, informed citizen.<sup>62</sup>

Federalist party organizers, several years after Hamilton’s first description of a similar kind of organization, began to follow in their opponents’ footsteps. And in doing so they followed what had become the prevailing model of political organization: the

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<sup>61</sup> Hamilton to Bayard, Apr. 16-21, 1802, in Syrett, ed., *Papers of Alexander Hamilton*, 25:607-609. Even though it was fairly conventional in structure and purpose, Hamilton’s proposal has not been well received by his historians: on the idea as “retrograde,” see Ron Chernow, *Alexander Hamilton* (New York: Penguin Press, 2004), 658-659; on the proposal as “questionable” and forced, see Gerald Stourzh, *Alexander Hamilton and the Idea of Republican Government* (Stanford, Calif.: Stanford University Press, 1970), 125; and for the society as a “repulsive pressure group,” see Douglass Adair and Marvin Harvey, “Was Alexander Hamilton a Christian Statesman?” *William and Mary Quarterly*, 3d ser., 12 (1955): 308-329.

<sup>62</sup> *Serious Considerations Addressed to the Electors of New Jersey concerning the Choice of Members of the Legislature for the Ensuing Year* (n.p., 1803), 3; *A Declaration of the Principles and Views of the Democratic-Federalists in the County of Cumberland, and State of New Jersey, with Their Form of Association* (Philadelphia: Mathew Carey, 1801), 9-10.

societies would be open to all who shared some basic beliefs, at a cost that would not be prohibitive; they would be organized locally and be designed to serve both political and nonpolitical purposes; and they would promote themselves by publishing copies of their constitutions and bylaws. A few Federalist societies were organized with names such as the Society of American Republicans, formed in Philadelphia in 1808, but most of them adopted the politically invaluable name of George Washington. In states throughout the Northeast, more than two hundred Washington Benevolent Societies were formed. The younger generation of Federalists was crucial to this turn: when the “Federal Young Men of the city and county of Philadelphia” organized the Washington Association, they announced their hopes “to assist their senior fellow citizens in promoting the interest of the Federal cause.”<sup>63</sup>

The first Washington Benevolent Society, aside from a nonpolitical club started in Alexandria a month after Washington’s death, was formed in New York in 1808, by three men, including a twenty-two-year-old Guilian Verplanck.<sup>64</sup> Like the Tammany Society in New York, the society held its meetings in secret. Like other Republican societies, it opened itself to all comers who were able to pay relatively inexpensive dues (an initiation fee of one dollar, and half that each year thereafter) and who adhered to the right political beliefs. In some of the Washington Benevolent Societies, there was even a clause that poor men could join and have their dues waived: nearly one third of the members of the Boston society, for whom records have survived, were exempted. The monies were intended for benevolent purposes among members who fell on hard times. As the New

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<sup>63</sup> “Resolutions of the Philadelphia Washington Association,” *Poulson’s*, Aug. 1, 1811, quoted in Koschnik, “*Let a Common Interest Bind Us Together*,” 74.

<sup>64</sup> William Buckner McGroarty, “The Washington Society of Alexandria,” *Tyler’s Quarterly Historical and Genealogical Magazine*, 9 (1928): 147-163.

York society put it in their constitution, paraphrasing Edmund Burke, they were quite consciously following the lead of their opponents, for “when bad men combine, it is absolutely necessary that good men should unite.” They held their first meeting on Washington’s Birthday in 1809, hearing an address from Samuel Hopkins before having a dinner that spilled into five separate taverns. By the Independence Day celebration that year, some two thousand men marched in procession as Washington Benevolents. And each society was intended to oppose local Republican political organization. First, the new mode of Federalist association “followed Tammany to Rhode Island,” in Dixon Ryan Fox’s reading of the situation, and Washington Benevolent Societies were formed in large numbers in each northeastern state that had a reasonably strong Republican presence. In states such as Connecticut, which had only a very few Republicans at all, the Washington Benevolent Societies were much less common.<sup>65</sup>

With the Embargo, the drive to create an effective, organized opposition to the party of Jefferson had taken on a new energy. And between 1808 and 1812, the formation of 208 societies can be established. More certainly existed. Each took what was becoming a ubiquitous form for a political fraternity. When Rhode Islanders “associated to inform, advise and otherwise assist American Citizens” by forming a Washington Benevolent Society in 1810, they drafted a constitution and bylaws that, like all the Republican societies, spelled out in precise terms who could apply for membership, how they were to be admitted, what they needed to do maintain that status, and what benefits

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<sup>65</sup> Dixon Ryan Fox, “The Washington Benevolent Society,” *Columbia University Quarterly*, 21 (1919): 27-37; Robert W. July, *The Essential New Yorker: Gulian Crommelin Verplanck* (Durham, N.C. Duke University Press, 1951), 17-25; Dixon Ryan Fox, *The Decline of Aristocracy in the Politics of New York, 1801-1840*, ed. Robert V. Remini (New York: Harper Torchbooks, 1965), 88-99; David Hackett Fischer, *The Revolution of American Conservatism: The Federalist Party in the Era of Jeffersonian Democracy* (New York: Harper and Row, 1965), chap. 6; Samuel Eliot Morison, *The Life and Letters of Harrison Gray Otis, Federalist, 1765-1848*, 2 vols. (Boston and New York: Houghton Mifflin, 1913), 1:300-306.

would obtain. The standards were open, generally asking only that members be citizens “of good moral characters and true friends of the constitution of the United States,” as the Rhode Island organizers put it. And, as noted, the fees were kept low (or, for the needy, dispensed with altogether).<sup>66</sup>

There were, however, two kinds of constraints on membership that did matter: as with virtually all fraternal societies, prospective members would be voted on by the current members. Four black balls would be enough to prevent admission in the Rhode Island society; for another Washington Benevolent Society in the state of New York, the number of black balls was set at five. And, even once admitted, men (this was a male-only institution, though no rule stated that explicitly) had to take an oath to support the institution and could be expelled for immoral conduct or for failure to pay dues. Such constraints were thought to be the only way “to establish a plain, obvious, and comprehensive bond of union between the members, and to ensure a proper degree of sympathy, and a certain community of sentiment, upon great and acknowledged principles of morals and policy,” wrote the organizers of the nation’s largest Washington Benevolent Society, the one in Philadelphia, which had three thousand members in 1816. The members all had to agree on their basic purposes for coming together and had to swear to obey the rules and to support their shared beliefs: “as members of the Washington Benevolent Society we will, in all things comply with its regulations, support its principles, and enforce its views.” The little books published for members—usually containing a membership certificate, the constitution of the society, the U.S. Constitution,

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<sup>66</sup> Fischer, *Revolution of American Conservatism*, 116, table 19; Letter proposing organization (July 9, 1810) and constitution, Washington Benevolent Society of Providence, R.I., Rhode Island Historical Society, Providence, R.I.; Washington Benevolent Society, February 1812-January 1816, Connecticut Historical Society, Hartford, Conn..

Washington's Farewell Address, and, often, an engraving and short biography of him—contained all the political beliefs that the members ought to share.<sup>67</sup>

One orator noted in an address on *The Bond of Friendship* to his fellow members in 1812, “we do associate for the express purpose of manifesting benevolence, of cultivating friendship.”<sup>68</sup> For all their emphasis on shared beliefs, however, it was apparent in their articles of agreement that it was the rules, not the beliefs, that held the men together once admitted. Take, for instance, the society in Philadelphia, which had elaborate provisions regarding expulsion that allowed members' expulsions “for refusing to comply with the provisions of the constitution and by-laws; for abandoning the principles which entitled him to become a member of the association; for disorderly or improper conduct in the presence of the Society.” But the procedure to be followed was detailed and, in every way, protective against arbitrary dismissal. The clause in the constitution went on: “but no member shall be expelled, unless at a regular meeting of the Society; nor unless two-thirds of the members present shall vote for his expulsion; nor unless notice shall have been given at a preceding meeting, that a motion for the expulsion of a member would then be made; nor unless a written notice of the facts charged, shall have been furnished to the member, in like manner as is directed in the trial

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<sup>67</sup> *Constitution of the Washington Benevolent Society of the Town of Florida, and County of Montgomery, Instituted 11<sup>th</sup> December, 1810* (Albany, N.Y.: Balance Press, 1811), art. 10; *A Summary Statement of the Origin, Progress, and Present State of the Washington Benevolent Society of Pennsylvania: With an Account of the Opening and Dedication of the Washington Hall, on the First of October, 1816* (Philadelphia: Office of the United States' Gazette, 1816); *Washington's Farewell Address, to the People of the United States: Published for the Benefit of the Washington Benevolent Society*, 2d ed. (New York: J. Seymour, 1809); *The Text-Book of the Washington Benevolent Society: Containing a Biography and Character of George Washington, His Farewell Address to the People of the United States, and the Federal Constitution with the Amendments*, 3d ed. (Concord: George Hough, 1814); Fischer, *Revolution of American Conservatism*, 122.

<sup>68</sup> David Hitchcock, *The Bond of Friendship: Being an Address Delivered before the Great-Barrington Branch of the Washington Benevolent Society—April 21, 1812* (Stockbridge, Vt.: Published for the author, 1812), 15.

of an accused officer, in the tenth article of the constitution.” David Hackett Fischer has found that, in practice, the Washington Benevolent Societies were “little oligarchies tightly controlled by the young Federalists who had founded them,” but they were oligarchies that operated by committees according to constitutional rules. From the perspective of the members of the societies themselves, the clubs were well regulated and bound constitutionally to act in ways that would not subject a member to arbitrary authority. The Democratic-Republican clubs of the 1790s had no such rules. Much had been learned about how such societies *ought* to be formed.<sup>69</sup>

From the perspective of Jeffersonian outsiders to the Washington Benevolent Societies, however, these were at worst dark and frightening bodies and, at best, obnoxious ones. And yet their mode of organization was, to all appearances, perfectly legitimate: they followed what had already become a common mode of Republican organization, and, in some cases, the societies sought and received incorporation. And so the critics of the Washington Benevolent Societies did not focus upon ways in which, institutionally, the societies fell short of good, republican modes of operation. Rather, Jeffersonian critiques of the societies generally focused upon their being comprised of bad men. They alleged that the clubs had malicious, even treasonable, designs, which were sheltered behind a veil of secrecy. And they insisted that, for all their claims to being open to all who supported constitutional government, they were merely a bastion for those passionately opposed to the Jefferson and Madison administrations. That is,

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<sup>69</sup> *Summary Statement*, sec. 24. Similar protections can be found in some but not all Washington Benevolent Society constitutions: see Constitution of the Washington Benevolent Society of Providence, R.I., art. 11, Rhode Island Historical Society, Providence, R.I. (three-fourths vote, with notice); *The Constitution of the Washington Benevolent Society at Cambridge: Instituted the 22d of May, 1812* (Cambridge, Mass.: Hilliard and Metcalf, 1812), art. 8 (majority vote, with notice); *The Constitution of the Berlin Branch of the Washington Benevolent Society of the County of Rensselaer...* (Albany: Websters and Skinners, 1814) (no clause regarding expulsion).

though some of the allegations concerning the Washington Benevolent Societies mirrored those made against Republican organizations in the first decade of the nineteenth century, for the most part the language focused on the ways in which the Federalist societies did not even meet their own stated standards. The Washington Benevolent Societies were created to cherish constitutional government, and yet they threatened it. They claimed to admit all men who believed in the principles of Washington and in the Constitution of the United States, and yet they admitted only opponents of the current Republican regime.

Many of the charges of evil intentions came out of Vermont, and they were reprinted widely. Vermont was a battleground, where Federalist societies believed they had a chance successfully to combat the overwhelming strength of the state's Republican Party. In the run-up to an 1812 election, one Republican paper advised its readers to protect lists of Republican candidates from being destroyed by the Washington Benevolents, "For it is fully ascertained, from their organized system of operation, that threats, flattery, corruption, and deceptions of every kind will be practised on the honest and unsuspecting of our citizens." For many of their critics, the Federalist societies had not only appeared to play dirty in legitimate politics but also had genuinely subversive intentions: The *Green Mountain Farmer* in Bennington, Vermont, urged the conquest of Canada during the War of 1812 in part because of "their incitements of secret treasonable societies among us." They comprised "Tories, monarchists, and aristocrats...without regard to character or reputation," noted another Vermont paper, though a New Hampshire writer saw their hopes as resting on the seduction of "the young and credulous." And there was widespread belief that the societies were tearing apart local communities: "Churches are separating, dissolving, and dismissing their pastors in

various places amidst the ravages of disunion in consequence of the Washington Benevolent Societies.” Meetings were called for “investigating and enquiring into the origins, progress, and designs of certain secret self-created societies in various sections of our country,” and in some places committees were established for keeping a watchful eye on the Washington Benevolent Societies.<sup>70</sup>

The two key points that are easily missed in all of the charges made against the Washington Benevolent Society are these: the Federalists adopted a mode of organization that most Americans, regardless of party affiliation, could accept as legitimate in how it admitted and treated its members; and, second, the clubs were faulted for not adhering to their own stated purposes more than they were criticized for anything else. As Sylvester Pond put it in a much-reprinted exposé about the Federalist club in his hometown in Vermont, “The principles of the Washington Benevolent Society are NOT to disseminate the principles of Washington and Benevolence; but to proselyte and build up a *party*, so as to be able to change the present Administration of government.” They claimed to be open to political debate, but “every principle that does not favour their peculiar notions about politics is kept out of sight.” They claimed to be open to supporters of the Constitution, but “Then why reject all republicans and receive every federalist, let his character be what it may?” As conceptions of legitimate membership in these sorts of societies became more generally accepted, there was a tendency to fault the Washington

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<sup>70</sup> *Green Mountain Farmer*, Feb. 25, 1812; *Vermont Republican*, Feb. 24, 1812; *New Hampshire Patriot*, Mar. 2, 1813, *Vermont Republican*, June 1, 1812, Mar. 9, 1812, all quoted in William Alexander Robinson, “The Washington Benevolent Society in New England: A Phase of Politics during the War of 1812,” *Massachusetts Historical Society, Proceedings*, 49 (1915-1916): 276n.2, 280nn.5, 8, 281nn.1, 2.



Benevolent Societies most often for not even adhering to these, their own professed standards regarding individual membership.<sup>71</sup>

Moreover, it appears from some of the few extant records of individual Washington Benevolent Societies that allegations of internal tyranny and political control were unfounded. Members of the club in Northwood, New Hampshire, went out of their way explicitly to deny any authority over their members in terms of how they voted. One week in early 1813, “at a former meeting of this Society which owing to the severity of the weather was not generally attended—a Committee was appointed to nominate candidates for the State County District and Town offices to be filled in March.” But when they reconvened, and “upon more mature deliberation,” they decided that “it does not appear consistent with the principles of this Society to descend to the business of electioneering or to concern as a body therein.” They resolved, in fact, “that as this Society has no power, so it has no wish to dictate to any member the manner in which he shall exercise his privileges as a citizen—but would leave him as it finds him, responsible only to his own conscience his country and his God.” These were not assertions made publicly to appease outsiders; these were proceedings recorded in a private book of minutes, displaying a genuinely held belief about the limits of associational authority and the need to make efforts to preserve individual members’ autonomy. No better statement could be made of what had, over the course of the last decade of the eighteenth century and the first decade of the nineteenth, become the widely accepted understanding of the

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<sup>71</sup> *Eastern Argus*, Apr. 23, 1812, letter dated “Castleton, [Vt.,] March 21, 1812.”

minimal level of autonomy that any individual member of a fraternal society ought to maintain.<sup>72</sup>

Indeed, more than anything, the Washington Benevolent Societies provide evidence that what is being described here crossed party lines. Both Federalists and Republicans were part of a growing consensus as to the legitimate bonds of membership, including commitments to procedural protections against arbitrary power as well as to the existence of legally guaranteed rights carried into the association. Societies formed by partisans on both sides appear to have shared practices and goals. And, more important still, similar critiques were made toward those groups formed by their rivals. Indeed, although the Washington Benevolent Societies appeared to wish to turn back the clock, they were a part of something new and recognizable as a post-1800 phenomenon in the way they described and delineated what was expected of their members. Even though they held “the times of Washington for our hope,” as did the Rhode Island Washington Benevolents, and though Daniel Webster proclaimed how much “The mind delights to associate with the spirits that have gone before it,” the Washington Benevolent Society—no less than its critics—exemplified a new kind of voluntary affiliation. It was something unique to the post-Revolutionary moment, and in the histories of these societies can be found all the worry and uneasiness that the first republican generations had toward unchecked power and toward potential threats to personal autonomy.<sup>73</sup>

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<sup>72</sup> Resolution of Mar. 2, 1813, Records of the Washington Benevolent Society of Northwood [N.H.], New Hampshire Historical Society, Concord, N.H.

<sup>73</sup> Constitution of the Washington Benevolent Society, Washington Benevolent Society of Providence, R.I., Rhode Island Historical Society, Providence, R.I.; Daniel Webster, *An Address Delivered before the Washington Benevolent Society, at Portsmouth, July 4, 1812* (Portsmouth, N.H.: Oracle Press, 1812), 5-6.

Political ambition and the perceived need to counter the worst tactics of the opposition meant that there were no easy answers in working out a conception of voluntary membership in political societies that satisfied everyone. But ideas and common-law principles brought to bear in these discussions had ramifications as other kinds of voluntary societies began to appear in communities across the young United States. One such kind of association, the mutual insurance society, will be the subject of chapter 3.

## Chapter 3

### Mutual Insurance: The Bonds of Membership

Early in 1813, Stafford Parker sat down in his home in Port Royal, Virginia, to write a letter to the head of Virginia's Mutual Assurance Society, an association set up and incorporated in 1794 to allow people statewide to share the costs of losses by fire. Parker, who had inherited some insured properties, had just received notice that, at the next session of the county court, the Society would file a motion and seek execution against him for \$19.62, plus interest, as assessments for the past two years to compensate other members for their losses. Parker began by confessing his ignorance of the specific rules of the society, which was to him "clothed with a mysterious veil." Though he had talked to many people, no one had yet "satisfactorily elucidated the theoretical or practical principles upon which it stands or is governed," he informed Samuel Greenhow, the principal agent. It all "appears to be as mysterious as the labyrinth of Dadalus."<sup>1</sup>

"In their Purity," Parker began to lecture, insurance associations "are founded on humane and social principles" and are "generally productive of much good in Society." He then quoted "a Distinguished Englishman" (he did not name him, but it was William Blackstone) to define the insurance contract for Greenhow: "a contract between A & B, that upon B's paying a Premium *equivalent* to the hazard run, A will indemnify and secure him from a particular event." Here, though, "there is little or no hazard run." "In all my life, I never knew but one small house to be destroyed by fire in this place," but "while the event from which I am to be indemnified never happens the Demands of the

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<sup>1</sup> Stafford H. Parker to Samuel Greenhow, Jan. 4, 1813, Mutual Assurance Society of Virginia, Records, 1795-1866, Robert Alonzo Brock Collection, Henry E. Huntington Library, San Marino, Calif..

Party insuring are *extremely frequent*.” As soon as is possible according to law, Parker had decided, “the Contract subsisting between the Mutual Assurance Society and myself, *must* be dissolved.”<sup>2</sup>

For more than a decade, Virginia’s mutual fire insurance company had faced challenges as it sought to unite “two opposite & conflicting Sentiments, Benevolence & Self interest,” as Greenhow once described matters to Thomas Jefferson, and often found self-interest the stronger inclination. As Parker’s date with the Caroline County Court makes evident, legal institutions were an important arena in these moments of conflict, a fact true across the nation as mutual insurance associations sprang up in the years following the American Revolution. From a single colonial predecessor, the Philadelphia Contributionship, these cooperative societies, organizations “congenial with the warmest feelings of benevolence and the most enlightened maxims of civil society,” ranged from New England to South Carolina by 1800. To many, they served as perfect exemplars of the promise of the Revolutionary age, associations aiming not at profit but at mutual support, combining cooperation with self-improvement and security. Such organizations enabled members to pool resources to support victims of fire as well as to indemnify themselves from loss. As George Hay noted after a devastating fire in Norfolk, where many members of the Mutual Assurance Society of Virginia had insured their homes and businesses, such losses “would have been ruinous to the individuals who were the immediate sufferers, but being now divided among many, they are scarcely felt.”<sup>3</sup>

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<sup>2</sup> *Ibid.*, emphases in original. The quotation, slightly altered, is found in Sir William Blackstone, *Commentaries on the Laws of England: In Four Books* (Oxford: Clarendon Press, 1765-1769), book 2, chap. 30.

<sup>3</sup> Samuel Greenhow to Thomas Jefferson, May 29, 1809, in J. Jefferson Looney, ed., *The Papers of Thomas Jefferson, Retirement Series*, vol. 1 (Princeton, N.J.: Princeton University Press, 2004), 243; Charles F. Mercer to Samuel Greenhow, May 18, 1809, Brock Collection; Dalit Baranoff, “Shaped by Risk: The

As men and women joined such associations as the Mutual Assurance Society of Virginia in the 1790s and the early 1800s, however, they bound themselves to “the constitution, rules and regulations of the said society” and came to experience directly the tensions between individual autonomy and collective action inherent in that act. Mutual fire insurance organizations in the early republic provide especially useful case studies for our understanding of the changing assumptions about the consequences of voluntary membership: such groups had well-defined policies and lists of expectations at a time when many other forms of association remained relatively unstructured; they were consciously modeled on a “mutual” principle, meaning that benefits and obligations were intentionally balanced; they appeared almost simultaneously in states north and south, allowing us to see where their development diverged and where it did not; and, last, the law of fire insurance and, in particular, mutual fire insurance was being shaped out of whole cloth in the late eighteenth and early nineteenth centuries, making their course of development particularly reflective of the post-Revolutionary moment.

Associations serving the loftiest ends could be a threat to their constituent members, people such as Stafford Parker learned, making unforeseen demands and acting as a private, and frequently objectionable, governing power in an age when Americans were particularly anxious about unchecked authority. When the Mutual Assurance Society made members liable on short notice for assessments up to the full value of their insured property, for instance, Jefferson came to see that his home may be “in ten times greater danger from such an establishment than from fire.” The optimism of the early years of the republic led many Americans to attempt new ways of cooperating, new

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American Fire Insurance Industry, 1790-1920” (Ph.D. diss., Johns Hopkins University, 2003), 34-36; George Hay to William F. Ast, July 10, 1799, Brock Collection.

modes of concerted action. But the fears and political ideals of the age led to efforts to constrain associational authority, and legal and political institutions were called upon to mediate persistent tensions between individual self-government and effective association.<sup>4</sup>

### A Brief History of Mutual Fire Insurance

Fire insurance of any kind was a relatively recent development, its earliest beginnings a consequence of the Great Fire of 1666 in London. There were a few attempts in colonial British America to establish some sort of insurance association, such as the Friendly Society in Charleston, South Carolina, begun in 1735. It closed only a few years later, when a fire destroyed two-thirds of the city and exhausted the group's funds. An immensely more successful venture, one that still offers insurance today, was founded in 1752 as the Philadelphia Contributionship for the Insurance of Houses from Loss by Fire. Incorporated in 1768, this organization was the first successful effort at a mutual insurance company in North America. It was modeled after a London association known as the Amicable Contributionship (or the Hand-in-Hand, after its emblem and firemark), which had been founded in 1696. Benjamin Franklin proposed a similar insurance organization in 1750 to the Union Fire Company, made up of thirty volunteer firefighters, and they pooled their money in equal shares (half to be jointly invested) to provide compensation to any participant who lost his property to fire. The men soon shared their idea with other fire companies, drew up a deed of settlement (a constitution), and some

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<sup>4</sup> Thomas Jefferson to William Frederick Ast, Sept. 17, 1799, in Barbara Oberg, ed., *The Papers of Thomas Jefferson*, vol. 31 (Princeton, N.J.: Princeton University Press, 2004), 186-188.

thirty years later, having issued about two thousand policies in Philadelphia and undergone formal incorporation in 1768, remained the only fire insurance company in what had become the United States.<sup>5</sup>

Mutual fire insurance shared many features with more established sorts of indemnity such as marine insurance, especially its use of policies in which the property to be insured was intimately described and the terms of coverage were closely spelled out. The difference was in the internal organization of the association. The Contributionship announced in the first article of its deed of settlement that all persons insuring in the society “shall be taken and deemed as members of the same.” Those policyholders were and are the entire company. The capital on which it was founded was not held by stockholders or partners but consisted solely of the premiums and fees paid by the insurers themselves. Those members elected officers to direct the affairs of the association, met annually to determine matters of particular importance, and were liable, up to a previously determined limit, for further assessment in case of substantial losses. Thus, all members stood at once as insured and insurer, and each participant held an interest in determining who or what was to be insured.<sup>6</sup>

The company’s interest in insuring only reasonable risks—and, particularly, in taking steps to make those risks already insured as secure as possible from loss—led the

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<sup>5</sup> Philadelphia Contributionship, *The Deed of Settlement of the Society for the Insuring of Houses, in and near Philadelphia* (Philadelphia: n.p., 1787?); Nicholas B. Wainwright, *A Philadelphia Story: The Philadelphia Contributionship for the Insurance of Houses from Loss by Fire* (Philadelphia: Willam F. Fell, 1952); Baranoff, “Shaped by Risk,” 34-35; Humbert O. Nelli, “Insurance and the Bicentennial,” *Journal of Risk and Insurance*, 43 (1976): 197-199; J. A. Fowler, *History of Insurance in Philadelphia for Two Centuries (1863-1882)* (Philadelphia: Review Publishing and Printing, 1888), 298-300.

<sup>6</sup> John Bainbridge, *Biography of an Idea: The Story of Mutual Fire and Casualty Insurance* (Garden City, N.Y.: Doubleday and Company, 1952), 20-21, 50-54; speech of Horace Binney, in *Centennial Meeting of the Philadelphia Contributionship for the Insurance of Houses from Loss by Fire* (Philadelphia: C. Sherman, 1852), 9-31; *Deed of Settlement*, 1.



Philadelphia Contributionship to take a particularly strong hand with its members. From the start, buildings were closely examined before insurance was offered, with the premium to be paid being individually determined rather than derived from some broader classification scheme as would later become the rule. Buildings with thicker walls paid a lower rate, meaning the well-built homes of the richer Philadelphians were favored, and in 1769 the Contributionship determined to insure no wooden buildings at all. The Contributionship's members determined that all policyholders must install trap doors on their roofs, build rails to aid firemen, pay fines for unswept chimneys, and, most notoriously of all, in 1781, chop down the shade trees around their homes.<sup>7</sup>

That decision, made at the annual meeting in April (and followed by a legislative decision declaring that all trees in the city's streets and alleys were to be removed, an act repealed five months later following a public outcry), was the subject of a petition in 1784 signed by forty members asking that the rule be reconsidered. Those men "found it convenient and agreeable to them to have trees planted in the streets before their houses; which the said Contributionship have thought proper to prohibit by one of their bye-laws, although the same is expressly permitted by a law of the State." When the Contributionship refused to back down, the nation's second insurance company was established, the Mutual Assurance Company, famously calling itself the Green Tree and allowing—though charging extra for—trees around member's homes.<sup>8</sup>

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<sup>7</sup> Fowler, *History of Insurance in Philadelphia*, 300; Wainwright, *A Philadelphia Story*, 42; Sharon V. Salinger, "Spaces Inside and Outside, in Eighteenth-Century Philadelphia," *Journal of Interdisciplinary History*, 26 (1995): 1-31. On the avoidance of risk, see Robert E. Wright, *The First Wall Street: Chestnut Street, Philadelphia, and the Birth of American Finance* (Chicago: University of Chicago Press, 2005), 94-96.

<sup>8</sup> *Deed of Settlement*, "Bye Laws, made at the General Meetings of the Contributors," Apr. 14, 1781, 8; Wainwright, *A Philadelphia Story*, 80-82; advertisement of proposed mutual insurance company, Aug. 10, 1784, quoted in Fowler, *History of Insurance in Philadelphia*, 306.

As a consequence of a particularly onerous bylaw, then, competition entered American mutual insurance, although the form the rival association took was almost identical to the Contributionship. The Mutual Assurance Company was also scarcely less rigorous in the monitoring of its membership, calling for the policyholders' trees to be trimmed each fall so that they reached no higher than the eaves of the house. As the first insurance companies began to appear outside of Philadelphia, such as the Mutual Assurance Company of New York (1787) and the Baltimore Equitable Society (1794), they followed the basic form of organization of the Contributionship. When leading men of Baltimore convened in a tavern to discuss a plan of insurance, "a motion was made that an Insurance Fire Company be established here, upon a plan similar to one in Philadelphia instituted by the late Dr. Franklin." Such societies even borrowed the Contributionship's peculiar terminology. "Deed of settlement," as lawyer and Contributionship director Horace Binney noted in 1852, was a term "never used" in America for "articles of association for insuring, for banking, or for the like purposes" before it was borrowed by the Contributionship from London offices, but it appeared frequently thereafter. Also like the Contributionship, the mutual insurance companies set up in Baltimore and New York limited their insurance geographically to the city and near environs and had strict rules regarding insured property, including prohibitions on trees. As the 1790s progressed, however, very few fire insurance societies held a true monopoly as more rivals came onto the scene, including stock companies such as the Insurance Company of North America and agencies of London offices such as the Phoenix. Restraints on members either became less onerous (the Contributionship finally backed

down on the tree issue in 1810, for instance) or were perceived to be less so as fire insurance could be obtained from a number of institutions.<sup>9</sup>

By 1794, then, mutual insurance associations had begun to adapt and refine their views on five key aspects of their organization, as economic reality and members' demands informed the institutions' initial, idealistic plans for cooperative aid. Because of its relatively long history when compared to the first post-Revolutionary insurers, the Contributionship in particular worked through these initial stages of trial and error. Its successors had the benefit of the Contributionship's mistakes.

The first notable feature of such groups was a strict selectivity of risks, to be determined both from the nature of the property and, often, from the reputation of the proposed member. Mutual insurance societies, as Joseph Angell summarized in 1854, "should have the power of exercising their own discretion in the selection of persons whom they may admit to membership, and whose property they may insure; as the character of the person assured may be of importance." And, indeed, the membership of these early companies was predominantly elite, especially well-off merchants and some artisans and shopkeepers, many of whom owned multiple properties. Every deed of settlement included a long list of the kinds of buildings that would never be considered for insurance. And as people joined, "each indemnifying the other" to prevent "many worthy and virtuous families" from being reduced to poverty by fire, they did so in full

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<sup>9</sup> *The Deed of Settlement of the Mutual Assurance Company, for Insuring Houses from Loss by Fire in New-York* (New York: William Morton, 1787) (original, with appended signatures, at New-York Historical Society); Mutual Assurance Company policy of Thomas Randall, Dec. 12, 1792, New-York Historical Society; minute book of the Baltimore Equitable Society, quoted in Bainbridge, *Biography of an Idea*, 66-67; Baltimore Equitable Society, "Deed of Settlement of the Society for Insuring of Houses in and near Baltimore," art. 33, *Maryland Journal and Baltimore Advertiser*, Feb. 28, Mar. 5, 1794; Binney, *Centennial Meeting of the Philadelphia Contributionship*, 44-45; *An Act to Incorporate the Subscribers to the Insurance Company of North America* (Philadelphia: T. Bradford, 1794); M.J. McCosker, *The Historical Collection of the Insurance Company of North America* (Philadelphia: Insurance Company of North America, 1967).

awareness that the practicability of their efforts was founded on the exclusion of what they deemed uninsurable.<sup>10</sup>

Second, there was an interest in the amelioration of risks, with the associations calling for improvements to make the house more fireproof or, at the least, more accessible and prepared for firefighting efforts. Besides its calls for such substantial and permanent alterations as a trap door providing roof access, the Philadelphia Contributionship responded to immediate threats by making calls on its members. With a spate of city fires in 1780, the society determined that members and anyone who might apply for membership must “engage to provide himself with a certain number of buckets.”<sup>11</sup>

Third, the fire insurance companies in North America, unlike those in London, were formally incorporated. English offices after 1720, in consequence of restraints on incorporation following the famous debacle of the South Sea Company, either did not petition for incorporation or, when they did, were refused. Similarly, the Philadelphia Contributionship did not bother to attempt a formal incorporation for more than a decade. Only in 1768, owing to hassles in lending money in the name of the directors or the treasurer, did the Contributionship take the step of seeking legislative incorporation, a step that would come much earlier in the life of every subsequent mutual.<sup>12</sup>

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<sup>10</sup> Joseph K. Angell, *A Treatise on the Law of Fire and Life Insurance: With an Appendix containing Forms, Tables, &c.* (Boston: Little, Brown, 1854), 45, paraphrasing the opinion in *Lane v. Maine Mutual Fire Insurance Company*, 3 Fairfield 44, 47 (1835); Salinger, “Spaces Inside and Outside,” 1-31; Baranoff, “Shaped by Risk,” 35-38; Baltimore Equitable Society, “Deed of Settlement,” preamble. On exclusion and insurance, see Carol Weisbrod, “Insurance and the Utopian Ideal,” *Connecticut Insurance Law Journal*, 6 (1999-2000): 397-398.

<sup>11</sup> *Pennsylvania Gazette*, Jan. 12, 1780, quoted in Fowler, *History of Insurance in Philadelphia*, 301; *Deed of Settlement of the Mutual Assurance Company*, 12-13.

<sup>12</sup> Chap. 576, “An Act for incorporating the society, known by the name and style of The Philadelphia Contributionship, for the insuring of houses from loss by fire, to ratify and confirm the articles of

Fourth, the Philadelphia Contributionship came to a very early realization that the security of their funds required an accumulation of capital. In its first years, the treasurer was obliged to carry separate accounts for every member, and interest was allowed to each on his or her deposits, a proportion of the expenses charged, and the balance settled at the expiration of the policy. While this plan was in effect, Binney noted in 1852, “the Company was in effect a dividend-paying company, the dividend being apportioned and paid periodically, and there being no capital and security for losses beyond the actual deposits and the interest not divided, except the guaranty in one event of a further payment of fifty per cent. of each member’s deposit. It was a cardinal defect in the scheme.” The separate accounts were pooled by unanimous vote in 1763, to the relief of the cramped hand of the treasurer, and had soon accumulated to the extent that the Contributionship’s funds could withstand losses that earlier would have bankrupted it. The funds themselves were used to purchase bank stock and, for the Baltimore Equitable Society after the Revolution, the stock of the United States. Indeed, according to Dalit Baranoff, mutual insurance societies served a vital economic function, pooling capital and investing it at a time when capital was relatively scarce.<sup>13</sup>

Fifth, as was the case with most profit-seeking corporations, there was from the beginning a commitment to a democratic mode of decision making in these societies. Major decisions were made at annual meetings, which were previously announced and to be attended by all members, and the principle of majority rule was explicitly declared in

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agreement of the contributors, and to enable them to make suitable bye-laws, for the better management and prosecution of their said design,” *Acts of the General Assembly of Pennsylvania*, Feb. 20, 1768; Mary Elizabeth Ruwell, *Eighteenth-Century Capitalism: The Formation of American Marine Insurance Companies* (New York: Garland, 1993), 42, 53-54.

<sup>13</sup> Binney, *Centennial Meeting of the Philadelphia Contributionship*, 30-33; Bainbridge, *Biography of an Idea*, 54; Baltimore Equitable Society, “Deed of Settlement,” art. 26.

the deeds of settlement. Further, the breadth of the leadership made it fairly representative in its own right, with both Philadelphia and Baltimore naming twelve directors and several officers and the Mutual Assurance Company of New York even calling for the election of twenty-four directors. The Contributionship, though it often had a small turnout at its annual meetings, revealed a functioning democracy in the tree debates of the early 1780s. The initial 1781 decision was made by the unanimous vote of those members in attendance, and following a petition effort the question was posed again in 1784, with forty-nine members in attendance, four times as many as usual. The losers, seeking a way to keep their trees, convened that July, and made one last effort to persuade the Contributionship majority, giving notice that they had two months to amend the rule before a schism took place. That September, as the Contributionship stood firm, the Green Tree was formed. Although the interests of the minority, in this case, were ultimately preserved only by withdrawal, the repeated efforts to solve the problem by means of persuasion evince a commitment to democratic means of conflict resolution.<sup>14</sup>

Mutual insurance was being adapted by experience and by changing social circumstances by the early 1790s, and the coming decades would pose new questions and demand new answers. Looking back in the mid-nineteenth century, Joseph Story noted that “the whole law of Insurance is scarcely a century old; and more than half of its most important principles and distinctions have been created within the last fifty years.” For

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<sup>14</sup> Philadelphia Contributionship, *Deed of Settlement*, art. 2; Baltimore Equitable Society, “Deed of Settlement,” art. 2; *Deed of Settlement of the Mutual Assurance Company*, 4-5; Anthony N. B. Garvan et al., eds., *The Architectural Surveys, 1784-1794*, Mutual Assurance Company Papers, vol. 1 (Philadelphia: Mutual Assurance Company, 1976), xiv. From this time, as competition became a feature in American insurance, companies began to declare that, if a member purchased insurance on the same property with another institution, his policy was void. See the Apr. 9, 1787, bylaw of the Contributionship (*Deed of Settlement*, 8) and the Baltimore Equitable Society, “Deed of Settlement,” art. 34; *Deed of Settlement of the Mutual Assurance Company*, art. 28.

mutual insurance societies in particular, there were principles and distinctions left only hazily understood as the eighteenth century came to a close. What limits were there on the ways in which these groups could change to meet new circumstances, formed as they were by individual contracts of indemnity but dedicated to principles of majority rule and equitable burdens? What does the commitment to *mutual* insurance mean, and who can enforce that meaning? The rights, remedies, and procedures found at law and in courts of equity gave a particular shape and cast to the moments of conflict that began to provide some answers to longstanding uncertainties and unforeseen questions. In the end, the ways in which Americans in the early national era perceived the correlative rights and obligations of membership, and how they defined such things as consent and mutual aid, guided the course that jurists and legislators took as they grappled with the particular challenges posed by mutual insurance.<sup>15</sup>

#### The Mutual Assurance Society of Virginia

In 1794, the same year that witnessed the founding of the Baltimore Equitable Society and the nation's first joint-stock fire insurance company, the Mutual Assurance Society against Fire on Buildings of the State of Virginia was formed. Unlike the other mutuals, this incorporated association endeavored to offer insurance to the entire commonwealth of Virginia, not a single city. Also unlike the others, it was in its internal organization not a direct derivative of the Philadelphia Contributionship. It was instead based on a plan proposed by a Prussian immigrant named William Ast and modified by

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<sup>15</sup> Joseph Story, *Commentaries on Equity and Jurisprudence: As Administered in England and America*, 3d ed., 2 vols. (Boston: Little, Brown, 1843), 1:23.

some of the leading lawyers of Virginia. From the start, however, participants in this effort at mutual insurance found themselves confronted with unanticipated burdens and a scheme of organization that one judge later insisted had “not been carried into effect, with an ability proportioned to the benevolence of the design.” Though many undoubtedly were spared from poverty by the Mutual Assurance Society when fire destroyed their insured property, there were others, such as Stafford Parker, who regretted ever having become involved with the association. The imperfections in the plan of organization made conflicts between individual members and the society inevitable, prompting explicit articulations of the very meaning of voluntary membership and the rights and duties that ought to accompany such a commitment. Concurrent developments in Massachusetts, with the formation of the Massachusetts Mutual Fire Insurance Company in 1797 and its own set of legal challenges, offer a further perspective from which to examine the evolution of the member-to-society relationship as plans of mutual insurance matured in the early American republic.<sup>16</sup>

William Frederick Ast was only in his late twenties when he began to work to establish a mutual insurance association in his adopted state of Virginia, his ambition untempered by age. He unsuccessfully petitioned Congress that same year to establish mutual insurance companies “in every State in the Union, under the authority of the Government of the United States,” proposing that “an additional tie or attachment would thereby be created from every individual whose property may be insured, to the Government.” He was never shy about declaring the brilliance of his plan, and he sought

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<sup>16</sup> Chap. 26, “An Act for Establishing a Mutual Assurance Society against Fire on Buildings in this State,” Dec. 22, 1794, *Acts Passed at a General Assembly of the Commonwealth of Virginia* (Richmond, Va.: Augustine Davis, 1795); Henry St. George Tucker, writing in *Mutual Assurance Society v. Stone*, 30 Va. 218, 230 (1831); chap. 67, “An Act Incorporating the Massachusetts Mutual Fire Insurance Company,” *Acts and Resolves of Massachusetts, 1796-97*, 456-459.



from the legislature of Virginia “for his trouble in suggesting forming & publishing the said Plan” an annual payment out of the Society’s funds of “one Cent for each hundred Dollars that may be insured,” which he received when the plan was adopted on December 22, 1794.<sup>17</sup>

Ast and those with whom he worked to establish the Virginia society remained hopeful through the first several years of the company that more and more citizens would join “one of the best institutions existing, the only object of which is to succour the unfortunate,” thereby making the risks and potential costs miniscule for each individual member. As Ast noted in an 1802 publication that listed all the members of the Mutual Assurance Society and the amounts of their insured property—a list that, impressively enough, began with Thomas Jefferson, James Madison, John Marshall, and Bushrod Washington—“It is pleasing to see, that the number is daily increasing, and particularly from the country, so that we come every day nigher to that desirable end of a General Insurance.” Ast made it a point to inform everyone, members and nonmembers alike, why all Virginia property owners should participate: “It is a great pity that the system of Mutual Insurance is, for want of being more examined into, not better understood,” he told members in a printed letter. “If it was generally understood, and the people would all

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<sup>17</sup> *Journal of the House of Representatives of the United States, being the First Session of the Third Congress...*, vol. 2 (Washington, D.C.: Gales and Seaton, 1826), 49; Walter Lowrie and Walter S. Franklin, eds., *American State Papers: Documents, Legislative and Executive, of the Congress of the United States...*, vol. 1 (Washington, D.C.: Gales and Seaton, 1834), no. 45, “Insurance against Loss by Fire,” 77; “Memorial of Wm. F. Ast and of sundry inhabitants of the City of Richmond,” in Charles T. Cullen and Herbert A. Johnson, eds., *The Papers of John Marshall*, vol. 2 (Chapel Hill: University of North Carolina Press, 1977), 296-297. Ast’s age is determined from the notice in *Richmond Enquirer*, Sept. 26, 1807: “Departed this life on Sunday the 20<sup>th</sup> inst. after a few hours’ illness, William F. Ast, Esq., principal agent for the Mutual Assurance Society vs. fire, in the 41<sup>st</sup> year of his age.” Perhaps the most quoted description of Ast is the one by Samuel Mordecai, who in the 1850s remembered him as “a small, shrivelled, wizen-faced man, who looked as if he was a descendant of the mother of vinegar.” [Samuel Mordecai], *Richmond in By-gone Days: Being Reminiscences of an Old Citizen* (Richmond, Va.: George M. West, 1856), 253.

insure, there is no question but one premium would insure the houses situated in the country forever: therefore every one ought to lend an assisting hand to make it general.”<sup>18</sup>

Virginia’s General Assembly took great pains to ensure that the Mutual Assurance Society would be on a solid footing before it began collecting premiums, the initial payments that served as the consideration for the insurance contract and that, in these early mutuals, initially constituted the entirety of the capital stock. They required subscriptions for three million dollars’ worth of property before the company could begin operation. Amazingly, this took only a year, and on December 17, 1795, a number of men gathered at the Capitol to formally organize the Mutual Assurance Society. At their request, an explanatory act was passed by the legislature a few days later to allow voting by proxy at the general meetings and to define a quorum as comprising delegates representing either a majority of individual subscribers or a majority of property insured.<sup>19</sup> That made it possible for about twenty men, two representing only themselves but others representing dozens (two proxies, Thomas Newton of Norfolk and Ludwell

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<sup>18</sup> Form letter from William F. Ast to Henry Beatty, Sept. 26, 1796, in Mutual Assurance Society papers, 1796-1821, Virginia Historical Society; *Statement of the Subscribers and Members: Agreeable to Their Declarations for Insurance which are Filed and Recorded in the General Office of the Said Society* (Richmond, Va.: n.p., 1802); W. F. Ast to Samuel Moody, June 8, 1807, Moody Family Papers, Virginia Historical Society.

<sup>19</sup> A majority of property convened and amended the society’s constitution in 1796 (see “Constitution, Laws, Regulations, and Rules of the Mutual Assurance Society...Copied from the Journals of General Meetings,” 16, Robert Anderson Papers, John D. Rockefeller, Jr., Library, Colonial Williamsburg Foundation). On worries that, technically speaking, the Mutual Assurance Society may not have been organized by a “majority” of subscribers, see William Dandridge to Andrew Dunscomb (cashier general), n.d., 1799, Brock Collection. In 1800, a decision was made at the general meeting to allow the senator or delegate from members’ districts to serve as the proxy unless another had been specially appointed. Chap. 15, “An Act to amend the several acts passed for the establishment of the mutual assurance society against fire on buildings in the state of Virginia,” Jan. 23, 1800, in Samuel Shepherd, ed., *The Statutes at Large of Virginia, from October Session 1792, to December Session 1806, Inclusive...*, 3 vols. (1835; rpt., New York: AMS Press, 1970), 2:210.

Lee of Alexandria, cast more than 40 percent of the 450 votes), to approve a constitution, elect officers, and set William Ast's experiment in motion.<sup>20</sup>

William Foushee, mayor of Richmond and already president of the James River Company, was elected to the presidency, and Ast served as principal agent, the position of more practical, daily importance. There were some elaborate provisions to serve as internal checks on potential abuse, including the purchase of a lockbox to hold the funds and stocks of the company that required four keys to open, each to be held by a different officer, as well as requirements that policies and payments be signed and countersigned by various officers.<sup>21</sup>

The internal bureaucracy, however, was largely irrelevant to the crises that the Mutual Assurance Society would face in the first decade of the nineteenth century. Those challenges would center on precisely how the enforceable rights and duties of members were defined. As people joined the association, subscribing to a policy and reading their complimentary copy of the constitution, rules, and regulations of the society, they became entitled to certain benefits and assumed certain obligations. The central duty, of course, was payment of assessments when losses by fire caused a shortfall, and to this end a lien was placed on the insured property as security for that payment. A unique feature of their constitution—one that perpetually caused problems and posed interpretive

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<sup>20</sup> Chap. 41, "An Act to explain an act, intituled 'An act for establishing a mutual assurance society against fire on buildings in this state,'" Dec. 23, 1795, in Shepherd, ed., *Statutes at Large*, 1:405-406; Richard Love, *Founded upon Benevolence: A Bicentennial History of the Mutual Assurance Society of Virginia* (Richmond, Va.: Valentine, 1994), 5; "Constitution, Laws, Regulations, and Rules of the Mutual Assurance Society... Copied from the Journals of General Meetings," Robert Anderson Papers, John D. Rockefeller, Jr., Library, Colonial Williamsburg Foundation; John B. Danforth and Herbert A. Claiborne, *Historical Sketch of the Mutual Assurance Society of Virginia, Richmond, Va.: From Its Organization in 1794 to 1879* (Richmond, Va.: Wm. Ellis Jones, 1879), 3-4.

<sup>21</sup> "Constitution, Laws, Regulations, and Rules," 14-15, Anderson Papers; Love, *Founded upon Benevolence*, 7.

challenges for Virginia’s jurists—was that the nature of that lien meant that membership could be imposed involuntarily if that property was sold. For property insured remained insured and liable for assessment in the hands of “heirs, executors, administrators and assigns.” Following the examination of that issue as it developed in Virginia and federal courts in the early nineteenth century, the somewhat different experiences of the first Massachusetts mutual insurance company will be set next to the legal framework being worked out in Virginia. Finally, I will examine the Mutual Assurance Society’s greatest crisis, one that came about when the association substantially (and, to some, very unequally) adjusted the demands it would make of some of its members at the expense of others. Such redefinitions of the burdens of membership would never have been necessary but for the horrific fires in Norfolk and Fredericksburg in 1799 and again in Norfolk in 1804. The heat of those conflagrations found its way into Virginia’s courtrooms as the immature jurisprudence of fire insurance crossed paths with a developing common law of membership.<sup>22</sup>

Even before the devastation of Norfolk in 1799, the Mutual Assurance Society sought and received a new authority from the General Assembly to collect its monies by motion, a proceeding requiring only ten days’ notice, rather than the usual form of a suit. As Henry St. George Tucker lectured his students somewhat later, these sorts of “summary proceedings” have from time to time been “authorised by our laws in certain cases, deemed by the legislature particularly entitled to speedy redress,” such as a client’s claim against an attorney for money collected. But Thomas Jefferson, for one, instantly saw the potential problems of combining the power to proceed by motion with a lien on

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<sup>22</sup> “Act for Establishing a Mutual Assurance Society,” Dec. 22, 1794, chap. 26, art. 6. For accounts of losses broken down by year, see Samuel Greenhow, “To the Editor of the Enquirer,” *Richmond Enquirer*, Oct. 27, 1809.

the full value of the property insured. When the vice president had gathered with several of his neighbors at Monticello to appraise his property, a step required to join the Mutual Assurance Society, he learned of this new statute. “We all declared off from that moment,” he wrote to Ast. “We considered our houses as in ten times greater danger from such an establishment than from fire.”<sup>23</sup>

Jefferson’s deeply held belief that the law should never work to the prejudice of the independent yeoman farmer lay at the root of his anxiety. “To make a farmer’s house liable to be sold at short hand when his resources come in but once a year,” he wrote, “is to lay it under much greater danger than that of fire.” He also noted the absence of any provision for withdrawal, which was rectified at the very next general meeting (though there is no reason to think that Jefferson’s opinion was a deciding factor). Ast responded to Jefferson’s worries in a letter several months later. He noted the salutary changes that had been passed regarding exit, but he defended the summary proceeding. “To succour the unfortunate ought, I think go before any other payment upon this ground the fathers of the Land have granted a Summary process—as each has in general only a small Sum to pay, which is proportioned to his Riches, they can easily raise it: if they are willing—the Law is only for the hard hearted the tender heart will always come forward of his own accord in so laudable a Cause.” He also made sure to correct Jefferson’s beliefs on the low risks of fire in the countryside, referring to the lack of water and firefighting equipment and reminding him of “a certain Class of people who undergo often a severe

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<sup>23</sup> Chap. 30, “An Act to amend the act, for establishing a mutual assurance society against fire on buildings in this state,” Jan. 12, 1799, in Shepherd, ed., *Statutes at Large*, 2:160-161; Henry St. George Tucker, *Commentaries on the Laws of Virginia: Comprising the Substance of a Course of Lectures Delivered to the Winchester Law School*, 2 vols. (Winchester, Va.: Republican, 1837), 2:242; Jefferson to Ast, Sept. 17, 1799, in Oberg, ed., *Papers of Thomas Jefferson*, 31:186-188.

discipline” and occasionally “do a great deal of Mischief.” Jefferson insured Monticello.<sup>24</sup>

In a manner that reveals a great deal about the post-Revolutionary tendencies in voluntary affiliation, establishing a means of exit for those who no longer wished to be involved with the Mutual Assurance Society, as Jefferson saw, was not something that seems to have occurred to its initial framers. The organization had begun operation—with charter, by-laws, and constitution—without any prescribed mode of withdrawal for its members. The first such provision for exit came in 1800, six years after the Society was formed, and allowed only for egress at the end of each calendar year with proper notice. Four years later, an amendment to the charter, legislatively approved, allowed for withdrawal upon six weeks’ notice. Five years after that, in 1809, the Society allowed immediate withdrawal upon receipt of written notice. The letter, following a prescribed form, of one exiting member in 1821 evokes the thrust of that trend, in which Abijah Janney did “hereby require you to issue to me such a discharge as to the said assurance as I am by the Rules and Regulations of the Society aforesaid, entitled to demand and receive.” In all of this, the Mutual Assurance Society typifies the progression of voluntary associations in the late eighteenth and early nineteenth centuries toward a greater ease of exit, usually defined in its own constitutional article.<sup>25</sup>

It was a good thing that a means of withdrawal became a part of the institution’s fundamental law, for there were many in the first decade of the nineteenth century who

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<sup>24</sup> Jefferson to Ast, Sept. 17, 1799, in Oberg, ed., *Papers of Thomas Jefferson*, 31:187-188; William Frederick Ast to Jefferson, May 10, 1800, in Oberg, ed., *Papers of Thomas Jefferson*, 31: 571-572.

<sup>25</sup> “Constitution, Laws, Regulations, and Rules,” art. 17, passed Jan. 4, 1800, Anderson Papers; “An Act for Carrying into Execution the Constitution of the Mutual Assurance Society...,” passed January 29, 1805, in Shepherd, ed., *Statutes at Large of Virginia*, 3:145; *Constitution, Rules, and Regulations of the Mutual Assurance Society...* (Richmond, 1810), art. 10, sec. 11.

took up the offer, including some who had been thrust involuntarily into the ranks of this supposedly voluntary association. Though it was not an aspect of the society's constitution that troubled Jefferson (without a close reading of the incorporating act, it would have escaped his notice), the prospect of Virginians' becoming members of the Mutual Assurance Society unawares was apparent to the company's organizers from the very beginning. "Purchasers and mortgagers of any property insured by virtue of this act," it was declared in the charter, would also become purchasers of the insurance and, thus, become members of the society. Those transferring property "shall at the time apprise the purchaser" and endorse the policy to the new owner. That notification was important, because the "purchaser or mortgagee shall be considered as a subscriber in the room of the original." There is some evidence that the prospect of involuntary membership was not cause for serious concern in the earliest years of the company. Thomas Rootes wrote to Ast after taking over a property "for some gent[leman] in England" because he believed the house to be insured but was unsure whether the premium had been paid, "and if not, what the amount is: that preparation may be made to do what is needful." Another man wrote to Ast to describe the property and find out whether it was insured. Neither man seemed particularly disturbed by the prospect that they or those they represented might have joined the Mutual Assurance Society unwittingly. The society, after all, was largely composed of people who had every hope, in these early years, that the initial payment of the premium would be enough to insure their property forever.<sup>26</sup>

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<sup>26</sup> "Act for Establishing a Mutual Assurance Society," Dec. 22, 1794, chap. 26, art. 8; Thomas A. Rootes to William Frederick Ast, Sept. 1, 1799, and William Pasteur to Ast, Aug. 29, 1802, both in Brock Collection.

It became necessary, however, for the company to assess its members to cover substantial losses, such as the almost sixty thousand dollars paid out in 1799 (the losses of the previous three years had come to less than fifteen hundred dollars all told). Some Virginians then began to feel the effects of the decision to couple the transfer of insured property with a transfer of membership. Anna Byrd was among the first to challenge the premise that such a transfer was valid and enforceable without any notification or a formal transfer of the policy. A daughter of Robert Munford III who had married into the formerly illustrious Byrd family with her marriage to Otway Byrd in 1781, Anna Byrd entered the nineteenth century as a struggling widow. She hoped to take in boarders in the large Williamsburg house she purchased from Dr. Philip Barraud, an insuring member of the Mutual Assurance Society since its first year of operation. Some years later, when a lawyer for the society demanded that she pay a quota assessed in 1805, she contended that, because Barraud had never apprised her of the insurance, she was not liable for anything to an association of which she had nothing to do. She brought the matter to the circuit court of James City and, ultimately, to Virginia's highest court. There, she learned that the judges saw the requirement of notification as nothing more than a piece of advice to the original subscriber. Barraud's failing to tell Byrd did not in any way affect the right of the society to treat her as a member and to assess her accordingly.<sup>27</sup>

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<sup>27</sup> Greenow, "To the Editor," *Richmond Enquirer*, Oct. 27, 1809; *Mutual Assurance Society v. Anna Byrd*, 3 Va. 170 (1810); Marion Tinling, ed., *The Correspondence of the Three William Byrds of Westover, Virginia, 1684-1776*, 2 vols. (Charlottesville, Va.: Virginia Historical Society, 1977), 2:806n.; William Munford to St. George Tucker, Dec. 22, 1805, Tucker-Coleman Papers, Swem Library, College of William and Mary. For a brief biographical sketch of Barraud, a doctor in Norfolk, see William Cabell Moore, "Gen. John Hartwell Cocke of Breemo 1780-1866: A Brief Biography and Genealogical Review with a Short History of Old Breemo," *William and Mary College Quarterly Historical Magazine*, 2d ser., 13 (1933): 154n.36. The house still stands in Colonial Williamsburg.



A similar case, decided earlier that year, differed in only one particular that helps to explain the court's rationale. Seth Barton had purchased the estate of John James Maund after Maund had declared for insurance but before he had paid the premiums. Barton was then pursued by the cashier of the Mutual Assurance Society, William Price, for the unpaid premiums plus interest, totaling a weighty \$117.47. Barton's initial defense at the county court in Spottsylvania, a few years before the *Byrd* decision had been handed down, was that Maund had never informed him of the insurance. He lost. On appeal at the district level, in Fredericksburg, Barton's defense took a new tack, one that prevailed and brought the matter of *Greenhow v. Barton* to the Supreme Court of Appeals. He argued that, because Maund had never paid the premiums that were required to perfect the insurance—a step necessary for him to become a member in the first place, Barton argued—no assignee of his property could rightfully be deemed a member in his place. The legislature had in 1799 authorized the Mutual Assurance Society to proceed by motion against subscribers, but in the high court Spencer Roane was unwilling to extend that by construction to include the purchasers of property from those who had never paid into the society's funds: "a man is not to be ousted of his ordinary and constitutional mode of trial, unless (at least) it be by an express legislative declaration, or by a constructive declaration so strong as to leave no doubt of the meaning of the legislature, that another remedy should be substituted." Of course, as Judge William Fleming noted in his opinion disagreeing with Roane, the act allowed any person to have a jury trial by request, a right Barton had waived.<sup>28</sup>

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<sup>28</sup> *Greenhow, Principal Agent of the Mutual Assurance Society v. Barton*, 15 Va. 590 (1810); *Barton v. Price, Cashier*, bill of exceptions from Spottsylvania District Court, Sept. 16, 1805, Fredericksburg Circuit Court, Historic Court Records, Sharron S. Mitchell, clerk; John James Maund to William Frederick Ast,

The bulk of the disagreement between the two judges was over how to interpret the terms “subscriber” and “member” in the incorporating act and those amending it, and the inconsistencies in how the words had been used left plenty of room for each to make a compelling case that Maund or Barton did or did not fit the bill. Each judge fretted over the consequences of the other’s interpretation: for Roane, this was yet another challenge to the vital institution of trial by jury; for Fleming, a too strict definition would mean that “the frequent sales, or transfers of assured property would greatly tend to abolish the institution altogether.” In the end, their split and St. George Tucker’s absence from the court meant that the district court’s decision stood. Barton was not liable.<sup>29</sup>

The Supreme Court of the United States participated in similar exercises in statutory interpretation and, consequently, the debates on the meanings and transferability of voluntary membership on two occasions, both arising out of Alexandria’s excision from Virginia with the creation of the District of Columbia. In 1816, a bill in chancery had been brought to the circuit court for the District, seeking payment of assessments out of the estate of a man who had purchased property owned and insured by a Mutual Assurance Society member. Justice William Johnson, a Democratic Republican from South Carolina who had been Jefferson’s first appointee and who wrote for the Court every time a mutual insurance case came before it, was faced with the task of interpreting the power of a Virginia institution over people now outside of its borders.<sup>30</sup>

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Oct. 24, 1801, Brock Collection; “Letters of John James Maund: 1790-1802,” *William and Mary College Quarterly Historical Magazine*, 20 (1912): 272-280.

<sup>29</sup> *Greenhow v. Barton*, 15 Va. 590, 594.

<sup>30</sup> *Mutual Assurance Society v. Watt’s Executor*, 14 U.S. 279 (1816); Donald G. Morgan, *Justice William Johnson, the First Dissenter: The Career and Constitutional Philosophy of a Jeffersonian Judge* (Columbia: University of South Carolina Press, 1954); Oliver Schroeder, Jr., “The Life and Judicial Work of Justice William Johnson, Jr.,” *University of Pennsylvania Law Review*, 95 (1946-1947): 164-201, 344-386.

He wrote for a Court confronted with the same clauses of the incorporating act that had divided Roane and Fleming, and his decision in favor of the Mutual Assurance Society reveals the depth of the company's reliance on the sovereign power of the state to not only enforce, but also to define at a basic level, the bonds of membership.

it must be admitted, that whatever may be the strict construction of the 8th section and its operation in the state of Virginia, so far as it is intended to force on the purchaser a personal character or liability, it could have no operation in the town of Alexandria, at the date of this transfer. The laws of Virginia had then ceased to be the laws of Alexandria, and *it could only be under an actually existing law, operating at the time of the transfer, that the character of membership in the Virginia company would be forced upon the purchaser*. . . . The transfer, therefore, of the district of Alexandria to the national government, put an end to the operation of the 8th section, so far as it operated by mere force of law, independent of his own consent, to fasten on the purchaser the characteristics of a member. But it is otherwise with regard to the soil. [emphasis added]

In the end, Johnson and a majority decided (over the silent dissents of Joseph Story and Henry Brockholst Livingston) that the lien the Mutual Assurance Society had on the property of Watt remained intact and enforceable even though the “character of membership” could only be imposed on an unwitting purchaser by sovereign act—and Virginia was no longer sovereign there. A lien that “had its origin in contract, although enforced by statute,” he noted in the second case, must be enforced despite a change in sovereignty.<sup>31</sup>

Twice more were Virginia courts called on to address the challenges of interpreting and enforcing statutes that, from one point of view, conferred the burdens of a voluntary membership on people involuntarily. The law was largely settled by the time

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<sup>31</sup> *Mutual Assurance Society v. Watt's Executor*, 14 U.S. 279, 281-282 (1816); *Mutual Assurance Society v. Faxon et al.*, 19 U.S. 606 (1821). In the latter case, which centered on an unpaid premium and was similar to *Greenhow v. Barton*, Johnson interpreted the incorporation statute much as Spencer Roane had and denied that the society had a valid claim. The society itself had conditioned insurance on the payment of a premium, and prior to that payment there can be no lien inferred (“if it were possible ever to infer a lien,” Johnson noted parenthetically).

these cases reached the state's high court in 1827 and 1831, and yet a divergence in how the two cases were decided highlights an intricate interweaving of the notions of state sovereignty and of contract as foundations for an ascription of the status of member onto unwitting individuals. Virginia legislators had foreseen "that the property insured would be constantly passing from hand to hand," wrote Judge Dabney Carr, and thus made a purchaser or mortgagee "to all intents and purposes, a member of the Corporation, entitled to all the advantages, and subject to all the burthens, of every other member. The right of the Legislature to do this, has not been denied; and it will be seen at a glance, that without such provision, the Society could never have gotten on." From that perspective, the sovereign power of the state to address a potential roadblock to a cooperative endeavor that had obvious social benefits was decisive. Both the letter of the act and, Carr observed, its spirit brought assignees into a "mutual assurance and mutual risque" on the same footing with all the other members.<sup>32</sup>

Following the reorganization of the state's courts in 1831, Henry St. George Tucker joined the Virginia high court as its president, and he was soon called upon to voice his opinion on these matters when the Mutual Assurance Society sought to collect from Daniel Stone. The case was particularly challenging, involving the property of an insured member of the Mutual Assurance Society that changed hands more than once, without any notification of its engagement with the society, and to which Stone now had only an equitable title. For that reason, the case arrived as a bill in equity, and Tucker and the other judges were being asked "whether an assignee without notice, will be protected in equity against the claim of this assurance society?" The chancellor for Williamsburg

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<sup>32</sup> *Stratton v. Mutual Assurance Society*, 27 Va. 22, 24 (1827).

had emphatically answered yes, on the grounds that years of unpaid monies meant Stone could not even have collected from the society if his house had burned down. Writing to overturn that decree, Carr (who remained on the court, and remained a good friend to the Mutual Assurance Society) and Tucker provide the clearest summaries yet of the evolving notions of the bonds of membership in Virginia and the role of state authority in defining and maintaining those interpersonal ties.<sup>33</sup>

Carr continued to stress the authority of the state to facilitate the continued claims of the Mutual Assurance Society upon property transferred with or without notice. In 1831, he insisted that the enforcement of those claims empowered rather than inconvenienced the people of Virginia. “Every man has a right to bind his property by a lien, a mortgage, for instance, which when perfected according to law, follows it into all hands.” At its core, however, it was Carr’s fear of an interpretation that allowed transfers of property to immediately sever all connections with the Mutual Assurance Society—a construction that “would go far to destroy, at a blow, the whole institution”—that impelled him to reverse the chancellor’s decree.<sup>34</sup>

When Tucker delivered his opinion, one that concurred with Carr’s conclusion but not with his reasoning, he began with a profound insult.

the plan upon which the simple idea of an association of individuals for their mutual insurance against fire, was to be carried into effect, was formed, suggested and published, by Mr. Ast; and though he may have had the aid of some professional gentleman to throw it into the form of a law, its clumsy and inartificial execution can leave little doubt of its real parentage. Drawn without system, and expressed, in many instances, in terms wholly inappropriate, it is not wonderful, that it has been a fruitful source of litigation; and so deeply imbued was the first act with these defects, that all the subsequent legislation seems to have been marked by the original vice of its constitution.

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<sup>33</sup> *Mutual Assurance Society v. Stone and Another*, 30 Va. 218, 236-237 (1831).

<sup>34</sup> *Ibid.*, 228-229.

Judges had repeatedly been called upon to interpret the agreements that formed this association “with a liberality which will attain the real objects of the contracting parties, instead of a critical rigor which would defeat their most obvious intentions.” In this case, Stone was the unfortunate sufferer of a legal lien on the property, one created statutorily without (much) equivocation, which would be enforced at equity as well as at law. There was blame to go around, Tucker insisted. Any purchaser should inquire about the existence of a lien on the property. And the judge was baffled that the Mutual Assurance Society did not affix, “as is usual with insurance companies, some emblem of the insurance on some conspicuous part of the tenement insured.” In the final analysis, Tucker was regretful about deciding against Stone, a man who had for years been paying to insure that same property with the Eagle Fire Insurance Company of New York, but “it is impossible” that the Mutual Assurance Society “can justly be deprived of its lien.”<sup>35</sup>

Both Carr and Tucker had long pasts with the Mutual Assurance Society. In fact, it was likely that virtually every Virginia lawyer of their generation had had some dealings with an association that was such a “fruitful source of litigation.” The surviving records of Fredericksburg, for instance, reveal how frequently lawyers for the society brought motions and suits against delinquent members. Carr had once held that role, representing the society in the first decade of the nineteenth century in the courts of Charlottesville and its surrounding areas. His diligence comes through in his correspondence with the home office, reporting to Ast of successful motions against delinquents, executions issued, and many subscribers who “paid up and thereby

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<sup>35</sup> Ibid., 230, 239; *American Fire Marks: The Insurance Company of North America Collection* (Philadelphia: Insurance Company of North America, 1933); Alwin E. Bulau, *Footprints of Assurance* (New York: Macmillan Company, 1953).

prevented motions.” He even prosecuted a motion for unpaid fees against James Monroe while he served as the United States minister to France, though the judge refused to issue the execution.<sup>36</sup>

How different were Henry St. George Tucker’s early experiences with the Mutual Assurance Society. In 1817, while serving in Congress, he wrote to the company on behalf of a family who was being pursued for unpaid assessments although the legal guardian of the children had, on the death of the head of household, given notice and withdrawn. The withdrawal was apparently ignored on a technicality, and assessments and interest continued to pile up. Tucker wrote that the Hunter family would happily pay what was due up to the point of their withdrawal if the Mutual Assurance Society would drop the charade and acknowledge their genuine attempt to sever the connection. “I beg leave to assure you of the regret I feel at being induced by a sense of duty to resist the claims of a Society established for such beneficent purposes as that to which you are the agent,” Tucker wrote to James Rawlings, but he was frustrated by the cavils and legal maneuvers of the society. Perhaps with “greater liberality” you might “restore it to the popularity which it enjoyed in its establishment.” Tucker was clearly no enemy of the Mutual Assurance Society. He joined in 1827 on his move to Winchester, and his father had been a member, insuring his home on Williamsburg’s palace green, from 1796 on. But as a lawyer and judge, Tucker met with aggravation when he confronted the society,

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<sup>36</sup> Dabney Carr to William Ast, May 12, 1804, Brock Collection. On Carr’s early career, including his legal education with Jefferson and with William Wirt, who also worked for the Mutual Assurance Society until 1804, see Anya Jabour, “Male Friendship and Masculinity in the Early National South: William Wirt and His Friends,” *Journal of the Early Republic*, 20 (2000): 83-111; Dumas Malone, *Jefferson and His Time*, 6 vols. (Boston: Little, Brown, 1948-1981), 3:176, 6:153, 225; John Randolph Tucker, “Reminiscences of Virginia’s Judges and Jurists,” *Virginia Law Register*, 1 (1895): 4, 7. Much valuable correspondence between Carr and Wirt is collected in John Pendleton Kennedy, *Memoirs of the Life of William Wirt*, 2 vols. (Philadelphia: Lea and Blanchard, 1849).

an irritation that came through when he described the unfortunate circumstances of Daniel Stone.<sup>37</sup>

Legal controversies in Virginia over questions of membership in a mutual fire insurance association were not without parallels in other states. After a fire in 1825, for instance, the Baltimore Equitable Society found itself faced with a series of actions brought against them in the Baltimore County Court that “excited great interest” in the city. John McEldery, a prosperous merchant who had insured his property with the society from its earliest days, filed suit when an insured home was rebuilt by the company despite McEldery’s explicit request that he would rather have the money. Several other citizens brought precisely the same complaint. The court determined that, according to the deed of settlement, the society had the option to pay or to rebuild, at its discretion. The matter at law was a simple one, to be determined by the articles of agreement between the members. The jury, in every instance but one, however, did what it could for the insuring members by finding that homes were “insufficiently repaired” and assessing substantial monetary damages. In Maryland, as in Virginia, legal institutions arbitrated internal disputes in the mutual insurance societies, primarily by interpretation of the private association’s formational documents but with an eye to maintaining equitable relationships and fair dealings within the institutions.<sup>38</sup>

It was in Massachusetts, where after its 1798 incorporation the Massachusetts Mutual Fire Insurance Company began insuring homes, that some of the most intriguing

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<sup>37</sup> Henry St. George Tucker to James Rawlings, Apr. 17, 1817, Brock Collection. Jefferson’s opinion is a useful indicator of the status of these two judges, Tucker and Carr, among Virginia’s jurists: he approached first Tucker, then Philip Pendleton Barbour, then Carr as he tried to find a professor of law for the University of Virginia. All declined. See Malone, *Jefferson and His Time*, 6:423.

<sup>38</sup> *McEldery v. Baltimore Equitable Society*, Baltimore County Court, September term, 1825, in *Baltimore Patriot*, Jan. 28, 1826. On McEldery’s insurance with the Baltimore Equitable Society, which began with almost \$20,000 worth, spread over sixteen properties, see Baranoff, “Shaped by Risk,” 37-38.



parallels to and divergences from Virginia's experience can be found. Like the Mutual Assurance Society of Virginia but unlike every other mutual, the Boston-based company sought business outside of its home city and offered to insure "any Mansion-House or other building, within this Commonwealth." The Massachusetts legislature also demanded that the incorporators gather a massive sum in subscriptions (two million dollars, surpassed only by Virginia's call for three million) before it could begin operations. Both societies limited the insurance offered at four-fifths of the value of the property: all insurance companies took similar, but not identical, precautions to discourage arson or, at least, carelessness. The leaders of all such institutions founded in the eighteenth century came from among the most notable, elite men of their generation: such men as James Sullivan (attorney general and future governor), Moses Hays (a well-known underwriter), and Paul Revere helped lead the effort in Boston. And the potential for assessments above the initial payments, capped in Massachusetts at two dollars for every dollar originally paid, was a condition of membership. In most important particulars, the Massachusetts Mutual Fire Insurance Company was a mutual endeavor quite similar to those in other states. As it sought its first members, it defended its plan by noting how it had learned from the experiences of those societies of "the same nature" in England, New York, and Virginia.<sup>39</sup>

The Massachusetts company, however, differed from the Mutual Assurance Society in important ways. First, membership was to last for a term of years, as opposed

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<sup>39</sup> *Rules and Articles of the Massachusetts Mutual Fire Insurance Company* (Boston, 1798), arts. 1, 11; report of Andrew Cunningham, secretary, Massachusetts Mutual Fire Insurance Company, Jan. 20, 1799, quoted in Edward R. Hardy, *Reports of 1888-1900, with an Account of the Early Insurance Offices in Massachusetts, from 1724 to 1801*, Insurance Library Association (Boston: Frank Wood, 1901), 86; Osborne Howes, Jr., "The Rise and Progress of Insurance in Boston," in Justin Winsor, ed., *Memorial History of Boston*, vol. 4 (Boston: James R. Osgood, 1883), 183-184; *Massachusetts Mercury*, Mar. 7, 1800. The Mutual Assurance Company of New York was its chief influence.

to Virginia's open-ended insurance. Membership in the Mutual Assurance Society was to be perpetual, a person's withdrawal coming only with the sale or other assignment of the insured property or, after 1800, with formal notice according to the bylaws. The Virginians called for septennial revaluations of the property, but failure to have buildings revalued meant only that one's insurance was void, not that his or her membership and liability was. In Massachusetts, on the other hand, the term of membership was for seven years, expiring precisely at noon. In this, Virginia was the anomaly, though both Philadelphia offices would offer perpetual insurance, on a much different model, by 1810, allowing exit at the end of each seven years.<sup>40</sup>

That discrepancy in the duration of membership was related to another substantial difference: the composition of each association's capital and its means of tapping into the additional resources of the members. Each company always had some resources at hand—in Massachusetts, they were denominated its "absolute fund"—from which members' losses were to be paid. Whereas the capital stock of Virginia's institution comprised only the initial premiums and whatever profits came from its investment, the founders of the Massachusetts company opted for a much larger initial pooling of money. Each prospective member would pay not only a premium but also a sum four times that amount as a deposit, which, if unused during the seven years, would be refunded. Were the absolute fund to be depleted entirely, then and only then would the company seek further assessments from its members, to a previously set limit. There was no lien on the

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<sup>40</sup> *Rules and Articles of the Massachusetts Mutual Fire Insurance Company*, art. 12; Fowler, *History of Insurance in Philadelphia*, 313, 322-323; Bainbridge, *Biography of an Idea*, 57-58; Binney, *Centennial Meeting of the Philadelphia Contributionship*, 31-32; William M. Howard, "Fire Insurance Written under Perpetual Contracts," *Journal of the American Association of University Teachers of Insurance*, 23 (1956): 129-134; William M. Howard and Harry J. Solberg, "Perpetual Fire Insurance," *Journal of Finance*, 13 (1958): 70-79.

insured property. In short, the Massachusetts Mutual Fire Insurance Company asked for more up front, demanded less later. When more mutual insurance associations were formed in Massachusetts, such as the Norfolk Mutual and the Middlesex Mutual in the mid-1820s, deposit notes became a standard feature of premiums paid by new members, which made them liable for the sometimes substantial but clearly defined unpaid amount on those notes.<sup>41</sup>

One of the most perplexing legal issues regarding participation in mutual insurance societies centered on how to define and set limits to members' right of exit. The practical workings of the terms of entrance and exit in the state's first mutual were uncertain enough to wind up at issue in the Massachusetts Supreme Court in 1807. John Sullivan had insured his home for \$6,000 (with a premium of \$24 and a deposit of \$96) in 1799. A year later, he sold the house but remained living there as a mortgagee for several months before he assigned the mortgage as well and no longer had any connection to the property. Another two years passed. Then, Sullivan asked the Massachusetts Mutual Fire Insurance Company for his \$96 deposit, which they immediately refused to pay. He brought suit, for covenant broken, and the finest legal minds in the state were called on to argue and then to reargue the cause before the highest court and its new chief justice, Theophilus Parsons.

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<sup>41</sup> *Rules and Articles of the Massachusetts Mutual Fire Insurance Company*, arts. 11, 15; Edwin Merrick Dodd, *American Business Corporations until 1860: With Special Reference to Massachusetts* (Cambridge, Mass.: Harvard University Press, 1954), 222-223; Angell, *Treatise on the Law of Fire and Life Insurance*, 45, 45-47n.4; chap. 64, "An Act incorporating the Norfolk Mutual Fire Insurance Company," *Laws of the Commonwealth of Massachusetts, Passed by the General Court...* (Boston: True and Greene, 1824), 513-515 (this was the first mutual insurance company in Massachusetts to be given a specific, statutory lien on members' insured property [sec. 6]); chap. 141, "An Act to incorporate the Middlesex Mutual Fire Insurance Company," *Laws of the Commonwealth, Passed by the General Court...* (Boston: True and Greene, 1825), 220-228.

Technically at issue was article 19 in the association's bylaws, which specified that all deposit money "not demanded within one year, from the expiration of the policy or policies, shall be deemed as forfeited," but the larger question was how to define membership. The lawyers for the company insisted, rightly, that Sullivan's insurance was ended with the alienation of the property, but they went further to say that, without insurance, he was not a member. "A man by insuring his building becomes ipso facto a member of the corporation," they noted, and when Sullivan lost the necessary qualification of membership he had precisely one year to seek the return of his deposit. Sullivan's attorneys, however, who initially included Attorney General James Sullivan (a founding member of the mutual, now squaring off against it), had a much different reading. "Though by alienation the property ceased to operate as an insurance, yet the insured for other purposes continued a member of the company, entitled to benefits, and liable to burdens...and without a surrender of the policy, he would so continue for the whole seven years." When he gave up his interest in the insured property, he was entitled, by article 18, to demand the unused part of his deposit money, but he certainly need not. Parsons and his court were being asked to define when and how membership in the mutual insurance association could be ended. The bylaws, the incorporating act, and the course of events between Sullivan and the company were the materials with which the court formed its opinion, but lawyers and judges alike appear to have been working largely from analogy and legal principle as they tackle the first reported case involving mutual insurance (or fire insurance of any kind) in a New England court.<sup>42</sup>

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<sup>42</sup> *John L. Sullivan v. Massachusetts Mutual Fire Insurance Company*, 2 Mass. 318 (1807). James Sullivan's views on the nature of corporations and the authority of the state over them is explored in depth in Oscar Handlin and Mary Flug Handlin, *Commonwealth: A Study of the Role of Government in the American Economy: Massachusetts, 1774-1861*, rev. ed. (Cambridge, Mass: Belknap Press of Harvard

The company's lawyers piled on several arguments, each aimed in a different direction, to show that Sullivan could not "choose his own time" for withdrawal. At the core of their view was the simple idea that the association had only one object: "to insure mutually the buildings of the members of the company." Thus, once Sullivan lost the qualifications of membership, all of his rights also expired, "except that of receiving back so much of his deposit money as remained unappropriated, and this upon the express condition that it be demanded within a year." From their perspective, Sullivan was asking the court to abrogate a common law principle as well established as any, "that contracts cannot be waived or annulled without the consent of all the parties to them."<sup>43</sup>

Parsons was unmoved, and he unabashedly identified with the withdrawing member's point of view. The defense had presented a hypothetical argument that a member, if allowed to choose his own time to withdraw, could have special knowledge of fires or "that a hostile fleet is intending to destroy a town" and then withdraw to "leave his former associates to shift for themselves." Obviously, wrote Parsons, "for we know no motive to induce him to surrender at any time, but to guard against the consequences of future losses." As for whether Sullivan could recover his deposit, Parsons began, "his right must be derived from the act of incorporation of the company, and from their articles, both of which make a part of the case." A contract actually can be annulled by one party, if that contract "secure[s] to one of the parties a right to dissolve it without mutual consent." On the face of it, the bylaws, up through article 17 anyway, make

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University Press, 1969), esp. appendix D, 254-261. See also Dale A. Oesterle, "Formative Contributions to American Corporate Law by the Massachusetts Supreme Judicial Court from 1806 to 1810," in Russell K. Osgood, ed., *The History of the Law in Massachusetts: The Supreme Judicial Court, 1692-1992* (Boston: Supreme Judicial Court Historical Society, 1992).

<sup>43</sup> *Sullivan v. Massachusetts Mutual Fire Insurance Company*, 2 Mass. 318 (1807).

Sullivan “a member of the company for seven years, subject to all the burdens to which a member is liable...and no alienation of his property, although by it the company are discharged from all risk, could dissolve his connection.” But the framers, in article 18, had allowed an out. And if that withdrawal “could not be exercised but with the consent of the company,” it would be pointless: *any* contract can be dissolved by mutual consent, so “the construction of this article must be according to the natural import of the words; and the right to surrender the policy by the insured, on alienation, may be exercised by him at his election.” He declared that Sullivan “is therefore to receive” all money not put to legal use by the company for “purposes mentioned in the act and articles.”<sup>44</sup>

The *Sullivan* case and the bylaws on which it rested reveal a divergence in how these experiments in mutual insurance in Massachusetts and Virginia were crafted by their organizers and were molded by their legal environment. In both institutions, there was a constant tension between the need to maintain the bonds of membership (for a suffering member must have an *enforceable* right to collect from his or her fellows) and to make those ties loose enough that they did not dissuade people from joining and did not keep people attached and liable who ought not to be. The solution in Massachusetts, as Sullivan’s legal battle made patent, was twofold and largely followed the plan of older mutuals such as those in Philadelphia and Baltimore: first, to admit members for a finite period of time; second, to allow withdrawal whenever “the property insured, shall be alienated by death, sale, or by any other means.” They made special note of that provision for exit in their first advertisements, for it was apparent that few would relish the idea of

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<sup>44</sup> *Ibid.*, 326-329. The case, though not much cited in later insurance cases, established the definition of membership in a mutual insurance company for the authors of America’s first treatise on corporate law, Joseph K. Angell and Samuel Ames, in their *Treatise on the Law of Private Corporations, Aggregate* (1832; rpt., New York: Arno Press, 1972), 63.

remaining liable to pay for other's losses once they no longer had property to lose—and thus nothing to gain—at the time of that liability.<sup>45</sup>

In Virginia, as the unfortunate events in the lives of people such as Anna Byrd and Daniel Stone reveal, a different tack was taken to address that same problem. To prevent the burdens of membership from remaining on those who no longer had correlative rights, the Mutual Assurance Society and the General Assembly collaborated to form a legal apparatus—a lien, created by the act of joining—by which membership would follow the property. In a sense, they did not contemplate a society of mutual insurers so much as they saw the company as a pooling of mutually insured property. The Virginian organizers and those jurists and legislators that were called on to aid their project exhibited a strong worry that insured property would change hands far too often to make a mutual insurance project feasible without a lasting, mutual tie that attached to the land. The experience of agent Edward Tiffin in Charles Town in 1796 is telling. He wrote to William Ast that he had “called upon the different persons who first subscribed to give in their declarations,” but there had been “an almost general transfer of property in this place, and the new purchasers seem slow in coming into the Business.” Later that year, Tiffin abandoned the effort and moved to Ohio (where he quickly became one of the territory's leading men). William Fleming fourteen years later could not imagine the Mutual Assurance Society's survival without providing for some way that membership follow the land.<sup>46</sup>

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<sup>45</sup> 1800 advertisement. This advertisement was printed frequently and widely, e.g., *Massachusetts Mercury*, Mar. 7, 1800 (Hardy, *Reports of 1888-1900*, 87-89).

<sup>46</sup> Edward Tiffin to William Frederick Ast, July 20, 1796, Brock Collection; *Greenhow v. Barton*, 15 Va. 590, 594 (1810). Fleming's view was one also heard frequently among Mutual Assurance Society officers and is evidence of an anxiety about the fluidity of land ownership after the Revolution and the abolition of entail that merits further exploration. See Holly Brewer, “Entailing Aristocracy in Colonial Virginia:

The framers of the Massachusetts Mutual Fire Insurance Company evinced no such worry and consistently described membership as a personal commitment, a status inheritable upon death but never assumed by purchase. There were indeed occasional problems when insured property changed hands and then was damaged or destroyed. When Amasa Stetson's house on Ann Street in Boston burned in 1801, he had recently altered his property interest in the house (through a series of conveyances not important here) and was leasing it to others: "The estate then became less his. He had less control of it, and less interest in preserving it," argued the company. The 1808 case of *Stetson v. Massachusetts Mutual Fire Insurance Company* has become famous among legal historians for the failure of the company's second argument—that Stetson had added a room to his house, thereby altering the building and the risk—on the grounds that this new thing, fire insurance, simply cannot prevent "every, the least, alteration" in America's constantly growing, changing cities. But their first argument may have been the stronger one, and the court's rejection of it further illustrates a divergence between the jurists of Virginia and Massachusetts in their conceptions of mutual insurance and the commitments of membership.<sup>47</sup>

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'Ancient Feudal Restraints' and Revolutionary Reform," *William and Mary Quarterly*, 3d ser., 54 (1997): 307-346; Cynthia Kierner, "'The Dark and Dense Cloud Perpetually Lowering over Us': Gender and the Decline of the Gentry in Postrevolutionary Virginia," *Journal of the Early Republic*, 20 (2000): 185-217.

<sup>47</sup> *Stetson v. Massachusetts Mutual Fire Insurance Company*, 4 Mass. 330 (1808); policy of Benjamin Hall, Massachusetts Mutual Fire Insurance Company, Mar. 1, 1799, American Memory online database, "An American Time Capsule: Three Centuries of Broad-sides and Other Printed Ephemera," Library of Congress. The *Stetson* case is discussed in pro-development terms in William E. Nelson, *Americanization of the Common Law: The Impact of Legal Change on Massachusetts Society, 1760-1830* (1975; Athens: University of Georgia Press, 1994), 157. This principle of fire insurance law was reinforced in a case involving another mutual, the Baltimore Equitable Society, in *Jolly's Administrators v. Baltimore Equitable Society*, 1 Harr. and Gill, 295, 305-306 (1827), where *Stetson* was cited as the determining precedent. As James Kent noted, thereafter it was clear that "strictness and nicety required in the contract of marine insurance, do not so strongly apply to insurances against fire." James Kent, *Commentaries on American Law*, 2d ed., 4 vols. (New York: O. Halsted, 1832), 3:373.



The Supreme Court of Massachusetts understood the significance of allowing Stetson's insurance to remain in effect even if he no longer had as much interest in the property as when he joined the company: such insurance could be called a wager contract, one declared void in many states (by statute) and widely held to be contrary to good policy (owing to arson temptations). More significant still to the Massachusetts Supreme Court was the concern that Stetson had engaged himself to the association by contract, thereby assuming the burdens and acquiring the rights of membership, based on the company's understanding of the nature of his property ownership, one that he could not change without annulling the policy. But Justices Isaac Parker and Samuel Sewall had little problem deciding that Stetson had a good claim. The relevant bylaw "imports a continuance of the contract, notwithstanding an alienation of the premises insured," in terms of Stetson's obligations as a member. He clearly remained bound, individually, even if it were determined that someone else now owned the property. As for his claim for compensation, whether he had sufficient interest in the house for the policy to remain unaffected was a matter for a jury to decide, and one had decided in Stetson's favor in the initial trial. The fact that his interest in the property was no longer exactly "the interest contemplated by the parties when the insurance was effected" was, in Massachusetts, not a legal reason to eliminate the company's liability to pay.<sup>48</sup>

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<sup>48</sup> *Stetson v. Massachusetts Mutual Fire Insurance Company*, 4 Mass. 330, 335 (1808). Theophilus Parsons sat out, having been counsel in the case before his appointment. The details of the property transfers were summed up by Nathan Dane in his significant early treatise: "a moiety was insured by this company; this was conveyed in fee: the grantor reserved a term for seven years, and the grantee immediately reconveyed in mortgage, and the mortgagee leased to the mortgagor for another seven years, reserving rent." Nathan Dane, *A General Abridgment and Digest of American Law: With Occasional Notes and Comments*, 8 vols. (Boston: Cummings, Hilliard, and Co., 1823), 2:204. On the question of property interest, wager contracts, and arson, see Kent, *Commentaries*, 3: 371; Angell, *Treatise on the Law of Fire and Life Insurance*, preliminary note, sec. 18, 20; James Oldham, *English Common Law in the Age of Mansfield* (Chapel Hill: University of North Carolina Press, 2004), 141-146.

In Virginia, on the other hand, that same concern—in this case, for insurance on a home fully owned by the insurer but which, unbeknownst to the society, stood on a leased plot of land—voided an indemnity contract, despite Chancellor George Wythe’s passionately worded decree in favor of the insured on the first appeal. The high court’s decision was later cited in Conway Robinson’s important Virginia treatise of 1835 as an instance of one of “the governing rules of decisions in courts of equity”: contracts in which material facts are not disclosed, even by mistake, are null and void. That rule held in this case, according to the president of the court, Peter Lyons, “especially, as, by the constitution, rules and regulations of the society, formed by the insurers in this case, the assurance was mutual...and the property of each person so insured being bound for such payment, ought to be as permanent as the property of the others.”<sup>49</sup>

Wythe had devoted a great deal of space in his opinion to establishing that Charles Mahon’s home was surely his, meeting all the relevant legal criteria of property, and thus could certainly be insured. Lyon’s thinking, however, cut through that issue, ignoring Wythe’s philosophical musings on the nature of property, to what was for him the relevant fact: that Mahon’s property interest in his own home was not as certain, not as permanent, as the other members’ interests. A principle of mutual fairness among the society’s membership provided the foundation for Lyons’s reasoning in overturning Wythe’s decree and stands, along with John Sullivan’s struggle against the Massachusetts Mutual Fire Insurance Company, as an instance of how the evolving understandings of voluntary association came to inform the law of contract. For Mahon, the only good news

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<sup>49</sup> *Mutual Assurance Society v. Mahon*, 9 Va. 517, 519 (1805), which overturned Wythe’s decree in *Mahon v. Mutual Assurance Society* (1805) at the superior chancery court in Richmond (Brock Collection); Conway Robinson, *The Practice in the Courts of Law and Equity in Virginia*, vol. 2 (Richmond: Samuel Shepherd, 1835), 32-33.

was that, as he had entered the Mutual Assurance Society on false pretenses, he had never been insured and was entitled to the return, with interest, of all monies paid in. It was not enough to rebuild a house.<sup>50</sup>

### A Member's Rights and the Greatest Trial of the Mutual Assurance Society

Charles Fenton Mercer was a young and aspiring politician in 1809 when he was nominated by “a very large and respectable meeting” of Loudoun County members of the Mutual Assurance Society to bring their grievances to the attention of Samuel Greenhow, the principal agent. He was to report back to “a more general meeting of the society” in Leesburg in two weeks, where they would decide whether to continue their support of the Mutual Assurance Society or should instead attempt “dissolving it, if the latter can be effected by judicial or legislative decision.” Mercer demanded attention to their concerns, for even if the insurance company could not be dissolved, there was a “*certainty* that, unless satisfactory information be furnished, the whole of those members will avail themselves of the mode, authorized by law, of withdrawing, individually, from the

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<sup>50</sup> The *Mahon* decision also provided grounds for exemption from assessment a few decades later, in *Ingrams v. Mutual Assurance Society*, 40 Va. 661 (1843), where a bill in chancery to recover past quotas was denied, as Ingrams held his property by mortgage and the society was thus never liable to pay any loss. “It is true that the members of the association are the assurers as well as the assured; but the membership, as I apprehend, is created by the insurance, and if there be no insurance there is no membership.” There was never any insurance and, thus, no liability for assessment. Within a short time after *Mahon*, the society allowed leaseholders to insure if the lessor also signed the declaration for insurance (see printed form attached to policy of Peter Powell, Jan. 29, 1813, Brock Collection).

Some decades later, the mutual fairness principle articulated in *Mahon*, though uncited, was the rationale for a Maine court to make an influential decision voiding an insurance contract, for every member of a mutual insurance company has an interest in ensuring that the other members have, not a contingent interest in the insured property, but such interest “as would insure the payment of his proportion of any losses, occurring during their mutual membership” (*Brown v. Williams*, 28 Maine 252, 254 [1848]; quoted at length in *Smith v. Bowditch Mutual Fire Insurance*, 6 Cush. [Mass.] 448 [1850] and Angell, *Treatise on the Law of Fire and Life Insurance*, 225-226 [also quoting *Mahon*]).

society.” Within the four pages Mercer wrote to Greenhow appeared some of the most notable features of American associational activity in the early national period: the ad hoc but formalized nature of many associations, in this case one arising spontaneously to address concerns about a larger corporation’s abuses; the ever-present shadow of legal control, which as Mercer noted could come either legislatively or judicially; and the threat of exit to give force to internal dissent. Mercer was confident of the Mutual Assurance Society’s “wise and humane purposes,” but he and those he represented doubted sincerely the direction it seemed to be taking.<sup>51</sup>

The trouble began when a fire swept across the east side of Norfolk on February 23, 1804, a section of the city that had been consumed just five years earlier, in 1799. The losses were estimated to approach \$100,000, and many in the Mutual Assurance Society were of the opinion that, as in 1799, an assessment would have to be levied against the members to cover the amount. The members (or their proxies) were convened in Richmond in July to discuss whether a quota ought to be called for, and Littleton Waller Tazewell led the opposition, moving successfully that the losses ought to be paid by selling off tens of thousands of dollars invested in United States, Virginia, and Bank of Alexandria stock. More important was the decision to appoint a committee, headed by Edmund Randolph, to reexamine the whole nature of the institution, to explore ways to make more equitable the risks run by members outside of the urban centers such as

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<sup>51</sup> Mercer to Greenhow, May 18, 1809, Brock Collection. Mercer was elected to the Virginia House of Delegates the following year and would become a leading Federalist, National Republican, and Whig until his death in 1858. This early episode of leadership in his home county goes unnoted in the two otherwise thorough works on his life and career: Robert Allen Carter, “Virginia Federalist in Dissent: A Life in Charles Fenton Mercer” (Ph.D. diss., University of Virginia, 1988); Douglas R. Egerton, *Charles Fenton Mercer and the Trial of National Conservatism* (Jackson: University Press of Mississippi, 1989). Mercer’s prominence in this period is apparent in Norman K. Risjord’s study of “The Virginia Federalists,” *Journal of Southern History*, 33 (1967): 486-517.

Norfolk. Including the losses in the February fire, members in cities had received ten times as much in insurance payments while paying, on average, only one-eighth more into the coffers than rural insurers. The inequities were apparent, and men such as Tazewell—whose Williamsburg holdings were classed in 1802 as “country” property—were tired of paying for city losses. Either the city members would begin to pay their share of the costs, it was becoming apparent in the fall of 1804, or the Mutual Assurance Society might just split in two.<sup>52</sup>

In August and September, Thomas Ritchie ran a three-part series in his influential newspaper, the *Richmond Enquirer*, examining both the philosophy and the recent, practical history of Virginia’s mutual insurance company. Unlike a stock insurance company, in which an insurer made annual payments to maintain indemnity, Ritchie noted, a mutual company was, by design, uncertain as to the demands it would make of its insured members. If no losses occurred, the total assessment would be zero; if losses were exceptionally high in a given year, so too would be the sums assessed. Ritchie stressed, too, a second key difference between the mutual and the stock insurance company: in stock companies such as London’s powerful Phoenix Insurance Company, the insurer had nothing whatever to do with the affairs of the company (other than deciding whether to take insurance there). In a mutual, however, an insured member may monitor the use of his money “through all the mazes of its employment and disbursement.” With the other members, “he gives his vote, and exerts his influence in the government of its concerns.” As in any democratic body, a person had control over

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<sup>52</sup> H. W. Burton, *The History of Norfolk, Virginia: A Review of Important Events and Incidents which Occurred from 1736 to 1877...* (Norfolk: Norfolk Virginian Job Print, 1877), 6; Danforth and Claiborne, *Historical Sketch of the Mutual Assurance Society*, 20-21; *Statement of the Subscribers and Members*, s.v. Tazewell; “View of ‘The Mutual Assurance Society against Fire, on Buildings of the State of Virginia,’”pt. 3, *Richmond Enquirer*, Sept. 8, 1804.

the course of the institution “as far as his zeal, or capacities may give him an ascendant power over the other members of the institution.”<sup>53</sup>

Upon that foundation—in essence, an explication of how persuasion ought to factor in to republican government—Ritchie built his case for a division of the funds of the town members from those of the country insurers, “though they may be conducted in the same office.” He appears to have had advance knowledge of the policy proposals Randolph’s committee would make at the next general meeting, to be held in January 1805. The third part of Ritchie’s series, which included six tables and made public the ninefold disparity in paid claims between town and country, hinted that a measure separating the funds between urban and rural members would “most probably be adopted” and made a strong case for the justice of that division. But the issue was controversial. According to Francis Corbin, one Fredericksburg printer took the underhanded tactic of not printing notice of the resolution authorizing Randolph to investigate division because, Corbin alleged, he and others in “the *Towns* do not relish the idea of a separation.”<sup>54</sup>

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<sup>53</sup> “View of ‘The Mutual Assurance Society against Fire, on Buildings of the State of Virginia,’” pt. 1, *Richmond Enquirer*, Aug. 29, 1804. At this time, Ritchie’s brand-new newspaper had a relatively small but quickly growing readership, between five and six hundred: see *Richmond Enquirer*, July 29, 1805 (“a few more than 500”) and Nov. 3, 1804 (600). On its significance, even in these early years, see Jerry W. Knudson, “The Jefferson Years: Response by the Press, 1801-1809” (Ph.D. diss., University of Virginia, 1962), 50-52. The 1804-1804 debates on division of the Mutual Assurance Society overlapped with the heated debates over the Bank of Virginia, which had a strong supporter in Ritchie: see *Richmond Enquirer*, “On Banks,” *Richmond Enquirer*, July 28-Aug. 25, 1804; Bert Marsh Mutersbaugh, “Jeffersonian Journalist: Thomas Ritchie and the *Richmond Enquirer*, 1804-1820” (Ph.D. diss., University of Missouri, 1973), 76-80, 176-177. An astonishing amount has been written on the interconnections between Ritchie and such leading Mutual Assurance Society figures as John Brockenbrough, Edmund Randolph, and William Foushee owing to historians’ fascination with the so-called “Richmond Junto”: this literature was well summarized, and effectively challenged, in F. Thornton Miller, “The Richmond Junto: The Secret All-Powerful Club—or Myth,” *Virginia Magazine of History and Biography*, 99 (1991): 63-80.

<sup>54</sup> *Richmond Enquirer*, Sep. 8, 1804; Francis Corbin to William Ast, Sept. 26, 1804, Brock Collection. Interestingly, writers have differed as to whom the division was intended to benefit: Samuel Mordecai writing in the 1850s thought those in the towns supported the change because country members were notoriously slow or resistant in paying into the company funds (*Richmond in By-gone Days*, 254-257). In

Randolph's proposal to divide the Mutual Assurance Society into two funds was approved by the members and given effect by a legislative act amending the constitution of the society, in January 1805. Nothing but such a drastic step, Randolph had declared, "can do away the objection, 'That, when a house takes fire in a town, a hundred or more houses may be destroyed, but when a house takes fire in the country, only one is consumed.'" Simply charging town members proportionally more was not a viable option (they could not realistically be expected to pay *nine times* more), but, even if separation was the most palatable remedy available, the officers of the society expected dissent. In the first issue of the *Enquirer* following the legislature's amendment of the charter, Ast wrote a letter to inform members, first, that the change made it likely that the country members may never be assessed again and, second, that town members would still do better to be a part of this society than to insure anywhere else. "Where will they do better?" he wrote. "The annual premiums abroad are very expensive, and the security of a few individuals precarious."<sup>55</sup>

Indeed, the precariousness of the mutually insuring few compared to the security of the many was precisely the point. Many in the towns felt they were being left to shift for themselves, especially when, within a few weeks of the division, the town members—

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current scholarship, Bruce A. Campbell's allegation ("John Marshall, the Virginia Political Economy, and the Dartmouth College Decision," *American Journal of Legal History*, 19 [1975]: 40-65) that the country members had achieved supremacy within the association and adopted the change against fervent town opposition has been accepted uncritically, e.g., in *The Papers of John Marshall*, vol. 7 (Chapel Hill: University of North Carolina Press, 1993), 217-218. Campbell's position is largely substantiated by Corbin's report and by Ast's letter to the *Richmond Enquirer*, Feb. 1, 1805, but it seems likely that continued optimism among the society's officers about effecting a general insurance across Virginia was, in 1804 and 1805, also motivating a genuine attempt to establish equitable burdens and benefits for the society's roughly two thousand members.

<sup>55</sup> Report of Edmund Randolph, Jan. 11, 1805, in Constitution of the Mutual Assurance Society as corrected by Samuel Greenhow, Robert Anderson Papers, John D. Rockefeller, Jr., Library, Colonial Williamsburg Foundation; *Richmond Enquirer*, Feb. 1, 1805; "An Act for carrying into execution the constitution of the mutual assurance society..." chap. 24, Jan. 29, 1805, *Shepherd's Statutes*, 3:145-149; *Journal of the House of Delegates of the Commonwealth of Virginia* (Richmond, Va.: Samuel Pleasants, Jr., 1804), 109.

and only the town members—were assessed for an amount equal to half of the original premium (on the reasonable premise that neither fund should be allowed to fall to below 1 percent of the value of the insured property). Opposition to the division and levy in Richmond, wrote the president of the society, Alexander McRae, was marked by “great zeal and assiduity,” though he hoped that the dissidents could be persuaded by publication. Others, such as Chief Justice John Marshall’s brother, Charles, made efforts to ensure that their homes were not classed as urban property. In the short term, however, the dissent was kept relatively contained. Randolph’s committee had proposed a loosening of the exit requirements, reducing the requisite notice from three months to six weeks, which was adopted, and some members, including the chief justice himself, simply left. Such exit quelled whatever dissent there may have been, which was undoubtedly one of the aims of establishing the new mode of withdrawal. At the annual meetings of 1806 and 1807, there was no great turnover in office, no business of interest. But James Currie, a medical doctor in Richmond since long before the Revolution, resisted the attempt of the Mutual Assurance Society to collect a quota from him, questioning not only the fairness of the society’s recent decisions but its very authority to make them.<sup>56</sup>

Currie’s was a bold and significant legal challenge, one that centered on the rights of individual members in democratically structured and formally chartered bodies, and he promptly lost. He was determined by the Petersburg district court to owe the society a sum approaching three hundred dollars. After Currie’s death in 1807, his administrators carried the matter to the newly organized Supreme Court of Appeals, claiming that the

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<sup>56</sup> Alexander McRae to William Ast, Apr. 21, 1805, and Charles Marshall to William Marshall, Feb. 18, 1806, both in Brock Collection; John Marshall to Samuel Greenhow, Oct. 17, 1809, in Charles F. Hobson, ed., *The Papers of John Marshall*, vol. 7 (Chapel Hill: University of North Carolina Press, 1993), 217-218.



substantial changes made in 1805 were so far beyond the scope of the original charter, under which Currie had joined, that they could not be binding on the original members. No quota called for under the new town-country organization of the society could be collected from those who had joined before the divide. Further, even if the general meeting of the corporation, largely comprising proxies, had voted to put additional burdens on the town members, “those men were delegated to give effect to the charter as it was,” and “a power to support is not a power to destroy.” Currie had joined with certain expectations, including one that the insurance—the burdens and the benefits—were to be mutual, not periodically and unevenly reapportioned.<sup>57</sup>

The legal arguments for each side were lengthy, articulate, and very public. Not only the final opinions of justices Spencer Roane and William Fleming but also the lawyers’ arguments were printed in full in newspapers as soon as the ruling came down. The lawyers for the Mutual Assurance Society asserted that Currie was doubly bound to pay, both by the will of the majority of the association and by the sovereign decision of the legislature to amend the institutional arrangement. They knew that a decision against the society might cripple it, for more than half of the insured property lay in towns and was assessed for a quota in 1805. By 1809, moreover, a new system of annual fees had been adopted—calling for one-seventh of a premium from country members and one-fifth from town members—and was potentially threatened.<sup>58</sup>

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<sup>57</sup> *Currie’s Administrators v. Mutual Assurance Society*, 4 Hen. and M. (14 Va.) 315 (1809). Campbell, “John Marshall, the Virginia Political Economy, and the Dartmouth College Decision,” 40-65; and Morton J. Horwitz, *The Transformation of American Law, 1780-1860* (Cambridge, Mass.: Harvard University Press, 1977), 111-114, provide useful contextual information, but, as will be seen, my interpretations, both of the nature of the case and of its significance, differ greatly from theirs.

<sup>58</sup> “An Act concerning the Mutual Assurance Society of Virginia...,” chap. 28, Feb. 16, 1809, *Acts Passed at a General Assembly of the Commonwealth of Virginia* (Richmond, Va.: Samuel Pleasants, 1809), 36-38. The decision was handed down on Dec. 2, 1809, and was printed in full in the *Richmond Enquirer* on December 9.

The Virginia court decided against Currie, but scholars have long focused on exactly half of the court’s rationale—and the wrong half at that. Justice Spencer Roane did opine that one legislature cannot bind subsequent assemblies and that necessarily a corporate charter was repealable, a “doctrine” supposedly overturned ten years later in *Dartmouth College v. Woodward*. But both Roane and William Fleming, in his concurring opinion, devoted the bulk of their opinions to another point: the association itself had requested the change. The whole issue of legislative supremacy was obiter dicta, as Fleming made clear when he asserted that, “As to the right of the assembly to alter the charter, I will just observe that it was, in effect, done by the society itself.” The crux of the dispute, then, was on the authority of a majority to bind Currie, a dissenting minority who claimed rights under the original charter. Ultimately, Roane took the position that the court could no doubt intervene to protect members such as Currie in certain cases, but that it need not here. “It is enough for our purpose that the act of 1805, if it has produced any injustice at all to any class of subscribers, has fallen short of that crying grade of injustice, which alone can disarm the act of its operation,” he wrote. “The society itself, at least, considered this, on the contrary, as a measure essential to the equalization of the risks; and, in this respect, I see no cause to differ from them in opinion.”<sup>59</sup>

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<sup>59</sup> 4 Hen. and M. (14 Va.) 315, 350 (1809). On the contests within this court, especially between Roane and St. George Tucker, who absented himself from this case, see F. Thornton Miller, *Juries and Judges versus the Law: Virginia’s Provincial Legal Culture, 1783-1828* (Charlottesville: University Press of Virginia, 1994); Timothy S. Huebner, “The Consolidation of State Judicial Power: Spencer Roane, Virginia Legal Culture, and the Southern Judicial Tradition,” *Virginia Magazine of History and Biography*, 102 (1994): 60; and Hamilton, *Making and Unmaking of a Revolutionary Family*, 136. On the scholarship seeing *Currie’s Administrators* as reflecting a pre-*Dartmouth* position of unrestrainable legislative authority to amend corporate charters, see Bruce Arthur Campbell, “Law and Experience in the Early Republic: The Evolution of the Dartmouth College Doctrine, 1780-1819” (Ph.D. diss., Michigan State University, 1973), 265-267; Campbell, “John Marshall, the Virginia Political Economy, and the Dartmouth College Decision,” 49-52; Timothy S. Huebner, *The Southern Judicial Tradition: State Judges and Sectional*

Crucial to Roane's opinion—and central to many judicial opinions concerning the member-to-society relationship in the early republic—was the fact that, as he put it, any members who disagreed with the opinion of the majority are “protected from oppression, by the liberty guaranteed them, of withdrawing from the institution altogether.” Though, as Michael Walzer has suggested, such a legal philosophy can be used to excuse a whole host of internal corporate evils, the right of withdrawal was the primary rhetorical way in which Currie's liberty was discussed in the legal battle over his rights as a member.<sup>60</sup>

Correlative to Currie's rights were his corporate duties, including the obligation to abide by the will of the majority (within limits, Roane was sure to note) or to get out of the way. John Marshall had made the central point many years earlier, as counsel in the British debt case *Ware v. Hylton*, that associational burdens should be no less binding because voluntarily assumed. “Banks, Canal Companies, and numerous associations of a similar description, are formed on the principle of voluntary subscription,” Marshall told the Supreme Court in 1796. “The nation is desirous that such institutions should exist; individuals are invited to subscribe on the terms of the law; and, when they have subscribed, they are entitled to all the benefits, and are subject to all the inconveniences of the association,” even if no penalties have been prescribed by the state for a failure to do so. That idea, that law gained its force owing to the consent of the governed but must no less continue to govern in the face of dissent, was as a premise as widely held in the Revolutionary era as any. Those views were coupled in the judges' opinions in *Currie's*

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*Distinctiveness, 1790-1890* (Athens: University of Georgia Press, 1999), 27-29; Horwitz, *Transformation of American Law*, 111-114.

<sup>60</sup> 4 Hen. and M. (14 Va.) 315, 352 (1809). The parallels found in reported case law concerning members and associations to Albert Hirschman's ideas concerning the importance of exit and voice in associational and market relationships are striking: *Exit, Voice, and Loyalty: Responses to Decline in Firms, Organizations, and States* (Cambridge, Mass.: Harvard University Press, 1970). See Michael Walzer, “Corporate Authority and Civil Disobedience,” *Dissent*, 16 (1969): 401.

*Administrators* with an explicit defense of majoritarian democracy, and their words make clear that the challenges of the Mutual Assurance Society's first fifteen years had compelled Virginians to extend, quite consciously, their core principles and ideals of government— notions of consent, representation, and justice—to the governance of voluntary associations over their members.<sup>61</sup>

Between the 1790s and the crisis of division in 1805, the members and officers of the society itself were coming to see it as more of a political entity and less a hopeful, utopian endeavor. In the engravings atop the earliest insurance policies, issued in 1796, stood the figure of Justice, her scales balanced, alongside two buildings, one burning and one fronted with scaffolding (a two-part story also common to English policies). To her left was a line of men ready to provide offerings on an altar labeled "Relief," and at her feet were the words of the Golden Rule.

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<sup>61</sup> *Ware v. Hylton*, 3 U.S. 199 (1796); Campbell, "John Marshall, the Virginia Political Economy, and the Dartmouth College Decision," 63. On Revolutionary America's changing conceptions from law being founded upon sovereign command to one in which "the true origin of the obligation of human laws" was consent, see James Wilson, "Of the General Principles of Law and Obligation," in Robert Green McCloskey, ed., *The Works of James Wilson*, 2 vols. (Cambridge, Mass.: Belknap Press of Harvard University Press, 1967), 1:97-125 (quotation on 121); Gordon S. Wood, *The Creation of the American Republic, 1776-1787* (Chapel Hill: University of North Carolina Press, 1969), 259-305; and especially Holly Brewer, *By Birth or Consent: Children, Law, and the Anglo-American Revolution in Authority* (Chapel Hill: University of North Carolina Press, 2005), 114-119, 216-219,



When new forms were made necessary by the 1805 amendments, a new engraving was commissioned, and the biblical words were replaced with a large stone tablet inscribed with a motto less religious than political and even practical, “In Union There Is Safety.” Firefighting was now a part of the story told (indicative of improving technologies and greater efforts to put out, and not simply to contain, fires). Justice had lost her blindfold, her scales rested on the ground, and the central icon was now the fasces; one was cradled in her arms, two more appeared with the eagle above the scene. At her elbow stood Virginia’s emblematic figure, Liberty, with her foot pressed down on the defeated tyrant. Both in its words and its imagery, not to mention its practices, the

Mutual Assurance Society was coming to be seen by everyone involved as a thoroughly political entity in the first decade of the nineteenth century.<sup>62</sup>



By 1809, it was apparent that members in neither half of the divided association were terribly happy with the state of affairs. Even if, as William Ast informed a country member in 1807, such “great slams” as the fire of Norfolk could no longer affect the country branch, “it has since the division, sustained a good many losses, and as the delinquents do not pay up, as fast as they ought to do, the funds actually on hand are low.” Just such a slam hit the town members’ funds later in 1807, when Fredericksburg was ravaged, and “swept away the money & public stocks on hand.” When the decision was made in February 1809 to assess members of both branches annually, and the charter was legislatively amended accordingly, it was because vast sums were owed to the

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<sup>62</sup> Policy of John Schultz, Mutual Assurance Society, Aug. 30, 1796, no. 251, Mutual Assurance Society papers, Virginia Historical Society; policy of Thomas Rutherford, Phoenix Assurance Company of London, Oct. 1, 1802, no. 136102, in Samuel Myers papers, 95 M99, medium oversize, Earl Gregg Swem Library, College of William and Mary. I am indebted to Margaret Pritchard for helpful advice on the symbols and techniques apparent in the two prints.

society, which itself owed money to stricken members. In the country branch, for instance, Ast's replacement as principal agent, Samuel Greenhow, informed Jefferson, somewhat ashamedly, that the society was owed \$44,000 by nonpaying members and thus could not readily pay \$12,000 in members' claims.<sup>63</sup>

Even leaving the legal challenges of James Currie and his administrators aside, then, there were reasons in 1809 to worry that the Mutual Assurance Society might soon meet its end. "The present State of the Institution furnishes no very strong inducement to the house owners of Virginia to become members," Greenhow had to concede to Jefferson. And, in an open letter in the *Enquirer* shortly before the *Currie's Administrators* decision came down, Greenhow publicly admitted that "the society has not been so punctual, as might be wished," though he remained confident that it had "acted with justice, honor & liberality" and continued to charge rates far lower than any foreign insurance house.<sup>64</sup>

Over the course of the year, however, resistance to the Mutual Assurance Society began to take more open and aggressive forms. Charles Fenton Mercer's letter from Loudoun County in May 1809, representing a meeting of discontented members, supposed that the association "must be susceptible, under good management, of such a direction as to accomplish its wise and humane purposes," but it appeared to many that that good management was lacking. Stephen C. Roszel, a delegate from Loudoun to the Virginia General Assembly who, according to Mercer, declaimed against the Mutual Assurance Society and spurred the meeting's "unfavourable impressions," made every

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<sup>63</sup> W. F. Ast to Samuel Moody, June 8, 1807, Moody Family Papers, Virginia Historical Society; Greenhow to Jefferson, May 29, 1809, in Looney, ed., *Papers of Thomas Jefferson, Retirement Series*, 1:241-245.

<sup>64</sup> Greenhow to Jefferson, May 29, 1809, in Looney, ed., *Papers of Thomas Jefferson, Retirement Series*, 1:241-245; Samuel Greenhow, "To the Editor of the *Enquirer*," *Richmond Enquirer*, Oct. 27, 1809.

effort to abolish the institution. Although those efforts did not succeed, such opposition was key to the failure of the society's attempt to have local sheriffs rather than paid agents collect premiums and quotas owed. "Without this, or some other mode of obtaining our money speedily & certainly, I confess I do not perceive how we are to pay losses," fretted Greenhow, but the sweeping changes of the 1809 legislation passed only after the House of Delegates, by a margin of one vote, removed that provision. Though certain that Roszel's accusations were based solely on misrepresentations of the society, "which in truth, he knows nothing of," Greenhow was worried that the company's enemies might succeed in legislatively terminating it. And "if the Institution should now be abandoned," he knew, "it would not be possible to restore it; or to create one founded on similar principles."<sup>65</sup>

James Ewell Heath, an eighteen-year-old agent for the society in Prince William County in northern Virginia, wrote to Greenhow to give those in Richmond some sense of the "angry brow of popular discontent" he faced every day and to request that he be replaced. "Having undertaken the task of officiating as one of its Agents, I feel it certainly an incumbent duty not to shrink from the performance *as far as is compatible with the attainment of other objects of an individual and consequently to me of a more important nature*," Heath wrote, underlining the point, and he was not willing to engage "in any measure of coercion." With the schedule of annual fees now in place but with the

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<sup>65</sup> Mercer to Greenhow, May 18, 1809, Brock Collection; Greenhow to Jefferson, May 29, 1809, in Looney, ed., *Papers of Thomas Jefferson, Retirement Series*, 1:241-245 (see also the notes accompanying this letter in Looney, ed., *Papers of Thomas Jefferson, Retirement Series*, 1:244-245n); Cynthia Miller Leonard, comp., *The General Assembly of Virginia, July 30, 1619-January 11, 1978: A Bicentennial Register of Members* (Richmond, Va.: General Assembly of Virginia by the Virginia State Library, 1978), 228, 232, 236, 244, 248, 252, 257, 399; *Journal of the House of Delegates of the Commonwealth of Virginia...One Thousand Eight Hundred and Eight* (Richmond, Va.: Samuel Pleasants, Jr., [1809]), 119-121.



method of collecting no more refined, Heath rightly predicted that, before one quota was brought in, “those of 1810 and 1811 will perhaps be due—the consequence of which will be the irritation of the members & their ultimate disgust towards a Society which they will conceive a more complicated system of oppressive taxation and a more refined engine of legislative tyranny than was ever introduced in the country.”<sup>66</sup> Heath wanted no part of this gritty business of compulsory assessments. He was eyeing a political career, one that began with his election to the General Assembly four years later, lasted for decades, and left him time to write fiction that only in recent years is being explored for “liberal attitudes toward gender, race, and class relations” unique among Southern novelists. Some sense of this liberal worldview—if not of exceptional prose—is apparent in Heath’s critique of the society’s coercive measures.<sup>67</sup>

Heath recounted for Greenhow an encounter with one of the “uninform’d members of the society,” who he believed made up “the greatest part,” in some detail. Upon Heath’s visit, Maryan Cave, a widow insuring her home on Main Street in Dumfries, “gave vent to a torrent of opprobrious epithets, which she very bountifully bestowed upon the Society and its Officers.” She was one of the many, Heath wrote, who could not reconcile the practices of the Mutual Assurance Society “to their ideas of

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<sup>66</sup> Heath to Greenhow, May 18, 1810, Brock Collection; Thomas Jefferson provides one example of the delay in collecting quotas, predicted by Heath, who was billed at once for two years’ quotas, interest, and a recently added lawyers’ commission. Benjamin Brown to Thomas Jefferson, Jan. 12, 1811, in J. Jefferson Looney, ed., *The Papers of Thomas Jefferson, Retirement Series*, vol. 3 (Princeton, N.J.: Princeton University Press, 2006), 294.

<sup>67</sup> Susan J. Tracy, *In the Master’s Eye: Representations of Women, Blacks, and Poor Whites in Antebellum Southern Literature* (Amherst: University of Massachusetts Press, 1995), 49-65, quotation on 65; see also Richard Beale Davis, *Intellectual Life in Jefferson’s Virginia, 1790-1830* (Chapel Hill: University of North Carolina Press, 1964), 309-312. Though his novel *Edge-Hill; or, The Family of the Fitzroyals* (Richmond, Va.: T. W. White, 1828), 2 vols., is now largely forgotten, it helped to establish him as a literary figure of the first rank in the South. He was the editor of the *Southern Literary Messenger* in its first months of publication and “almost the only person of any literary distinction” in Richmond, according to Edgar Allan Poe in 1841 [“A Chapter on Autography,” *Graham’s Magazine*, December 1841, in James A. Harrison, ed., *The Complete Works of Edgar Allan Poe*, vol. 15 (New York: Thomas Y. Crowell, 1902), 241].

justice or expediency.” Cave “spoke largely of the priviledges which she was entitled to, in a free country and of the violation of those priviledges in the inordinate demands of society.” She refused to pay anything, and though Heath did not want Greenhow to think that he gave too much credence to “the unmeaning lingo of a woman,” her challenge that the Mutual Assurance Society’s demands on its membership had no place in a free and republican polity stayed with him, and it was echoed many times by members in these crisis years of the company. Unsurprisingly, there was little prospect of persuading people to join. Agent William Dawson described a typical exchange in 1811: “Is your House Insured Sir (no is the answer it is such a wreched Society, that those already in it would soon leave you if the[y] could git back there money &c).”<sup>68</sup>

John Marshall was another member who made known his dissent to the course of the Mutual Assurance Society in the first decade of the nineteenth century. He terminated his membership some time before 1809, his motive “openly given at the time” to Greenhow. He noted specifically the legislative tinkering with the organization of the society and considered “the interference of the legislature in the management of our private affairs, whether those affairs are committed to a company or remain under individual direction, as equally dangerous & unwise.” It was true that he may at times find himself circumstantially “compelled to subject my property to these interferences, & when compelled I shall submit; but I will not voluntarily expose myself to the exercise of a power which I think so improperly usurped.” But Marshall had his finger on the key question: who protected those who *had* voluntarily exposed themselves to the authority of

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<sup>68</sup> Heath to Greenhow, May 18, 1810, and William Dawson to Samuel Greenhow, Dec. 5, 1811, both in Brock Collection.

an association such as the Mutual Assurance Society in the event it improperly usurped and exercised power?<sup>69</sup>

The *Currie's Administrators* decision had ultimately confirmed the authority of the majority in the Mutual Assurance Society to bind the whole, even if it meant holding individuals to commitments they had not foreseen, although Roane had suggested that his court would intervene to prevent patent injustices. The U.S. Supreme Court was first given an opportunity in 1810 to declare whether and how it would intervene, in a case that asked many of the same questions posed by James Currie, and Marshall's Court took precisely the same position as Virginia's high court had the previous year. John Korn and Jacob Wisemiller, merchants in Alexandria and members of the Mutual Assurance Society, were bound by the decisions of the majority when the society adjusted the liabilities of town members. Indeed, each member "is bound to consider it as his own individual act," as "every member, in fact, stands in the peculiar situation of being party of both sides, insurer and insured." Justice William Johnson's rationale—that "the majority of a corporate body must have power to bind its individuals," though that power is "restricted by the nature and object of its institution"—established courts as a final arbiter while steadfastly supporting the power of the group to seek its own welfare, to make alterations in the internal arrangements even if against the wishes of individual members. Johnson perceived that Korn and Wisemiller had "an obligation to conform to the laws of their own making, as members of the body politic," especially as they had signed insurance policies promising to abide by the regulations "which are already

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<sup>69</sup> Marshall to Samuel Greenhow, Oct. 17, 1809, in Charles F. Hobson, ed., *The Papers of John Marshall*, vol. 7 (Chapel Hill: University of North Carolina Press, 1993), 217-218. Marshall's frustration with the society was not long-lived. He joined again, declaring in 1815 for insurance for his home, office, laundry, and kitchen in Richmond: Hobson, ed., *The Papers of John Marshall*, vol. 8 (Chapel Hill: University of North Carolina Press, 1995), appendix 2, 399, revaluing the property in 1822 and 1829.

established, or may hereafter be established.” When the merchants sought to avoid another levy against them three years later, the Court was forced to repeat itself: “in the capacity of an individual of the body corporate the Defendants are bound by the by-laws of the society as far as is consistent with the nature of its institution.”<sup>70</sup>

What checks remained, then, on the Mutual Assurance Society and its powers over its constituency? There remained, always, the courts, which Roane insisted would intervene to prevent injustices, even if it had not exercised that option in Currie’s case, and which Johnson positioned as a final arbiter of whether amended bylaws fell within the principles and purposes of the institution. What Johnson called the “peculiar organization” of the Mutual Assurance Society, in which members not only insured themselves but also, in another sense, insured every other member, set the central dilemma in relief: every participant in the society received a promise—to be indemnified against loss for a certain consideration—but also made a promise to fulfill his or her part in maintaining the institution, obeying those rules and regulations deemed necessary for the welfare of the order. For the former to exist, the latter must be enforceable. Still, if the organization were altered, the nature and the extent of the amendments could prompt judicial intervention, something demonstrated by the very fact that such institutions as the Mutual Assurance Society found themselves so often explaining themselves to judges, judges who never denied their power to intervene if they only occasionally did so.<sup>71</sup>

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<sup>70</sup> *Korn and Wisemiller v. Mutual Assurance Society*, 6 Cranch 192, 200-201 (1810); *Atkinson v. Mutual Assurance Society*, 6 Cranch 202 (1810); *Mutual Assurance Society v. Korn and Wisemiller*, 7 Cranch 396, 399 (1813); “Changes of Contract of Insurance by Amendment of By-Laws of a Fraternal Mutual Benefit Association,” *Yale Law Journal*, 19 (1910): 379-380.

<sup>71</sup> *Korn and Wisemiller v. Mutual Assurance Society*, 6 Cranch 192, 200 (1810).

In corporations not founded on the mutual principle, courts tended to err on the side of individual members' rights, as will be seen in the next chapter. In early- to mid-nineteenth-century cases concerning stock companies, amendments to a corporate charter, though passed legitimately by majority vote, were held to have absolved members of their corporate duties. As James Kent noted in 1806, "the rights vested in the stockholders of a turnpike company, incorporated by law, are as sacred and as much entitled to protection as any other private rights." Such private rights within private institutions were to be protected by the use of public authority, which bound associations to act in explicitly delimited ways. The experiences of members of the Mutual Assurance Society reveal an institution that was designed to place the welfare of the whole as a priority, but which had to be adjusted, amended, and adjudicated as individual interests came face to face with associational priorities. At each step, some judicial verification became necessary, an outcome produced not so much by design as by the belief in the new republic that legal institutions stood to preserve those rights held by individuals in what Maryan Cave had called a "free country."<sup>72</sup>

Additionally, the nature of corporations as public creations meant that "their powers and privileges must therefore depend wholly on the act of Assembly," as St.

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<sup>72</sup> See chap. 4 for a thorough exploration of this issue. See also *Middlesex Turnpike v. Locke*, 8 Mass. 268 (1811); *Middlesex Turnpike v. Swan*, 10 Mass. 384 (1813); *Middlesex Turnpike v. Walker*, 10 Mass. 389; *Union Locke and Canal Co. v. Towne*, 1 N.H. 44 (1817); *Hartford and New Haven Railroad Company v. Croswell*, 5 Hill (N.Y.) 385 (1843); Peter Karsten, "Supervising the 'Spoiled Children of Legislation': Judicial Judgments Involving Quasi-Public Corporations in the Nineteenth Century U.S.," *American Journal of Legal History*, 41 (1997): 361n.177; Dodd, *American Business Corporations until 1860*, 81-83; James Kent, objections to "An act to amend an act entitled 'An act appointing commissioners for the inspection of turnpike roads,'" in Alfred B. Street, *The Council of Revision of the State of New York: Its History, a History of the Courts with Which Its Members Were Connected; Biographical Sketches of Its Members; and Its Vetoes* (Albany, N.Y.: William Gould, 1859), 338-339; David Thomas Konig, "Jurisprudence and Social Policy in the New Republic," in Konig, ed., *Devising Liberty: Preserving and Creating Freedom in the New American Republic* (Stanford, Calif.: Stanford University Press, 1995), 178-216; Heath to Greenhow, May 18, 1810, Brock Collection.

George Tucker noted. Not only were incorporated bodies very strictly limited in their powers to those delineated by the legislature (except for a very few general powers supposed to be implicit in all charters), but legislative props to corporate authority, such as facilitating the Mutual Assurance Society's collections by leaving it to sheriffs, could be and were withheld. That decision greatly weakened the institution, according to its officers and agents, and by 1819 the country branch was in "a very deranged state," according to John Marshall, largely because delinquent payments could not be collected and owing to what an investigating committee called "the extreme uncertainty of the real value of the houses insured" on isolated rural plots. The country office was shuttered three years later. Without legislative aid, as the demise of the country branch showed in 1822, mutual insurance could succeed only where there were strong compulsory measures or where there was more perfect information among the membership, in towns, where collections were far more efficient, where property values could be more easily known, and where it could be believed that "the benefits and dangers are perfectly mutual and equal among the members." The "depressed condition" of the country office meant that it could serve none of the "beneficial purposes for which it was instituted, without operating oppressively on many whose interest it is the province of the legislature to protect," and thus it was, by statute, closed.<sup>73</sup>

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<sup>73</sup> "No corporation hath been created in Virginia, since the revolution but by an act of the legislature. Their several powers and privileges must therefore depend wholly upon the acts of assembly by which they were first established, or such as have been afterwards made for the special purpose of limiting or enlarging, their privileges, respectively" (St. George Tucker, *Blackstone's Commentaries: With Notes of Reference to the Constitution and Laws of the Federal Government of the United States, and of the Commonwealth of Virginia...*, 5 vols. (Philadelphia: William Young Birch and Abraham Small, 1803), 2:472, cited by William Fleming, concurring, *Currie's Administrators v. Mutual Assurance Society*, 6 Hen. and M. 315, 356 (1809); *Head and Amory v. Providence Insurance Company*, 2 Cranch (6 U.S.) 127; Gregory A. Mark, "The Court and the Corporation: Jurisprudence, Localism, and Federalism," *Supreme Court Review* (1997): 425-426; John Marshall to Bushrod Washington, Aug. 3, 1819, in Charles F. Hobson, ed., *The Papers of John Marshall*, vol. 8 (Chapel Hill: University of North Carolina Press, 1995), 373; report of Mutual

Even without utilizing an arm of the state to hold such private institutions as a mutual insurance society in check, members and nonmembers preempted and responded to internal abuses. Individually, those within the Mutual Assurance Society had opportunities to voice their opinions and to add great strength to their voices by threatening withdrawal (and, especially, by acting on that threat) or by withholding payment, and could thereby foster change. Collectively, too, they could make demands of the society, such as those coming out of Loudoun County, that left the association's officers worried for the very survival of the institution. When Stafford Parker, Maryan Cave, or John Marshall expressed their thoughts on the nature of the association and the ways in which it was veering off course, they made use of varied and diverse languages of rights, legal and political. Parker emphasized the nature of insurance and the legal rights to which he, as a contracting party, was entitled, and Marshall described a private sphere of authority into which outside "interferences" should only venture on occasional, necessary invitation. Cave stressed protections that all participants in all collective endeavors, ranging from the state to the private corporation, should be able to claim within a republican polity. The liberal principle that individuals carried rights into any and all social relationships was becoming more and more commonly evoked in disputes and legal hearings regarding members of voluntary associations, especially in the first decade of the nineteenth century, as was seen in chapter 2. And that same trend can be seen in the disputes within and the changing policies and practices of the Mutual

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Assurance Society committee, appointed Apr. 5, 1822, chair, John Brockenbrough, quoted in Danforth and Claiborne, *Historical Sketch of the Mutual Assurance Society*, 52-53; chap. 25, "An act to abolish the Country Branch of the Mutual Assurance Society against fire on buildings in the state of Virginia," Mar. 4, 1822, *Acts Passed at a General Assembly of the Commonwealth of Virginia...* (Richmond: Thomas Ritchie, 1822), 25-26 (quotation on 25).

Assurance Society, as it engaged in increasingly complicated efforts to achieve the simple idea upon which it was founded.

From the moment Thomas Jefferson had first heard of it, he thought “the general idea of a mutual insurance against fire as a valuable one,” but he was wary of vesting too much power in William Ast’s proposed creation, such as authority to collect on short notice or to seize property ahead of the demands of other creditors. “It would be a good work to give it such modifications as might lend to it’s general establishment,” he told Ast, but the challenges were many. By the time Stafford Parker wrote to Samuel Greenhow in 1813 to terminate his membership and to describe for him how an insurance cooperative ought to work, the Mutual Assurance Society had gone through a series of political challenges, from within and from without, and the hopeful optimism of mutual indemnity had diverged still further from social reality, from the self-interest and internal conflict that, for many, now characterized the institution. Idealized hopes of effecting a general insurance on pure, equitable principles had produced a Mutual Assurance Society that could only succeed by compulsion, by division, and, ultimately, when the country branch was lopped off, by exclusion.<sup>74</sup>

Each step of the way, however, the challenges of association, the inherent tensions between individual autonomy and collective action, were channeled into legal and political means of resolution. Though some withdrew from the Mutual Assurance Society, it was a right more commonly asserted than exercised, and, whatever else one might say about the institution, it made losses by fire easier to bear, spread among many, than ever could have been the case for those who stood alone. When disputes did come,

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<sup>74</sup> Jefferson to Ast, Sept. 17, 1799, in Oberg, ed., *Papers of Thomas Jefferson*, 31:188; Weisbrod, “Insurance and the Utopian Ideal,” 398.



in Virginia as in Massachusetts, they were disagreements over the meaning and limitations of consent and of voluntary membership. They were founded in diverging opinions regarding the powers of a majority within a private association and of the general authority of the state to superintend those internal relationships. When Charles Clay, apparently a victim of a duplicitous insurance agent, wrote to William Ast to complain that he was “as strangely compelled into a business as a voluntary agent as ever a freeman was in a free country,” he was invoking concepts of great rhetorical power but of uncertain meaning. Only with the practical experience of creating and repeatedly re-creating new forms of concerted action, and the experience of legal and political attempts to resolve the often conflicting interests between group and member, could voluntary membership take on any real meaning in the new American republic.<sup>75</sup>

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<sup>75</sup> “View of ‘The Mutual Assurance Society against Fire, on Buildings of the State of Virginia,’” pt. 3, *Richmond Enquirer*, Sept. 8, 1804; Greenhow to Jefferson, May 29, 1809, in Looney, ed., *Papers of Thomas Jefferson, Retirement Series*, 1:243; Charles Clay to William Ast, Sept. 18, 1805, Brock Collection.

## Chapter 4

### Business Corporations: The Corporation as Membership Association

The American business corporation might appear to be an unlikely body of evidence with which to examine Americans' changing notions of voluntary affiliation and the rights and duties of membership. But by looking, not at business corporations, but at the conceptions of individual membership in them and, in those ideas, at parallels and differences to other associational forms, there is an opportunity to learn something new about a subject already so thoroughly studied. It may strike the modern ear as odd to refer to "members" of business corporations, a concept we usually denote with the words "shareholder" or "stockholder," or even "investor." But the term was heavily used, and was used interchangeably with the others, through much of the nineteenth century. The history of their usage is at least suggestive of a common history for varied kinds of formally organized combinations of individuals. And a key component of the project here is to explicate such interrelationships. Emphasis has long been laid on the economic imperatives that shaped early American corporate law and the internal, institutional development of the corporation, but the legal evolution of individual corporate shareholding was shaped more by conceptions of voluntary obligation and the rights that people carried into their myriad social relationships, ideas that were more a product of post-Revolutionary political culture than of any market revolution.

The term *member* carried important connotations even as stockholding was increasingly treated as something perceptibly different from other kinds of joining. The authors of the nation's first treatise on corporate law noted both the chief difference and

the continuities in their chapter “Of the Admission and Election of Members and Officers”: “As regards trading, and joint stock corporations, no vote of admission is requisite; for any person who owns stock therein, either by original subscription, or by conveyance, is in general entitled to, and cannot be refused, the rights and privileges of a member.” By the second third of the nineteenth century, the free and frequent transfer of stock, the comings and goings of people holding increasingly smaller stakes in companies they likely knew less and less about, was intimately related to the growing emphasis on the property rights of shareholders that was beginning to blind observers to the associational aspect of business corporations. But both the survival of the term *member* and the concomitant “rights and privileges” emphasized by corporate lawyers, however, provide an opportunity to explore this transitional period in the evolution of the corporate form by taking the language and conceptual categories of the early nineteenth century seriously rather than shying away from them or, what is still more common, too hastily translating them into the lingo of modern theories of the firm.<sup>1</sup>

This chapter does, however, have a great deal to say about issues that remain central to current scholarship on corporate governance and corporate law. The separation of ownership from control, for instance, which is the cornerstone of all models of corporate organization, is a product of the modern era, for under the common law every incidental power of a corporation resided in the membership of the corporation at large. Those incidental powers were so called because they need not be spelled out in a charter of incorporation—perpetual succession; the powers to sue and be sued, to purchase land, to have a common seal, to make bylaws, and (this sixth one was first included by James

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<sup>1</sup> Joseph K. Angell and Samuel Ames, *A Treatise on the Law of Private Corporations, Aggregate* (Boston: Hilliard, Gray, Little, and Wilkins, 1832).

Kent, following the *Rex v. Richardson* decision covered in chapter 2, and is only marginally relevant to stock-issuing corporations) the authority to expel members—encompass most of those legal capacities that allowed a business organization to function effectively in a vibrant marketplace. The membership of profit-seeking corporations increasingly comprised stockholders that were scattered across the country (and beyond) and lacking in specific or timely information. Over the same stretch of time that members' participatory duties were being abridged and authority centralized, members' monetary obligations became strictly reduced as well, with shareholders' liability to a corporation's creditors by the 1820s being limited to the monies already paid in, in the absence of specific provisions spelling out additional liabilities.<sup>2</sup>

For today's economists and legal theorists, four features serve to divide the corporation from other forms of business organization: perpetual succession; limited liability for investors; free transferability of shares; and centralized leadership. In 1800, only the first of these, barring statutory provision otherwise, was true of American business corporations. By 1832, when the first American treatise on corporate law was published, all four were the common standard.<sup>3</sup>

When historians have written about corporations in that year, 1832, they have centered upon the successful war Andrew Jackson waged against the Bank of the United States, a war against privilege and monopolistic control, a war of class division. It can be described as a battle between egalitarianism and corporate accumulation of money and

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<sup>2</sup> Sir William Blackstone, *Commentaries on the Laws of England: In Four Books* (Oxford: Clarendon Press, 1765-1769), book 1, chap. 18; Stewart Kyd, *A Treatise on the Law of Corporations*, 2 vols. (1793; rpt., New York: Garland Publishing, 1978), 1:69-70; Angell and Ames, *Treatise on the Law of Private Corporations, Aggregate*, 178.

<sup>3</sup> Roberta Romano, *Foundations of Corporate Law* (New York: Oxford University Press, 1993), 63.

power, and Jackson's Veto Message of July 10, 1832, is a document of seminal importance in its challenge to Americans to decide what role they believed corporations ought to play in the republic. But far more relevant for how Americans of the period actually interacted with corporations was the publication that same year of the first treatise on corporate law in the United States by two Rhode Island lawyers, Joseph Angell and Samuel Ames. Taking their *Treatise on the Law of Private Corporations, Aggregate*, as the starting point for an analysis of the corporation in the first third of the nineteenth century, rather than the explosive debates of the Bank War, produces a much different narrative. The bombastic American critics of corporate privilege had very little to say about how membership in corporations was experienced by the many thousands of shareholders in business corporations, about how they came to join and withdraw from such organizations, or the role of judicial and legislative authority in internal corporate workings. Angell and Ames's work, drawn from both British and American cases and often contrasting the two to emphasize the divergence of American law, dealt closely with moments of conflict between corporations and their creditors, debtors, and, more often than has been realized in historical and legal scholarship, their own members. Drawing heavily from their work and other legal commentators of the early nineteenth century, such as James Kent, Nathan Dane, and Conway Robinson, this chapter will examine the nature of membership in profit-seeking corporations of the early nineteenth century.

Following a discussion of the early efforts to define what, in the abstract, private and profit-seeking corporations really were, this chapter will attempt to answer two questions about the nature of individual membership in them. First, how did people

become members of business corporations? The modes of entrance were, in theory, two, but neither original subscription nor the transfer of shares from one member to an outsider, who theoretically then acquired all the rights, privileges, and liabilities of the original shareholder, were especially clear and certain in the first decades of the nineteenth century. Second, what were those rights and duties that they had as members? Following up on the explorations in chapter 3, attention in this chapter will turn specifically to the ways in which agreements to join served as a constraint on corporate change. In stock corporations, American jurists concluded in the early decades of the nineteenth century, fundamental alterations in the means or the ends of corporate action would free any member who had joined under the old terms from any obligation. And that history—and the way it relates to the broader changes in associational practices in the early American republic—reveals an aspect of early national civil society that has too long remained hidden: it rested on assurances that individual autonomy would not be allowed to fall victim to private authority within the legal regimes of the new United States.

An understanding of the meanings that shareholders, prospective shareholders, jurists, and legislators ascribed to corporate participation requires attention both to legal explications of “the nature of the liabilities of members to their own corporation” and to popular conceptions of what participation in, say, a turnpike company would and should entail.<sup>4</sup> Doing so reveals that, by the early 1830s, there was something approaching a standard model of corporate membership: largely unrestrained entrance and exit by the free transfer of shares; clearly defined and predictable liabilities; and limited shareholder

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<sup>4</sup> *Proprietors of Union Locks and Canals v. Towne*, 1 N.H. 44, 45 (1817).

involvement in corporate management. Those developments coincided with the unsteady evolution being charted in the other chapters of this dissertation, toward an emphasis on procedural formalities and well defined and delimited rights and duties of membership. In the wide-ranging efforts to make concerted action in American private groups both effective and acceptable—to members and prospective members, to the public, and to the legislative and judicial institutions that superintended the internal relationships within these groups—there came to be an emphasis on express consent, fair and equitable treatment by means setting limits to the powers of a majority, and formalized, attenuated relationships in increasingly diverse areas of social activity. The development of American corporate law is a part of that story.

### Defining the Corporation

Between 1804 and 1807, as many in the United States were still talking about the purchase of millions of acres of new land for the republic, William Marshall was trying to hold on to a small plot in Boston. After Marshall repeatedly had failed to pay assessments for the costs of road improvements he allegedly owed to the Front Street Corporation, Jabez Ellis purchased the land at public auction and sued to eject him. In the legal dispute that followed, Marshall had a strong argument for why he owed the corporation nothing: he had never been associated with the corporation in any way, and he had explicitly refused on multiple occasions to join this project for street repairs. But in an age when corporations were relatively rare and were invariably thought to be created to serve some public purpose, the best lawyers in Massachusetts divided on whether a man who clearly

stood to benefit from the corporation's endeavors could be compelled to share its costs as a member, to be unwillingly added to the body corporate.<sup>5</sup>

The new chief justice, Theophilus Parsons, was forced to sit out, having argued on behalf of Ellis and the Front Street Corporation before his appointment. Justice Joseph Parker heard the arguments, including the attorney general's laments over the "seriously alarming" increase in the numbers of corporations. "A spirit is growing in the country which will be productive of the most mischievous effects," he pleaded on behalf of Marshall, and "to an independent and enlightened judiciary can we alone look" to check that spirit. His argument hit its mark, as Parker concluded that William Marshall could not be "press[ed] into the service" of a corporation created by "a private act, obtained at the solicitation of individuals, for their emolument or advantage." Marshall had been offered membership and had refused, and he could stay on his land.<sup>6</sup>

In many ways, the modern law of private corporations begins with *Ellis v. Marshall*. When Rhode Island lawyers Joseph Kinnicut Angell and Samuel Ames published the first American corporate law treatise in 1832, they cited *Ellis v. Marshall* only once, but they took its central points—that a private corporation's existence begins with an offer by the state and a willing acceptance by private individuals; and whereas

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<sup>5</sup> *Ellis v. Marshall*, 2 Mass. 269 (1807); William E. Nelson, *Americanization of the Common Law: The Impact of Legal Change on Massachusetts Society, 1760-1830* (1975; Athens: University of Georgia Press, 1994), 134; Dale A. Oesterle, "Formative Contributions to American Corporate Law by the Massachusetts Supreme Judicial Court from 1806 to 1810," in Russell K. Osgood, ed., *The History of the Law in Massachusetts: The Supreme Judicial Court, 1692-1992* (Boston: Supreme Judicial Court Historical Society, 1992), 137-139; Oscar Handlin and Mary Flug Handlin, *Commonwealth: A Study of the Role of Government in the American Economy: Massachusetts, 1774-1861*, rev. ed. (Cambridge, Mass.: Belknap Press of Harvard University Press, 1969), 21-22; Morton J. Horwitz, *The Transformation of American Law, 1780-1860* (Cambridge, Mass.: Harvard University Press, 1977), 110-113.

<sup>6</sup> *Ellis v. Marshall*, 2 Mass. 269, 279 (1809); Edwin Merrick Dodd, *American Business Corporations until 1860: With Special Reference to Massachusetts* (Cambridge, Mass.: Harvard University Press, 1954), 18-27; *Gray v. Portland Bank*, 3 Mass. 364 (1807); *Terrett v. Taylor*, 13 U.S. 43 (1815); *Dartmouth College v. Woodward*, 4 Wheat. 518 (1819). The first English cases making this sort of public/private distinction came a few years later (Dodd, *American Business Corporations*, 18).



public corporations could require membership, a private corporation could not—as facts too obvious to be belabored. What was uncertain in 1808 was made out to be the only rational way to understand corporate existence in 1832, a fact that owed much to the bright line between public, or municipal, corporations (which could claim involuntary jurisdiction over citizens) and private ones that was drawn by the Supreme Court in 1819 in *Dartmouth College v. Woodward*. Story’s concurring opinion in *Dartmouth* was especially clear that the nature of the capital foundation of a corporation, not its intended purposes or its modes of action, determined whether it was public or private, and once classified as private those corporations and their charters were protected from arbitrary state manipulation by the contracts clause of the Constitution. Story applied the idea broadly, mentioning banks, insurance companies, canals, and turnpikes in his opinion. Angell and Ames embraced his view.<sup>7</sup>

*Ellis v. Marshall* did more than aid in drawing a legal distinction between public and private, however. The matter immediately at hand had more to do with the authority of a corporation over an unwilling participant, a question of governing authority that resonated especially clearly in the immediate post-Revolutionary era, than it did with the broader political economy of corporate activity in the Commonwealth of Massachusetts. Indeed, it was indicative of a broader shift that this dissertation traces in how Americans conceptualized membership in private, corporate groups: only consent, expressed clearly

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<sup>7</sup> 4 Wheat. 518, 560, 668-669, 708 (1819); U.S. Constitution, article 1, sec. 10; R. Kent Newmyer, “Justice Joseph Story’s Doctrine of ‘Public and Private Corporations’ and the Rise of the American Business Corporation,” *DePaul Law Review*, 25 (1975-1976): 836; Angell and Ames, *Treatise on the Law of Private Corporations, Aggregate*, 8-9, 21, 47. The importance of *Ellis* to the development of the public/private distinction is noted in Bruce Arthur Campbell, “Law and Experience in the Early Republic: The Evolution of the Dartmouth College Doctrine, 1780-1819” (Ph.D. diss., Michigan State University, 1973), 223. *Ellis* was cited by both Daniel Webster, counsel for the school, and by Justice Joseph Story in *Dartmouth*. It should be no surprise that Webster and Story cited the same cases, as Story was an important contributor to Webster’s case preparations: see R. Kent Newmyer, “Daniel Webster as Tocqueville’s Lawyer: The ‘Dartmouth College’ Case Again,” *American Journal of Legal History*, 11 (1967) 127.

and affirmatively, could make Marshall a member. It was the agreement to join that was of particular consequence.

The contested membership of William Marshall, it should be noted, did not hinge on whether he owned “shares” in the Front Street Corporation. Indeed, in earlier Anglo-American practice, membership in joint-stock enterprises was by no means coextensive with those who had purchased or otherwise taken possession of a share in the business enterprise. “Noblemen, gentlemen, shopkeepers, widows, orphans, and all other subjects” were invited to “employ their capital” in the stock of the East India Company, for instance, and profits would be distributed in the same proportion as their investments, but these shareholders were not identical with members of the corporation. The purchase of shares was an investment that did not entitle the holder to certain government-created privileges: a member, but not a mere investor, or shareholder, could trade in the Indies without violating the royal grant of monopoly. By Ellis’s time, Americans were beginning to have more experience with corporate stock ownership and were increasingly likely to conceive of corporate participation as the ownership of shares. More and more corporations were chartered with exactly that description of their constituents, and a distinction between shareholders and members would be limited to special circumstances, such as a charitable banking corporation that sought to raise funds by the sale of shares as investments. Beginning in the last two decades of the eighteenth century, as the sale and resale of corporate stock became more common, shareholding and corporate membership were increasingly assumed to be synonymous. But disputes such as Ellis’s and Marshall’s, overlapping with the rise to ubiquity of corporate securities, are helpful in an attempt to return to a time when such shares were not solely or even primarily negotiable

pieces of property but were also evidence of a relationship, with burdens and benefits and expectations. Certainly by the time that Angell and Ames sought to collect corporate law into a coherent treatise, the membership of a profit-seeking corporation was understood to comprise those who owned its stock. The three decades previous had seen furious evolution in what, precisely, that stock represented.<sup>8</sup>

The vast majority of Americans, even those of some means, had never owned corporate stock before the last years of the eighteenth century. The number of colonial corporations was miniscule, partially owing to difficulties in using the joint-stock form in the aftermath of the South Sea Bubble of 1720 and still more to the simplicity of economic conditions in British America. Where there were eighteenth-century economic enterprises resembling modern corporations, in their freely transferable shares and in their concentration of power in an elected few, they were usually unchartered associations comprising mostly elite investors, often for the purpose of land speculation. In Middlesex County, outside Boston, corporate securities first appear in probate records in 1778 and became a much more common asset recorded there in the second and third decades of the nineteenth century. There were simply very few stock-issuing corporations before their numbers swelled in the post-Revolutionary years, even including unincorporated investment opportunities, and when someone sought to borrow capital or to join a business venture it usually took place in a face-to-face transaction.<sup>9</sup>

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<sup>8</sup> Samuel Williston, "History of the Law of Business Corporations before 1800," *Harvard Law Review*, 2 (1888): 109-110; Angell and Ames, *Treatise on the Law of Private Corporations, Aggregate*, 64. On the post-Revolutionary uses of a shareholder/member distinction, see the discussion of the Philadelphia Savings Institution, below.

<sup>9</sup> 6 Geo. I, c. 18 (1720); Joseph Stancliffé Davis, *Essays in the Earlier History of American Corporations*, 2 vols. (Cambridge, Mass.: Harvard University Press, 1917), 1:105-106; Shaw Livermore, *Early American Land Companies: Their Influence on Corporate Development* (New York: Commonwealth Fund, 1939); Winifred B. Rothenberg, "The Emergence of a Capital Market in Rural Massachusetts, 1730-1838," in Ronald Hoffman et al., *The Economy of Early America: The Revolutionary Period, 1763-1790*

Over the next few decades in the United States, however, the numbers of private corporations rose beyond belief, and huge numbers of Americans were joining, contributing to the capital of countless new business associations by subscribing for stock. New York, which issued five corporate charters in 1800, incorporated seventy-three companies in 1832 (and slightly more than a thousand in the interim). By 1830, New England states had incorporated almost 1,900 businesses. “If a native of Europe,” Angell and Ames wrote, “should be informed, even with tolerable accuracy, of the number of Banking Companies, Insurance Companies, Canal Companies, Turnpike Companies, Manufacturing Companies, &c.--and of the literary, religious, and charitable associations...fully invested with corporate privileges, he could not be made to believe that he was told the truth.” Historian John Majewski has recently argued that, owing to a deliberate effort to “democratize” corporate participation in Pennsylvania, a far greater number of ordinary Americans owned more shares in more corporations than has been recognized; some thirty-eight thousand individuals purchased stock in Pennsylvania banks, turnpikes, and toll bridges between 1800 and 1821. When forty-two banks were chartered in that state in the year 1814, their stock was subscribed for by twenty-thousand individuals, including many “carpenters, grocers, draymen, hatters, innkeepers, and tailors,” who made up a fifth of his sample of the investors of five Philadelphia banks. Angell and Ames noted that “there is scarcely an individual of respectable character in our community, who is not a member of, at least, one private company or society which

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(Charlottesville: University Press of Virginia, 1988), 135-136; Stuart Banner, *Anglo-American Securities Regulation: Cultural and Political Roots, 1690-1860* (New York: Cambridge University Press, 1998), 127-128; Edwin J. Perkins, *American Public Finance and Financial Services, 1700-1815* (Columbus: Ohio State University Press, 56-75; Charles Royster, *The Fabulous History of the Dismal Swamp Company: A Story of George Washington's Times* (New York: Vintage, 1999), 82-83, 375.

is incorporated.” The corporation was becoming a fixture in this associated American social order, and many Americans had a share.<sup>10</sup>

The aim of this chapter is not to reexamine the explanations that historians, legal scholars, and economists have offered for the explosive growth in corporations (and, more recently, in corporate shareholding) in the new republic. Still, much of this scholarship is certainly relevant, as that scholarship addresses the larger debates among the first generations of Americans over whether corporations should serve public purposes or may seek solely private benefit. Those controversies often centered on nothing less than how to define the nature of corporate existence. Those ideas—about what corporations, in an abstract sense, really *were*—played a crucial role for lawyers, politicians, and corporate directors and members as they shaped the internal workings of those groups.

To understand the corporation, Americans in the post-Revolutionary years quickly came to center on the concession theory of corporate existence, in which any and all powers of a corporation were derived from its charter as specific concessions from the state. There was some experiment with general incorporation acts in the early republic: New York’s trailblazing statutes permitted churches to incorporate without special charter (1784), followed by libraries (1796), turnpike companies (1807), and

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<sup>10</sup> Evans, *Business Incorporations in the United States*, table 9; William C. Kessler, “Incorporation in New England: A Statistical Study, 1800-1875,” *Journal of Economic History*, 8 (1948): 43-47; Dodd, *American Business Corporations until 1860*, 11; John Majewski, “Toward a Social History of the Corporation: Shareholding in Pennsylvania, 1800-1840,” in Cathy Matson, ed., *The Economy of Early America: Historical Perspectives and New Directions* (University Park: Pennsylvania State University Press, 2006), 294-316; John Majewski, *A House Dividing: Economic Development in Pennsylvania and Virginia before the Civil War* (New York: Cambridge University Press, 2000), chaps. 1-2. By the time Angell and Ames wrote, Francis Lieber would describe American society as “a concatenation of various corporations, political, civil, religious, social and economical,” with the nation simply a “great corporation, comprehending all others.” Francis Lieber, *Encyclopædia Americana...*, 13 vols. (Philadelphia: Carey, Lea & Blanchard, 1830-1835), 3:547; Angell and Ames, *Treatise on the Law of Private Corporations, Aggregate*, 35.

manufacturing corporations (1811), and some other states, though not moving quite so quickly, passed similar laws. But the special charter, incorporating one corporation by means of a detailed statute, was the rule. State governments and communities wanted to keep their creations within defined bounds. Shareholders, too, wary of the unknown in deciding whether to become involved, had an interest in delimiting the means and the ends that a corporation might pursue. The concession theory not only met those purposes but provided some explanation for how, precisely, *pluribus* became *unum*.<sup>11</sup>

The classic statement of the concession theory came with John Marshall's definition of the power of the charter to shape corporate practices and legal capabilities in 1804. In *Head and Amory v. Providence Insurance Company*, Marshall spoke out against the ability of a corporation to bind itself by a parol contract if no such capacity had been granted in its incorporating act. "The act of incorporation is to them an enabling act," he wrote of private corporations. "It gives them all the power they possess; it enables them to contract, and when it prescribes to them a mode of contracting, they must observe that mode, or the instrument no more creates a contract than if the body had never been incorporated." Because the charter of the Providence Insurance Company only described the issuance of policies or "other instruments" that were "made and signed by the president of the said company, or any other officer thereof, according to the ordinances, bye-laws and regulations of the said company," Marshall determined for the Court, no other mode of contract was permissible. In a subsequent New York quo warranto

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<sup>11</sup> William P. Van Ness and John Woodworth, *Laws of the State of New York...* (Albany: H.C. Southwick, 1813), chaps. XLIII, XXXVIII, and LXVII; Lawrence M. Friedman, *A History of American Law*, 2d ed. (New York: Simon and Schuster, 1985), 198-201; David Millon, "Theories of the Corporation," *Duke Law Journal* (1990): 205-207; Henry N. Butler, "Nineteenth-Century Jurisdictional Competition in the Granting of Corporate Privileges," *Journal of Legal Studies*, 14 (1985): 138-143. According to Evans, *Business Incorporations in the United States*, the special-charter era can be thought to have ended as late as the 1870s (2).

proceeding, frequently cited by Angell and Ames, it was pronounced that “the specification of certain powers...is an implied prohibition of the exercise of other and distinct powers.” As the court noted, to think otherwise would produce “mischievous consequences,” especially “where charter privileges have been so alarmingly multiplied.” The charter was the source of authority and of accountability in the corporations’ relations with the rest of the world.<sup>12</sup>

Through the charter, the means of corporate conduct remained closely connected, conceptually and practically, to state power. The ends of corporate existence, on the other hand, moved somewhat more quickly away from that close identification with the state. By 1832, the idea that American states should create only those institutions that were needed to serve the interest of the commonwealth had given way to a looser but still public-regarding standard. As Angell and Ames would describe it, American states incorporated “all associations, whose object tends to the public advantage” but that might, also, “be established for the advantage of those who are members of it.” The public interest was not to be left out of the equation; indeed, a majority of corporations—even excluding the massive number of charters for towns and other municipalities—were for distinctly public projects. In the first four decades of the nineteenth century, of the many corporate charters issued by the states of New York, Maine, Ohio, Pennsylvania, Maryland, and New Jersey, more than half were for public utilities such as turnpikes, canals, and bridges. But still those who reflected on the subject could see a drift away from the conceptions of incorporated bodies as instruments of government or state-

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<sup>12</sup> *Head and Amory v. Providence Insurance Company*, 2 Cranch (6 U.S.) 127, 163-169; Newmyer, “Justice Joseph Story’s Doctrine of ‘Public and Private Corporations,’” 828-832; Dodd, *American Business Corporations until 1860*, 37; *People v. Utica Insurance Company*, 15 Johns. 358, 383 (1818); Angell and Ames, *Treatise on the Law of Private Corporations, Aggregate*, 60, 472.

endorsed monopolies. As Oscar and Mary Handlin described the trend in Massachusetts, “Democratic unwillingness to confine the corporation to a favored few had dispersed it among many holders and that in turn had separated it from the state.” In the past few years, the work of Johann Neem has further fleshed out this transition from corporations as public trusts to private, charter-protected institutions by emphasizing the role of partisan conflict and the contested space of the public sphere in the eventual walling off of what would become known as “private corporations, aggregate,” from arbitrary government alteration.<sup>13</sup>

Without doubt, however, that transition was gradual. In a practical sense, as William Novak has argued, the portrait of the corporations’ insulation from government supervision and discretion after 1819 ignores the conditional charters, their strict construction, and persistent state regulation that remained long after. Conceptually, too, the predominance of public-oriented incorporations and endless debate in the political sphere over corporate policies helped prolong the belief, even after the *Dartmouth* decision, that chartered corporations were institutions that existed to serve the public, even if their capital foundations were wholly private.<sup>14</sup>

Although a strong critic of the decision in *Dartmouth* that a corporate charter was a contract that could not be unilaterally amended by the legislature, David Henshaw of

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<sup>13</sup> Angell and Ames, *Treatise on the Law of Private Corporations, Aggregate*, 7-8, 35; James Willard Hurst, *The Legitimacy of the Business Corporation in the Law of the United States, 1780-1970* (Charlottesville: University Press of Virginia, 1970), 8-9; John Joseph Wallis, “Market-Augmenting Government? States and Corporations in Nineteenth-Century America,” in Omar Azfar and Charles A. Caldwell, eds., *Market-Augmenting Government: The Institutional Foundations of Prosperity* (Ann Arbor: University of Michigan Press, 2003), 239-240; J. Alton Burdine, “Governmental Regulation of Industry in Pennsylvania, 1776-1860” (Ph.D. diss., Harvard University, 1939), 34-35, 35n.68; Handlin and Handlin, *Commonwealth*, 139-161; Johann Neem, *Creating a Nation of Joiners: Democracy and Civil Society in Early National Massachusetts* (Cambridge, Mass.: Harvard University Press, 2008), chap. 3.

<sup>14</sup> William J. Novak, *The People’s Welfare: Law and Regulation in Nineteenth-Century America* (Chapel Hill: University of North Carolina Press, 1996), 105-111.



Boston had no problems with the corporate form. He would invest in and promote business corporations for much of his life and political career. He very much liked the fact that, unlike English corporations, those in the United States “have only particular powers,” are created for the common good, and “are here the natural consequence of the minute division of property, and of its general distribution among the whole mass of citizens.” They were, he thought, of “peculiar advantage to persons of small means.” Henshaw, in fact, embraced Marshall’s definition of the corporation in *Dartmouth* as “an artificial being, invisible, intangible, and existing only in contemplation of the law.” A corporation was this, and nothing more, with the charter defining every aspect of the fictitious entity. The Court’s reasoning aroused opposition among Henshaw and the many others who shared his views only because in *Dartmouth* it took the further step to rule that the charter that created the corporation constituted a contract with those who composed the corporation. Thus, barring some sort of reservation of the power to amend by the legislature, the association itself was impervious to change, even if such change was deemed by the government to be in the public interest.<sup>15</sup>

Of course, Joseph Story’s recommendation that states include a reservation of the power to amend in charters and general statutes combined with a continued regulatory power (the state could not contract away powers of police or its duty to the general welfare) to greatly limit the impact of *Dartmouth*. And recent scholarship has continued to dismantle the old narrative, the “classical portrait of insistent and inevitable

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<sup>15</sup> A Citizen of Boston [David Henshaw], *Remarks upon the Rights and Powers of Corporations, and the Rights, Powers, and Duties of the Legislature toward Them. Embracing a Review of the Opinion of the Supreme Court of the United States, in the Case of Dartmouth College, in New Hampshire, Given in 1819* (Boston: Beals and Greene, 1837), 5-6; John L. Brooke, *The Heart of the Commonwealth: Society and Political Culture in Worcester County, Massachusetts, 1713-1861* (1989; rpt., Amherst: University of Massachusetts Press, 2005), 317-318; Francois Weil, “Capitalism and Industrialization in New England, 1815-1845,” *Journal of American History*, 84 (1998): 1334-1354; 4 Wheat. (17 U.S.) 518, 636 (1819).

liberalization and privatization” of the corporation. Recent work on the nature of the relationship between government and philanthropic and religious associations, in particular, has furthered our understanding of the complicated way in which, as Mark McGarvie has put it, “the protection of private rights from public action required the delineation of private and public activities,” a task largely unachievable through political channels and thus necessitating a turn to law. But the question remained of what the effects would be for those who joined a corporate endeavor.<sup>16</sup>

Here, in fact, is a neglected way in which the charter continued to matter, as a way of delineating the rights of corporate *members* and not simply the rights and powers of corporations. Indeed, the charter stood at center stage in American views of the corporation even before its designation as a contract securing the corporation from government meddling. The principle was in large part a constitutional one. Oscar and Mary Handlin showed long ago how the corporate form rose to prominence even before those attributes with which we associate it, such as limited liability and contractual freedom from state interference, were legal realities, largely because the corporation as an instrument of public service suited American republican conceptions of how states should govern. Pauline Maier has extended that observation to show how Americans could embrace chartered entities because they were so comfortable with constitutional ones. In other words, perceptions of how states should govern their citizens (through limited means, demanding minimal taxation) encouraged the liberal use of the chartering power,

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<sup>16</sup> Novak, *People's Welfare*, 107; Mark Douglas McGarvie, *One Nation under Law: America's Early National Struggles to Separate Church and State* (DeKalb: Northern Illinois University Press, 2004), 13; Scott Gregory Lien, “Contested Solidarities: Philanthropy, Justice, and the Reconstitution of Public Authority in the United States, 1790-1860” (Ph.D. diss., University of Chicago, 2006); Joan C. Williams, “The Invention of the Municipal Corporation: A Study in Legal Change,” *American University Law Review*, 34 (1985): 369-438; Hendrik Hartog, *Public Property and Private Power: The Corporation of the City of New York in American Law, 1730-1870* (Chapel Hill: University of North Carolina Press, 1983).

so that a company, and not the state, would, say, build a bridge or improve a road. Perceptions of how states were governed *by* their citizens (constitutionally, with specifically delegated powers) nurtured a particular view of the corporation as a fictional entity with limited powers and aided in Americans' embrace of that concept. The desire for more and more corporations, wrote one legal commentator in 1830, "naturally grows from the genius of our institutions; for our governments, political and municipal, are founded on corporate principles."<sup>17</sup>

American experience was far outstripping the entire world's in the formation of corporations, for every conceivable purpose, which necessitated reflection on how and why corporations took the forms they did. Maier's work, emphasizing the charter less as contract than as constitution, points in the right direction, for this chapter will extend the recent critiques of the old account of the evolution of the American corporation by examining legal and political concerns over matters of internal corporate governance. From the vantage point of the state, as Marshall, Story, and Bushrod Washington each made clear in slightly different ways in *Dartmouth*, the corporate charter was a contract, unable to be amended by the state without the consent of the incorporators. But from the perspective of those who made up the corporation, the charter was something still more profound: it was a constitution, an agreement that, like a government's constitution, laid out the basic rules by which all subsequent laws would be formed and accepted. Nothing makes this way of conceiving of the private corporation more apparent than attention to

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<sup>17</sup> Oscar Handlin and Mary F. Handlin, "Origins of the American Business Corporation," *Journal of Economic History*, 5 (1945): 1-23; Pauline Maier, "The Revolutionary Origins of the American Corporation," *William and Mary Quarterly*, 3d ser., 50 (1993): 51-84; [Anonymous], "Corporations," *American Jurist and Law Magazine* (October 1830): 300. On the reciprocal relationship between constitutional experience at the associational or corporate level and at the level of government, see Jason Mazzone, "Organizing the Republic: Civic Associations and American Constitutionalism, 1780-1830" (J.D. diss., Yale Law School, 2004), esp. chaps. 5-7.

how jurists, relying on charters as the basic articles of agreement, began to work out how, exactly, people became—and ceased to be—members of business corporations.

### Joining the Corporate Ranks

Over the course of about five hundred pages, Joseph Angell and Samuel Ames in their 1832 treatise took occasion repeatedly to emphasize the fact that, even as English courts had begun to relax their constraints on corporate action (the Bubble Act had been repealed in 1825) and to modernize the corporate form, American courts and legislatures had outpaced them. As an organizing theme, their focus on divergence was quite typical of American treatises in the post-Revolutionary era. For a treatise on corporations, it was inescapable. Theirs was the first major work on corporations to be written on either side of the Atlantic since Stewart Kyd's 1793 publication in London, which dealt primarily with municipal bodies. A distinction between public and private, in fact, was not a part of Kyd's work or, indeed, of the thinking of any British or American lawyer in 1793. And so much had changed in legal thinking regarding the corporation in the intervening decades, particularly in the United States.<sup>18</sup>

This was most noticeably true in the matters of corporate contracts, implied promises, and torts, but there was profound change, too, in conceptions of individual

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<sup>18</sup> Ron Harris, "Political Economy, Interest Groups, Legal Institutions, and the Repeal of the Bubble Act in 1825," *Economic History Review*, 50 (1997): 675-696; A. W. B. Simpson, "The Rise and Fall of the Legal Treatise: Legal Principles and the Forms of Legal Literature," *University of Chicago Law Review*, 48 (1981): 669-671; Perry Miller, *The Life of the Mind in America: From the Revolution to the Civil War*, bks. 1-3 (New York: Harcourt, Brace, and World, 1965), 99-116; Stewart Kyd, *A Treatise on the Law of Corporations*, vol. 1 (London: J. Butterworth, 1793); Hartog, *Public Property and Private Power*, 185-186. A work devoted solely to municipal corporations, noted by Angell and Ames as "very faithful" and helpful in their research on mandamus, quo warranto, disfranchisement, and amotion, was published in 1827: J. W. Willcock, *The Law of Municipal Corporations: Together with a Brief Sketch of Their History, and a Treatise on Mandamus and Quo Warranto* (London: W. Benning, 1827).

corporate membership. Looking at the questions of entrance, exit, participation, and authority, it becomes clear that, even as the corporate form was evolved in the early nineteenth century, many elements of what it was for an individual to be a part of a profit-seeking corporation did not stray too far from their eighteenth-century roots. But there were moves toward the better definition and delimitation of members' rights and responsibilities.

The misconceptions of William Bridges when he bought one hundred shares in the Philadelphia Savings Institution on November 30, 1835, are especially helpful in the attempt to understand just what had changed, precisely because the facts were somewhat peculiar. On January 5 of the following year, Bridges showed up at a scheduled meeting of the institution, a stockholder's right as he understood it, and was "ejected therefrom by a vote of the members then and there assembled and denied the privilege of a Member, although at the time he owned the stock aforesaid and was a stockholder on the books of the institution," according to his deposition two days later. He asked a court to issue a writ of mandamus to compel the corporation to accept him, for there was no doubt that he held legitimately transferred stock, and the Supreme Court directed the president to show cause why they should not. A quo warranto proceeding, begun about the same time, rested on the same concerns, and the two were bundled up by the court in its effort to unravel *The Case of the Philadelphia Savings Institution* in April 1836.<sup>19</sup>

The charter of the Philadelphia Savings Institution was the source of the misunderstandings. As originally conceived, it would create a philanthropic savings bank that would, by means of investing its capital, offer enough of a return to encourage

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<sup>19</sup> Deposition of William G. Bridges, Case of the Philadelphia Savings Institution, Mandamus and Quo Warranto Proceedings, folder 9, Supreme Court of Pennsylvania, Eastern District, RG-33, Pennsylvania State Archives, Harrisburg, Pa.

people like Bridges to purchase stock in order to fund the whole endeavor. The institution would sell that stock as a means of raising funds, but, importantly, its charter explicitly defined the corporation as including only those forty-six men there named. The stock sold was only an investment (or, from another perspective, a charitable donation) and was never intended to bestow membership on the purchaser. The petition by William Bridges for a writ of mandamus to compel the corporation to accept his active participation in decisions reveals either his ignorance about his role as a stockholder in this hybrid form of corporate organization, or his belief that broader notions of corporate membership might just prevail in persuading the Pennsylvania high court to step in on his behalf. In either event, it was a conflict that sought a judicial determination of the consequences of stockholding.<sup>20</sup>

His attorneys, drawing heavily on the recently published *Treatise on the Law of Private Corporations, Aggregate*, by Angell and Ames, argued that stockholders should be members: “The rule is, that in monied institutions an interest in the stock is essential to membership. This rule is founded in good sense, which leads men to trust the care of their property to persons having a common interest with themselves. In the case of literary, charitable or religious institutions a general interest is sufficient.” The crucial issue was what should prevail in a corporation “of a mixed character” such as this, and they contended that “the principles as to monied institutions ought to govern: since the control of the stock ought not to be in the hands of persons having no interest in it.” The charter was imprecise and confused in its language, they observed, and some parts “seem to

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<sup>20</sup> *Case of the Philadelphia Savings Institution*, 1 Whart. 461 (1836). See also the return of Peter Fritz, president of the Philadelphia Savings Institution, to the petition for mandamus, Mandamus and Quo Warranto Proceedings, folder 9, Supreme Court of Pennsylvania, Eastern District, RG-33, Pennsylvania State Archives, Harrisburg, Pa.

imply, that the legislature meant stockholders only when ‘members’ are spoken of.” And if other parts of the charter imply the opposite, that stockholders are something other than members, “the principles stated with reference to joint-stock companies, ought to have weight in deciding between them.” The opposing counsel, also drawing from the already influential Angell and Ames treatise, argued that the charter was clear enough for the court’s purposes, and that Bridges was out. This was not an ordinary “monied corporation,” and no stockholder should have the power to “make as many members as he had shares to assign.”<sup>21</sup>

The court was perfectly willing to concede Bridges’ first point, that “in monied institutions, such as banks, insurance, canal, and turnpike companies, &c. the mere owning of shares in the stock of the corporation, gives a right of voting; and a stockholder ceases to be a member by a transfer of stock.” And in charitable or religious groups, control is quite reasonably given “to those who have no pecuniary interest whatever in their management.” The court must take into account that the Philadelphia Savings Institution seemed more in line with “the nature of a charity,” wrote Justice Morton Rogers, “where the professed object is to advance the interests of the poor and helpless.” A close look at the charter revealed “antagonist interests,” where “the interest of the stockholders is in some measure in opposition to the interest of the depositors.” Deciding that “there may be a peculiar propriety in the Legislature to entrust the control of the funds to persons who have no pecuniary interest in the corporation,” precisely because of its charitable end, mandamus was denied, and William Bridges was left with no say in the affairs of the Philadelphia Savings Institution.

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<sup>21</sup> *Case of the Philadelphia Savings Institution*, 1 Whart. 461, 464-465 (1836); “An Act to Incorporate the Philadelphia Savings Institution,” passed Apr. 5, 1834, *Laws of the General Assembly of the State of Pennsylvania...* (Harrisburg, 1834), no. 106.

In the end, it was the nature of the institution that determined who belonged in its ranks and who could have a voice in its decisions. And in the unequivocally profit-seeking business corporation, those who held shares of its stock were the voting constituency of record. They held all authority not elsewhere ascribed in the charter. A certificate need not be physically held: even where the incorporating act declared that certificates shall issue to the stockholders, “still, for want of them, the stock holders would not lose their rights,” determined the Supreme Court of Massachusetts in 1819. Certificates were, however, the usual practice, often “embossed with the company seal and emblazoned with the signatures of at least two top company officers,” in Robert Wright’s description.<sup>22</sup>

Unlike a bill of exchange or a promissory note, which was and is inseparable in a legal sense from the obligation represented, the stock certificate was and is only evidence of a person’s title to shares in a company. Never an absolutely necessary element to establish corporate membership, it was rather only a convenient one. That conceptual distinction is revealing. The distinction between stock as a bartered piece of property and as indicative of a relationship between corporation and individual member is especially apparent in the early years of American corporate development.<sup>23</sup>

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<sup>22</sup> Ibid., 466-467; *Chester Glass Company v. Dewey*, 16 Mass. 94, 101 (1819); Angell and Ames, *Treatise on the Law of Private Corporations, Aggregate*, 294, 316-318; Robert E. Wright, *The First Wall Street: Chestnut Street, Philadelphia, and the Birth of American Finance* (Chicago: University of Chicago Press, 2005), 76-77. In addition to Wright, on early securities trading, see Banner, *Anglo-American Securities Regulation*; Joseph Edward Hedges, *Commercial Banking and the Stock Market before 1863* (Baltimore: Johns Hopkins Press, 1938), 27-55; Richard Sylla, “U.S. Securities Markets and the Banking System, 1790-1840,” *Federal Reserve Bank of St. Louis Review*, 80 (May-June 1998): 83-98.

<sup>23</sup> Abbott Lawrence Lowell and Francis C. Lowell, *The Transfer of Stock in Private Corporations* (Boston: Little, Brown, 1884), chap. 5; Francis T. Christy, *The Transfer of Stock* (New York: Baker, Voorhis, 1929), 20-29.



It was in this period, for instance, that it was determined that stock issued by a corporation owning only real estate, such as a turnpike or inland-navigation company, was not, itself, to be treated as real, rather than personal, property. If, indeed, a share of stock represented only a share or portion of that company's property, then it would make sense to treat the stock in that way. But courts in the United States moved well in advance of English courts in deciding that, in fact, it was the corporation that owned the real estate; what the shareholder owned was a right to receive dividends out of the corporate treasury, where it was then only money. When a Connecticut court in 1818 resisted that logic, the state's legislature moved swiftly to enact a statute to make all corporate shares personal property, and that view had then prevailed in every state.<sup>24</sup>

Legal challenges, and then legal change, resulted from the fact that the corporate share was rarely acquired by someone paying its full value, which meant that, very frequently, the corporation would come seeking more. The fully paid share—stock as it is commonly understood today—was a rarity in the early nineteenth century. A share representing, say, one hundred dollars' investment in a company was, in most cases, purchased with little at the outset, with the understanding that subsequent calls would be made up to the par value of the stock. In some instances, most consequentially in the Massachusetts turnpikes organized under the Turnpike Act of 1805, there was no stated value at all for the stock. Corporators simply subscribed for a certain number of shares,

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<sup>24</sup> Banner, *Anglo-American Securities Regulation, 187-188*; *Welles v. Cowles*, 2 Conn. 567 (1818); Nathan Dane, *A General Abridgment and Digest of American Law: With Occasional Notes and Comments*, 8 vols. (Boston: Cummings, Hilliard, and Co., 1823), 3:108, citing *Russell v. Temple* (Mass., 1798); Paddy Ireland, "Capitalism without the Capitalist: The Joint Stock Company Share and the Emergence of the Modern Doctrine of Separate Personality," *Journal of Legal History*, 17 (1996): 49-62. See also the thorough discussion of the issue by Rhode Island chief justice Job Durfee in *Arnold v. Ruggles*, 1 R.I. 165 (1837).

paid their assessments (which could amount to hundreds of dollars), and, they hoped, collected dividends proportionally.<sup>25</sup>

That method of financing corporations in the early republic inevitably led to legal challenges concerning delinquents. And yet the method predominated through the early nineteenth century. Although there was plenty of variance in the details, those organizing a corporate business venture routinely followed the same course. When people sought to create a turnpike to connect Albany with Schenectady, New York, they met in November 1801 at the City Tavern in Albany and drew up articles of association, dividing the endeavor into two thousand shares worth fifty dollars. Those wishing to participate had a day to pay one dollar for each share subscribed, in order to defray initial organizing expenses. Once a charter of incorporation had been received from the legislature, they agreed, another four dollars would become due. As people subscribed, most commonly for about ten shares (some for as few as two, some as many as nineteen), elections were held and a committee selected to “to prepare a Bill to be presented to the Legislature at their next meeting for the purpose of Incorporating the Turnpike Company,” according to the company records. It was quickly passed. They soon prepared a circular seal for the corporation—“a stream of water with a bridge of three Arches across it, a road with Lombardy Poplar trees along the borders”—and the officers began the routine matters of turnpike construction (and the not-so-routine matter of purchasing ten thousand poplar trees). Over the next two years, the company assessed the members for five dollars, then six more, then another eight dollars in two installments. The year 1804 saw another fifteen dollars assessed, in three five-dollar installments, and the company secretary for

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<sup>25</sup> Dodd, *American Business Corporations until 1860*, 74; Charles R. T. O’Kelley & Robert B. Thompson, *Corporations and Other Business Associations: Cases and Materials*, 4th ed. (New York: Aspen Publishers, 2003), 488-489; Massachusetts Statutes, 1805, chap. 14.

the first time recorded discussions over what to do with delinquents. Not until 1805 (five more assessments, three dollars each) was the turnpike ready to open for business and toll collectors hired. In early 1806, a few weeks after another four dollars was assessed on each share, at last the first cash dividend was ready to distribute: 3 percent, or a dollar and half on each share, and additional dividends followed over the next seventeen years recorded in the company's ledger.<sup>26</sup>

Turnpikes, in which stock was especially widely held and yet famously unprofitable, figure largely in the early history of stock subscription and assessments. Unlike English turnpikes, which were most commonly unincorporated trusts, those in the new United States were usually incorporated, although proprietorships did exist. It was quite often a desire for local economic development, especially efforts to ensure that one's town was not bypassed by a turnpike promoted by a rival community, that led people to purchase turnpike stock. Profits were not necessarily expected. And yet, rather than throw good money after bad, there were times when many individuals in the early nineteenth century would attempt to evade calls to pay, and thus legislators, in their general acts and charters, and judges, when called upon by the companies to collect debts, had to come to terms with the exact nature of the turnpike shareholders' liabilities.<sup>27</sup>

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<sup>26</sup> Albany and Schenectady Turnpike Company, articles of agreement and ledger, New-York Historical Society; Act passed March 30, 1802, Laws of New York, 25<sup>th</sup> Session, ch. 69

<sup>27</sup> Eric Pawson, *Transport and Economy: The Turnpike Roads of Eighteenth Century Britain* (London: Academic Press, 1977); Edward C. Kirkland, *Men, Cities, and Transportation: A Study in New England History, 1820-1900*, 2 vols. (Cambridge, Mass.: Harvard University Press, 1948); Walter K. Wood, "The Alleghany Turnpike and Internal Improvements, 1800-1850" (M.A. thesis, Virginia Polytechnic Institute, 1969); Carter Goodrich, "The Virginia System of Mixed Enterprise: A Study of State Planning of Internal Improvements," *Political Science Quarterly*, 64 (1949): 355-387; Joseph Austin Durrenberger, *Turnpikes: A Study of the Toll Road Movement in the Middle-Atlantic States and Maryland* (Valdosta, Ga., 1931); Daniel P. Jones, "Commercial Progress versus Local Rights: Turnpike Building in Northwestern Rhode Island in the 1790s," *Rhode Island History*, 48 (1990): 21-32; Robert F. Hunter, "The Turnpike Movement

The first time a court was asked to step in and compel a man to pay his assessments, it was money owed to the Union Turnpike in New York in 1803. People were uncertain how to treat the obligations owed by Thomas Jenkins upon his “promise to pay to the president, directors, and company of the Union Turnpike Road the sum of \$25 for every share of stock in the said company, set opposite to our respective names, in such manner and proportion, and at such time and place, as shall be determined by the said president, directors, and company.” Jenkins had not made the initial ten-dollar payment, and he had not responded to subsequent calls for five dollars. The Supreme Court of New York held Jenkins liable to pay, but the state’s highest court, the Court for the Correction of Errors, found differently. Two opinions were written, and each based a decision in favor of Jenkins on different grounds, but, importantly, Senator Ezra L’Hommedieu held that the statute creating the turnpike had allowed the corporation only one remedy if Jenkins did not make his ten-dollar down payment: “The plaintiff, by this, forfeited his right to be a stockholder.” The corporation could not compel Jenkins to pay anything at all. They could, however, sell off his shares. Though the judges were feeling their way, somewhat tentatively, toward a principle that could be applied consistently (this was, L’Hommedieu observed, the first case of its kind), they could rest their decision against the Union Turnpike both on the incompleteness of Jenkins’s subscription and on the fairness of the outcome, for just as the turnpike could not claim money from

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in Virginia, 1816-1860,” *Virginia Magazine of History and Biography*, 69 (1961): 278-289; Daniel B. Klein and John Majewski, “Economy, Community, and Law: The Turnpike Movement in New York, 1797-1845,” *Law and Society Review*, 26 (1992): 469-512.

Jenkins, he could have made no claim on them: “in case the stock had rose, the company would have been under no obligation to have considered him as a stockholder.”<sup>28</sup>

The reversed Supreme Court in New York, however, found two opportunities in the next decade to assert its stronger stand on the liability of subscribers to corporate stock for subsequent assessment, and these decisions would not be overturned. Corporate organizers had found a way to ensure that subscribers to stock could be held legally accountable for not paying their share. The crucial point in both cases—and, as Angell and Ames observed in 1832, in virtually all subsequent case law on stock subscription—was an explicit contractual commitment on the part of the stockholder, in a shape either analogous to or exactly in the form of a promissory note. In other words, an abstracted understanding of the rights and duties of corporate membership had absolutely nothing to do with it, for the organizers of corporations had begun asking those who joined to sign express agreements that they would pay assessments. The courts of New York looked to those specific acts of personal obligation, finding there a way to authorize corporations’ pursuit of delinquents in actions of assumpsit, or debt. In *Goshen and Minisink Turnpike Company v. Hurtin* in 1812, and in *Dutchess Manu-Factory Company v. Davis* five years later, the Supreme Court decided in favor of the corporation, “on the principle that the maker of a promissory note is liable.” In the Empire State, there was an increasing emphasis that individual liability for corporate assessments was to be founded only on precise and express consent.<sup>29</sup>

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<sup>28</sup> *Jenkins v. Union Turnpike Road*, 1 Caine’s Case Reports (N.Y.) 86 (1805); *Union Turnpike Road v. Jenkins*, 1 Caine’s Reports (N.Y.) 381 (1803); Angell and Ames, *Treatise on the Law of Private Corporations, Aggregate*, 293; Dodd, *American Business Corporations*, 74-76.

<sup>29</sup> *Goshen and Minisink Turnpike Company v. Hurtin*, 9 Johns. 217 (1812); *Dutchess Manu-Factory Company v. Davis*, 14 Johns. 238 (1817); Angell and Ames, *Treatise on the Law of Private Corporations*,

Massachusetts had done the same. Subscriptions that were drafted after a company had been formed by statute, in which those same people named in statute agreed to pay all legal assessments, were enforced. When Aaron Willard signed such an agreement with the Worcester Turnpike Corporation, and when Elijah Pope did so with the Taunton and South Boston Turnpike, it was their personal promises to pay assessments that gave each corporation another remedy, aside from the one provided by statute (the sale of delinquents' shares), should Willard or Pope fail to pay up.<sup>30</sup>

That point, though some states took a slightly looser view, became fixed in the American law of business corporations in 1809 when the Andover and Medford Turnpike brought an action against Abraham Gould, who had signed no such paper and who had only agreed, with many others, "to take in said road the number of shares set against our names, and be proprietors therein." Theophilus Parsons, while noting that assessment was not a corporate power at common law, had no problem with inferring the company's power to tax its members from an act that had not expressly given it. There was for Parsons no other way to read a statute that authorized the turnpikes (the Andover and Medford was formed under the general Turnpike Act of 1805) to sell the shares of delinquents. What he and the court would not countenance was inferring any other remedy than that spelled out by law: "it is a rule founded in sound reason, that when a statute gives a new power, and at the same time provides the means of executing it, those who claim the power can execute it in no other way." But the Massachusetts court did not ground its thinking solely on the strict construction of a statute. The practical

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*Aggregate*, 293-294; Dodd, *American Business Corporations*, 74-75. See also *Highland Turnpike v. M'Kean*, 11 Johns. 98 (1814).

<sup>30</sup> *Worcester Turnpike Corporation v. Willard*, 5 Mass. 80 (1809); *Gilmore v. Pope*, 5 Mass. 491 (1809).

reasonableness of their position was apparent to them: although people approached to join a turnpike company “may not be able to judge of the probable expenses or profits,” they are more likely to “join the association” as long as “they know, that if the assessments become grievous, they may abandon the enterprise by suffering their shares to be sold.” As readers of the first American corporate law treatise would see, it was there established that “the members of a corporation are not liable to be proceeded against personally in a suit by the company for a legal assessment, unless there has been a *promise* on their part to pay it.”<sup>31</sup>

While a United States senator, John Quincy Adams subscribed for ten shares in the New Bedford and Bridgewater Turnpike Corporation in Massachusetts, a company divided into five hundred shares. When assessments for his part of the company’s \$50,000 in expenses were made, his one-fiftieth portion came to \$1,000. His refusal to pay, and the fact that the highest court in Massachusetts would not compel him to do so, reveals the relatively brief but consequential evolution by which membership in the stock-issuing business corporation moved toward limited and well-defined obligations. By the time John Quincy Adams contested the call for a thousand dollars, similar cases had produced within the jurisprudence of several states a legal doctrine that would ultimately prevail nationwide: without an express promise to pay, the sole remedy that a corporation had against a delinquent member was to reclaim and resell his or her shares.

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<sup>31</sup> *Andover and Medford Turnpike Corporation v. Gould*, 6 Mass. 40 (1809); Angell and Ames, *Treatise on the Law of Private Corporations, Aggregate*, 302; [Joseph K. Angell], “Law of Corporations: Personal Liability of the Members of an Incorporated Company for Stock Subscribed and for Assessments,” *United States Law Intelligencer and Review*, 2 (1830): 109-118; Dodd, *American Business Corporations*, 76. The point became especially clear when the Massachusetts Supreme Court extended this principle to a manufacturing corporation several years later: even though a group of unincorporated merchants have a legal right to compel one of their own to pay his share, the same cannot be said of a corporation, which “must derive all their rights and remedies from the provisions of the statute,” barring only those instances in which a member had explicitly bound himself to pay assessments. *Franklin Glass Company v. White*, 14 Mass. 286 (1817).

There must be evidence of members' express consent to bind themselves to such corporate demands. Adams's lawyer could insist, citing the *Andover* case, that the subscription paper he and others had signed "was not intended to give a remedy by action, but simply to make each subscriber a member of the corporation, subject to the legal duties belonging to him in that character." Those duties did include paying money to the company, in a sense, for if a shareholder failed to pay up, the corporation could terminate every one of that person's connections with the corporation. But the company could not compel payment, could not pursue the members' assets in court, because membership in the corporation was not enough to make a person financially liable. In order for an action to lie to collect, a second step was necessary, in which the member explicitly promised to pay assessments.<sup>32</sup>

It is certainly true, though some scholars have elided the point, that Massachusetts was less willing to allow actions to enforce assessments than were other states, such as Maryland, Connecticut, and Kentucky, where courts would not say that a statutory provision allowing the sale of a delinquent's shares necessarily prevented the corporation from also taking the shareholder to court to compel payment. Virginia took a direct route to resolve any confusion and passed a statute describing the steps a turnpike company must follow against a delinquent shareholder: the stock would be sold at auction, and if the sale price fell short of the amount the corporation was seeking, a motion would lie against the original shareholder to make up the difference. But a crucial point is that, in spite of the nuances of jurisdictional difference across the states of the early American

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<sup>32</sup> *New Bedford and Bridgewater Turnpike Corporation v. Adams*, 8 Mass. 138, 139-140 (1811). The case is explained as hinging on the lack of mutuality of a consideration in *Trustees of Phillips Limerick Academy v. Davis*, 11 Mass. 113, 117 (1814), but in the *Adams* opinion the court is clear that the issue rests on the lack of any express promise at all. No effort at all is made to evaluate the contract, none being found.



republic, jurists and legal commentators perceived and promoted what they saw as a prevailing trend in the developing American law of corporations. Angell and Ames, succinctly, described that law as having determined that a person's liability "is, indeed, to be measured by the extent of his express engagement."<sup>33</sup>

In this, we can learn a great deal about the meanings and the significance of certain varieties of voluntary engagement and, in that way, explicate contemporaries' conceptions about the nature of consent in the early American republic, something to which historians have been especially attentive in recent years. François Furstenberg, for instance, has provocatively argued that there was a fundamental shift in how the founders and the succeeding generation conceived of the consent necessary to justify political government and, perversely, even chattel slavery, in which a conception of tacit consent came to prevail. Men must directly oppose claims made to their allegiance, to their property, even to their bodies, or else a passive acceptance can be inferred, Furstenberg argues, in part because the public memory of the Revolution and the growing "cult of the individual" had enshrined the idea of active resistance and personal agency as the source of American freedom.<sup>34</sup> And yet a history of private governing power in the early

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<sup>33</sup> *Bend v. Susquehanna Bridge and Bank Co.*, 6 Harris and J. (Md.) 128 (1823); *Hartford and N.H.R.R. v. Kennedy*, 12 Conn. 499, 528 (1838); *Instone v. Frankfort Bridge Co.*, 5 Ky. 576, 577 (1812); *Grays v. Turnpike Co.*, 4 Rand. (Va.) 378 (1826) (see also *Herkimer Manufacturing Co. v. Small*, 21 Wend. [N.Y.] 273 [1839]); *Revised Code of the Laws of Virginia*, vol. 2 (Richmond: Thomas Ritchie, 1819), p. 213, sec. 6; Conway Robinson, *The Practice in the Courts of Law and Equity in Virginia*, vol. 1, *Containing Practice in the Courts of Law in Civil Cases* (Richmond, Va.: Samuel Shepherd, 1832), chap. 20; Benj. Vaughan Abbott and Austin Abbott, *A General Digest of the Laws of Corporations: Presenting the American Adjudications upon Public and Private Corporations...* (New York: Baker, Voorhis, and Co., 1869), 38-39; John B. Minor, *Institutes of Common and Statute Law*, vol. 1, *The Rights Which Relate to the Person*, 2d ed. (Richmond: Printed for the Author, 1876), 530-531; Angell and Ames, *Treatise on the Law of Private Corporations, Aggregate*, 306.

<sup>34</sup> François Furstenberg, *In the Name of the Father: Washington's Legacy, Slavery, and the Making of a Nation* (New York: Penguin Press, 2006), 187-195, 227; Holly Brewer, *By Birth or Consent: Children, Law, and the Anglo-American Revolution in Authority* (Chapel Hill: University of North Carolina Press, 2005), 7, 286.

republic reveals a countervailing trend that was a product of precisely the sorts of contests and conflicts being charted in this chapter. There came to be an unwillingness to infer much of anything about personal obligations to private associations. The outcome of William Marshall's encounter with the Front Street Corporation, and the successful resistance of many others to claims against their property to support corporations that they had indeed become a part of, reveal a growing certainty that express consent—precise, direct, and personal—was required to create the sorts of interpersonal bonds that made association effective.

Two final points remain to be made, and they can serve to underscore the larger trend being described here. First, the self-imposed obligations to pay lawful assessments were very rarely applied to anyone who subsequently acquired the same shares. A person who held stock as a transferee had acquired the ordinary rights and obligations of membership in a private business corporation, as those rights and duties were understood, but that did not include a promise to pay assessments that was enforceable at action, even if such a promise had been made by the original stockholder. Thus it was that William Sansom, who owned twenty shares in the Delaware and Schuylkill Canal, was held liable for assessments on those five shares that he had purchased at the company's founding, having made an explicit promise to pay assessments up to two hundred dollars on each. Those fifteen shares he had acquired from others, the Pennsylvania Supreme Court decided, "stand on a different ground." Because there was only one remedy described in the statute, their forfeiture and sale, there was no express commitment on which to base a legal action for recovery. This was not the "Solomonic decision" that Andrew Schocket has described, in which the court "split the difference." It was a holding fully consistent

with the nature of personal obligation and corporate commitments in post-Revolutionary America. For Sansom in 1803, it was indeed the “express promise” that made all the difference. In varieties of collective action ranging from the fraternity to the reform society to the business corporation, there was in the post-Revolutionary era a growing emphasis on the express promise—explicit, detailed, and well delimited—as the best means by which people could act in concert.<sup>35</sup>

Second, in a much-studied divergence of American common law from its English predecessors, during the first third of the nineteenth century, American jurists made the limited liability of shareholders for the debts of the corporation the default standard. In the absence of explicit charter or statutory provisions to the contrary, courts generally decided, beginning in the late 1810s, that stockholders were not liable for corporate debts beyond their original investment. That is, in cases in which a shareholder had paid the full value of the shares they owned, they could not be pursued by the creditors of a bankrupt corporation for debts it had accumulated, in a marked divergence from what had been a centuries-old common law standard for corporate bodies. That development has been explained in terms of economic imperatives (encouraging investment and lowering monitoring costs; accommodating the free transferability of shares) and as a more or less deliberate attempt to democratize the American marketplace by keeping entry into business markets open to all.<sup>36</sup>

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<sup>35</sup> Wright, *First Wall Street*, 76-77; *President, Managers, and Company of the Delaware and Schuylkill Canal Navigation v. William Samson*, “Case Stated for the opinion of the Judges of the Supreme Court,” Folder 47, Miscellaneous Papers 1704-1899, Records of the Supreme Court, Eastern District, RG33, Pennsylvania State Archives; *Delaware and Schuylkill Canal v. Sansom*, 1 Binn. (Pa.) 70 (1803); Andrew M. Schocket, *Founding Corporate Power in Early National Philadelphia* (DeKalb: Northern Illinois University Press, 2007), 188.

<sup>36</sup> Frank H. Easterbrook and Daniel R. Fischel, *The Economic Structure of Corporate Law* (Cambridge, Mass.: Harvard University Press, 1996), chap. 2; Richard A. Posner, “The Rights of Creditors of Affiliate Corporations,” *University of Chicago Law Review*, 43 (1976); Kevin F. Forbes, “Limited Liability and the

Those benefits of limited liability, for the accumulation of capital and the effective organization of corporate enterprise, however, have been read backward into the origins of the legal principle itself in a way that has obscured as much as it has revealed. Set next to developments in the law and the practice of corporate membership, limited liability takes on a new hue. Clearly, even contemporaries were acutely aware that limiting shareholders' liability was productive: as Angell and Ames noted, "by such means persons are induced to hazard a certain amount of property for the purposes of trade and public improvement, who would abstain from doing so, were not their liability thus limited." But before courts had even made the turn toward a full articulation that, under the common law, corporate stockholders' liability was limited to their initial investment, people had begun to assume it. Early national conceptions of membership allowed little room for any other view. In the 1819 Massachusetts case generally cited as the turning point, *Spear v. Grant*, the judge noted that "public opinion" about individual responsibility clearly presupposed that corporate members were not liable. Although the fact that the court cited public opinion in a legal decision shocked the court reporter, the content of that public perception should come as no surprise. The practical, day-to-day experience of membership in the early American republic had by 1819 led people to assume that the obligations of members would be bounded and strictly delimited.<sup>37</sup>

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Development of the Business Corporation," *Journal of Law, Economics, and Organization*, 2 (1986): 163-177; Herbert Hovenkamp, *Enterprise and American Law, 1836-1937* (Cambridge, Mass.: Harvard University Press, 1991), chap. 5; Susan E. Woodward, "Limited Liability in the Theory of the Firm," *Journal of Institutional and Theoretical Economics*, 141 (1985): 601-611. For the emphasis on democratic goals, see Stephen B. Presser, "Thwarting the Killing of the Corporation: Limited Liability, Democracy, and Economics," *Northwestern University Law Review*, 87 (1992): 148-179.

<sup>37</sup> Angell and Ames, *Treatise on the Law of Corporations, Aggregate*, 23-24; *Spear v. Grant*, 16 Mass. 9, 14 (1819); "On the Liability of Corporators," *American Law Magazine*, 1 (1843), art. 5 (reprinted from *Carolina Law Journal*, 1 [1831]: 217); "Law of Corporations," *Law Intelligencer and Review*, 2 (1830): 109-109-118, 210-212, 240-247, 270-276; "Manufacturing Corporations," *American Jurist and Law*

## The Rights of Shareholders to Enforce the Terms of Agreement

In the past decade, scholars of corporate law and governance have done important work on what had been a little-recognized attribute of the corporate form that was critical in its rise to preeminence in the modern market economy. Called both “entity shielding” and the “locking in” of capital, it is in effect the mirror image of shareholder limited liability. Just as the latter insulates shareholders from business debts, so this concept of entity shielding protects the corporation’s assets and the firm’s control of them. This scholarship emphasizes the ways in which the corporation has, historically, been legally protected from the demands of its stockholders, who otherwise might try to reclaim the capital they had invested, and from the demands of the stockholders’ personal creditors. And that, according to this line of thought, is the crucial point in the relation between law and corporation. It is the legal creation of a lasting business institution.<sup>38</sup>

This trend in current legal scholarship is related, of course, to the common conception that the corporate form is fundamentally about the separation of ownership (the shareholders) from control (the board of directors). Such separation has been the starting point for all studies of corporate governance since Adolf Berle and Gardiner Means published *The Modern Corporation and Private Property* exactly one hundred

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*Magazine*, 2 (1829): 96-119; Edwin J. Perkins, *American Public Finance and Financial Services, 1700-1815* (Columbus: Ohio State University Press, 1994), appendix.

<sup>38</sup> Margaret M. Blair, “Locking in Capital: What Corporate Law Achieved for Business Organizers in the Nineteenth Century,” *UCLA Law Review*, 51 (2003): 387-455; Henry Hansmaan and Reiner Kraakman, “The Essential Role of Organizational Law,” *Yale Law Journal*, 110 (2000): 387-440; Henry Hansmaan, Reinier Kraakman, and Richard Squire, “Law and the Rise of the Firm,” *Harvard Law Review*, 119 (2006): 1335-1403. See also Kenneth Lipartito, “The Utopian Corporation,” in Kenneth Lipartito and David B. Sicilia, eds., *Constructing Corporate America: History, Politics, Culture* (New York: Oxford University Press, 2004), 101-102.

years after the Angell and Ames treatise. Shareholders quite willingly part with the right to control the company owing to coordination problems among their numerous, dispersed ranks, and they are content to elect directors, who hire and monitor managers that make daily decisions and, if all goes according to plan, make money. The standard and still influential principal-agent model casts the shareholders as principals whose interests ought to be served by the directors and officers and who face “monitoring and bonding costs” to make sure those interests are protected. Some scholars have shifted the interpretive base from which they view this relationship, focusing on the economics of those transaction costs as explaining the nature of the corporation, an organizational structure set up to govern those transactions. The nexus of contracts model takes a similar tack, focusing on discrete contracts as shaping the corporate form and viewing shareholders, who bear the risk of the business, as engaging in contractual relationships with a whole host of other contributors, including employees, creditors, and communities. The corporation, according to this view, is merely the meeting point of those various engagements. The latest model of corporate governance, team production theory, describes directors as mediating among a wide range of constituencies rather than simply working for their shareholders.<sup>39</sup>

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<sup>39</sup> On the separation of ownership from control, see Adolf A. Berle, Jr., and Gardiner C. Means, *The Modern Corporation and Private Property* (New York: Corporation Trust Company, 1932); Dalia Tsuk, “From Pluralism to Individualism: Berle and Means and 20<sup>th</sup>-Century American Legal Thought,” *Law and Social Inquiry*, 30 (2005): 179-225; Oliver D. Hart, *Firms, Contracts, and Financial Structure* (Oxford: Oxford University Press, 1995), 127; Romano, *Foundations of Corporate Law*, 153-155. On the principal-agent model, see Michael C. Jensen and William H. Meckling, “Theory of the Firm: Managerial Behavior, Agency Costs, and Ownership Structure,” *Journal of Financial Economics*, 3 (1976): 305; Eugene F. Fama and Michael C. Jensen, “Separation of Ownership and Control,” *Journal of Law and Economics*, 26 (1983); Melvin A. Eisenberg, “The Conception That the Corporation Is a Nexus of Contracts, and the Dual Nature of the Firm,” *Journal of Corporate Law*, 24 (1999): 819-8130. On the transaction cost model, see Oliver E. Williamson, “Transaction Cost Economics,” in R. Schmalensee and R. Willig, eds., *Handbook of Industrial Organization*, vol. 1 (Amsterdam: Elsevier Science, 1989); Williamson, “The Modern Corporation: Origins, Evolution, Attributes,” *Journal of Economic Literature*, 19 (1981): 1537-1568. On nexus of contracts, see Armen A. Alchian and Harold Demsetz, “Production, Information Costs, and

Each theory of the firm offers something different to the historian attempting to understand the utility, effectiveness, and popularity of the corporate form in the nineteenth-century United States, even if some at first glance appear to be largely irrelevant to the study of the small, closely held corporations of the early national period. As scholars look with increasing sophistication at what, exactly, the corporate form offered to Americans in the young republic, some, such as Margaret Blair, using a team production model of corporate government, have begun to emphasize the ways in which the corporate form “uniquely facilitated the establishment of lasting enterprises that could accumulate substantial enterprise-specific physical assets, and form extensive specialized organizational structures.” This new vein of corporate governance scholarship focusing on the locking in of capital, or entity shielding, holds that “as early as the late eighteenth century, business people were trying to find legal ways to assemble assets and people in a way to allow the organizations to survive and grow,” and, more specifically, to survive and grow by ensuring that people could make “credible commitments to each other”—commitments, enforceable at law, that each would contribute what he or she promised, but also that the capital would stay with the corporation and could neither be withdrawn by fickle owners nor be pursued by their creditors.<sup>40</sup>

That, however, only goes part of the way toward the legal assurance of people’s commitments to one another necessary to create lasting business institutions. History reveals an attendant concern, a second guarantee that was needed. Prospective corporate

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Economic Organization,” *American Economic Review*, 62 (1972): 777, 781-783; Jensen and Meckling, “Theory of the Firm,” 309-310. On team production theory, see Margaret M. Blair and Lynn A. Stout, “A Team Production Theory of Corporate Law,” *Virginia Law Review*, 85 (1999): 287-315; Lynn A. Stout, “The Shareholder as Ulysses: Some Empirical Evidence on Why Investors in Public Corporations Tolerate Board Governance,” *University of Pennsylvania Law Review*, 152 (2003): 667-712.

<sup>40</sup> Blair, “Locking in Capital,” 413, 427.

members also needed to be sure that that money—locked into the firm as it was—would be directed to the ends for which it was intended when they purchased a share and joined the endeavor. Put another way, potential shareholders must be assured that no one of them would be entirely at the mercy of the majority.

Obviously, corporations would be held to the terms of their charters. But that is an issue of state power over chartered entities. As James Madison noted in 1825, speaking of governments, there is an important difference between the usurpation of power in opposition to the public will, which is illegitimate in every way, and the assumptions of power by the majority through ostensibly legal means, through governmental institutions. In the latter case, in politics, “the appeal can only be made to the recollections, the reason, and the conciliatory spirit of the Majority of the people agst. their own errors.”<sup>41</sup> In a similar way, corporations can operate perfectly legitimately and within the bounds of their charters and still trample on the interests of a minority in their ranks. What would be that minority’s remedy? As James Currie had asked about the Mutual Assurance Society in chapter 3, what would happen when a corporate majority sought and received an amendment to their charter by the legislature, one that took the corporation in an entirely new direction against the wishes of some members, or even against the wishes of one member? How are people’s credible commitments to one another maintained—or broken—by force of law under the pressures of corporate change?

These were unavoidable questions. A proposed route of a turnpike, spelled out by charter, might later be found to be unworkable. A cap on the amount of property that a

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<sup>41</sup> James Madison to Thomas Ritchie, Dec. 18, 1825, in *Letters and Other Writings of James Madison: Fourth President of the United States*, 4 vols. (Philadelphia: J. B. Lippincott and Co., 1865), 3:506-507; Drew R. McCoy, *The Last of the Fathers: James Madison and the Republican Legacy* (New York: Cambridge University Press, 1989), 115.



corporation might legally hold might need to be altered dramatically. If someone joined a corporation in the manner most common in the early nineteenth century, subscribing for a certain number of shares with a small down payment and promising, expressly and voluntarily, to pay in the remaining dollar value of the share when the company called for it, what would happen if the corporation changed in some significant way between the time of the promise and the time of the call?

In the immediately post-Revolutionary period, in the very early nineteenth century, jurists found the answer to that question not terribly difficult: the member was released from any obligation to pay, and the shares would be sold. Why this was the case is, in itself, important and reflective of a republican frame of mind about private associational commitments that needs explanation. Why the issue would become more complicated by the 1820s and 1830s, leading ultimately to a rule that prevails today permitting certain kinds of corporate change, is a second and no less significant question.

In an unincorporated association, no change was permissible without unreserved and unanimous consent. Some special agreement could be made at the outset defining a mode of amendment, how exactly a majority may bind the minority, “but such a power must be clearly shown and established,” as the complainant in one such case successfully argued before New York’s chancellor in 1820, “for it is in derogation of the legal and natural rights of the minority.” The authority of courts of equity to prevent by injunction, upon the application of a minority no matter how small, an unincorporated joint-stock company or partnership from using their funds to pursue a business outside the scope of their articles of agreement was well settled in the early nineteenth century. This was true both in legal and equitable terms as well as in the broader cultural perceptions of the

concept of collective agreements. As the influential social theorist Francis Wayland noted in the 1830s, once people join together, specifying both their objects and the means to be employed in pursuit of them, nothing can “properly be changed in any essential particular, without unanimous consent,” making such an association, “from the nature of the case, essentially unalterable.” As James Willard Hurst has noted, the extension of such a principle to corporate law, requiring unanimous consent to amend the charter, would have hindered the sort of “flexible continuity” that was of great appeal in the increasingly unpredictable marketplace of the early-nineteenth-century United States.<sup>42</sup>

And yet there was also a clear and perceptible danger that allowing a private corporation to make fundamental changes in its purposes, its organization, or even its modes of operation might leave a minority shareholder legally bound to participate in something to which he or she had never assented. It was, in a sense, a reprise of the *Ellis v. Marshall* principle, in which William Marshall’s refusal to consent to membership in the Front Street Corporation was held to have freed him from liability for corporate assessments. He could not be compelled to join, just as express agreements to join had become the starting point for American conceptions of belonging in increasingly varied kinds of group life in the post-Revolutionary decades. The fact that courts determined in the first decade of the nineteenth century, as we have also already seen, that financial obligation to pay assessments could arise only from an express promise adds a level of

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<sup>42</sup> Francis Wayland, *The Limitations of Human Responsibility* (Boston: Gould, Kendall, and Lincoln, 1838), 110; *Livingston v. Lynch*, 4 Johns. (N.Y.) 573, 582 (1820); James Willard Hurst, *The Legitimacy of the Business Corporation in the Law of the United States, 1780-1970* (Charlottesville: University Press of Virginia, 1970), 25. Of course, anything can be amended, including any corporate charter or any contract, provided every single person involved agrees to the change. This was the rule at common law for good reason: with unanimous consent, there is no one left with either cause or standing to protest. On the unamendability of partnership agreements without unanimous consent of partners, see *Natusch v. Irving*, (1824), reported in Niel Gow, *A Practical Treatise on the Law of Partnership*, 2d American ed. (Philadelphia: Robert H. Small, 1830), appendix 2, 576-595.

complexity to the issue at hand. A corporation's shareholders had chosen to join a state-created legal entity, and, further, in their promissory obligation to pay assessments on the stock for which they had subscribed, they had consented to support one corporation but not one fundamentally different. What remained to be seen in the years to follow, then, were the ways that such assent would be restrictive on the association. If it was, if a corporation could not make substantive changes in its goals or the means it would use to achieve them without facing legal challenge from members and, especially, without losing any legal claim to their pledged support, then profit-seeking organizations would face a formidable obstacle every time circumstances in the marketplace changed. There was a tension, then, between flexible continuity and the nature of personal obligation.<sup>43</sup>

The issue was first tested in 1811. Thomas Locke had subscribed for one share in the Middlesex Turnpike in 1805, agreeing to pay all legal assessments. The directors, with the approval of a majority vote of the stockholders in a regular meeting, sought a legislative amendment to the charter, and the legislature agreed in 1806, altering the route of the turnpike. The new route no longer passed near Locke's property, and he refused to consider himself still bound to pay assessments, arguing through his attorney that "the plaintiffs have no right to transfer his subscription for the promotion of one road to that of another, without his personal assent." Those assessments had piled up to the amount of 240 dollars before Locke's case came to the Supreme Judicial Court of Massachusetts, who found, in the record, proof of two things: "of an engagement to pay assessments for making a turnpike in a certain specified direction; and of the making a turnpike in a different direction." This freed him of any obligation. Locke, according to the court's

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<sup>43</sup> There is also, of course, a parallel to the law of philanthropy and trusts. On this area of jurisprudence and the business corporation, see Lien, "Contested Solidarities"; *Duke v. Fuller*, 9 N.H. 536 (1838).

opinion, “may truly say, *Non hoc in foedera veni*. [To this I never agreed.] He was not bound by the application of the directors to the legislature for the alteration of the course of the road, nor by the consent of the corporation thereto.” Stockholders such as Locke might find themselves victimized if such changes were not held to absolve them of their promised financial support. “Much fraud might be put in practice under a contrary decision,” the court determined.<sup>44</sup>

The principle became even clearer when Samuel Swan successfully resisted a call from the same company for \$1,440, or \$240 on each of his six shares in the Middlesex Turnpike. Like Locke, he claimed “he was exonerated from his subscription, so far as it concerned his personal responsibility, on the ground that the turnpike had been located differently from the plan under which he subscribed, as established by the act of incorporation.” The road as originally plotted was to pass near his property in Medford, but the charter amendment had stopped those plans. The turnpike’s lawyer had a pretty compelling case to make that Swan had effectively given consent to the change in the route of the turnpike, however: not only had he served as a director, a treasurer, and a clerk for the company, but he had even signed the petition to the legislature to alter the charter and change the proposed course of the road. Doing so, they argued, “operated as a waiver of any right to rescind his contract, and was an assent to all the doings of the corporation.” If anything could show an express consent of a shareholder to a corporate change, the Middlesex Turnpike’s attorney claimed, would it not be his acting, as a corporate officer, to make that very amendment?<sup>45</sup>

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<sup>44</sup> *Middlesex Turnpike v. Locke*, 8 Mass. 268, 272 (1811).

<sup>45</sup> *Middlesex Turnpike v. Swan*, 10 Mass. 284 (1813); Angell and Ames, *Treatise on the Law of Private Corporations, Aggregate*, 304.

The court could not disagree more. Just as they had in the turnpike's case against Locke, the court decided that Swan owed nothing, and in doing so drew a still brighter line between the duties of corporate membership and the express promissory commitment to pay assessments. The fact that Swan signed on to the corporate petition for amendment meant nothing, according to Justice Samuel Sewall. In two ways, Sewall wrote, Swan's alleged actions in support of the route change did not make him liable to support it financially: first, "the defendant may have been controlled by the will of the majority," and, even if that were not the case, "if he concurred in the votes and proceedings of the corporation, it was as a corporator, not carrying with his concurrence any renewal of his supposed collateral promise." Here was the pivotal distinction. Although a corporate member was without doubt "subject to the by-laws, rules, votes, and undertakings, of the corporation, so far as these are within the scope of the original design," that was a matter entirely separate from the express promise that Swan had made—like the one made by so many other members of private corporations across the new United States—that he would pay all legal assessments in order to fund a corporation's enterprise. In that promise, according to Sewall, Swan "is not a corporator, but an individual contracting with the corporation; and he undertakes in that extraordinary manner, referring himself to what the legislature had done, not to any probable subsequent grant." To compel Swan to hand over more than a thousand dollars to a corporation seeking to do something substantially different from what it had initially set out to do, then, would not be allowed.

Importantly, these are not cases hinging on whether, in passing these charter amendments, the state legislatures were in violation of a constitutional prohibition of the impairment of contracts. Each case, as a New Hampshire justice noted at the outset of an

1817 opinion, was rather “a dispute between a private corporation and one of its members,” and thus “a recurrence to the nature of the liabilities of members to their own corporation will we apprehend divest the case of many of its difficulties.” That case, in which Union Locks and Canals brought an action of assumpsit against Joseph Towne for seventeen unpaid assessments, was ultimately decided on a single point: did the charter amendments—changing the amount of property the company could own from six acres to one hundred, allowing them to charge tolls for an unlimited duration, and redefining the extent of the locks and canals to include new stretches of the Merrimack River—exonerate Towne from any liability to pay? Without doubt, the court held, for every shareholder “expects and indeed stipulates with the other owners, as a corporate body, to pay them his proportion of the expense,” but only “in the promotion of the particular objects of the corporation.” In that sense, Towne’s decision to participate is “in the nature of a special contract, the terms of which contract are limited by the specific provisions, rights and liabilities detailed in the act of incorporation.” Alter those unilaterally, and the deal is off.<sup>46</sup>

To skip to the end: There was a hint in *Union Locks* toward a consistently applicable principle by which to evaluate corporate evolution and the rights of individual stockholders, one that would, for the most part, come to prevail in the middle third of the century. That principle, what E. M. Dodd called the incidental-change doctrine, allowed alterations to corporate charters even where unanimous consent would appear to be necessary (that is, where there is no particular mode of amendment described in the charter) “provided the alteration can be characterized by some such criticism-disarming

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<sup>46</sup> *Union Locks and Canals v. Towne*, 1 N.H. 44 (1817); Dodd, *American Business Corporations*, 81-82.

adjective as auxiliary, incidental, or non-fundamental,” as Dodd put it in the early twentieth century. As Dodd observed in his seminal article on dissenting stockholders and charter amendments, it is a rule that “grants to the majority in the interests of fairness and of progress a power which there is no evidence that the minority intended to confer on them.” That is, while it may be *reasonable* to allow small and non-fundamental changes to corporate charters, it is done on the principle that there was an implied agreement among stockholders to allow minor, incidental changes without unanimous consent. But nothing the shareholders actually did carried such an implication. Thus, as Dodd describes it, “we are not speaking of an agreement implied in fact at all but rather of an agreement implied in law,” a “rule of law devised by the courts in the interests of justice and imposed on objecting stockholders irrespective of their actual intent.” The historical origins of the concept, origins that Dodd did not address, are crucial to the changes being charted in this chapter.<sup>47</sup>

In September 1830, a Pennsylvania man was freed from any financial obligation to the Indiana and Ebensburg Turnpike, by decision of the state’s Supreme Court, because the legislature had split the corporation into two separate turnpike companies. One of the two sought to recover money owed by Armour Phillips based on his subscription to the original corporation. In this case, the first of its kind in reported case law regarding charter amendments and the rights of dissenting stockholders since the *Dartmouth* opinion of 1819, the issue of contract and the constitutional prohibitions (both

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<sup>47</sup> E. Merrick Dodd, Jr., “Dissenting Stockholders and Amendments to Corporate Charters,” *University of Pennsylvania Law Review*, 75 (1927): 585-613, 723-752, quotations on 587, 589-590. See also Edward O. Curran, “Minority Stockholders and the Amendment of Corporate Charters,” *Michigan Law Review*, 32 (1933-1934): 743-779; Lynn L. Dallas, “The Control and Conflict of Interest Voting Systems,” *North Carolina Law Review*, 71 (1992): 8n.17; W. Lloyd Kitchel, “The Power of Stockholders to Bind a Corporation,” *Yale Law Journal*, 5 (1895): 83-92.

state and federal) against the impairment of contracts, was central. “It is impossible to avoid a conclusion,” wrote Chief Justice John Bannister Gibson, “that the supplementary act is, as regards original stockholders who have not consented to be arranged to either of the new incorporations, in direct collision with the tenth section of the first article of the Constitution of the United States.” Gibson embraced the defendant’s argument that, in creating the original turnpike company, Pennsylvania “parted with its right over that subject. That grant of power was met by a subscription of stock, and the state could not reassert its right over the matters granted.” Despite the turn toward constitutional law and the impairment of contracts here—a development probably inevitable in the jurisprudence of corporate commitments following *Dartmouth*—the crux of the issue remained unchanged. It was the nature of Phillips’s agreement at the moment of joining that mattered.<sup>48</sup>

Each stockholder of the original corporation, Gibson observed, “was entitled to his proportion of the tolls received on the whole route, instead of perhaps the least productive half of it; and to enforce his part of the contract without giving him the benefit of the entire thing for which he stipulated, would impair its obligation in a most material part.” Creating two corporations out of one was doubtless a new arrangement entirely: “The defendant has not thought fit to become a party, and his subscription cannot be demanded.” With every emphasis on the magnitude of the changes being made affecting the obligations of Phillips or Towne, however, the hints were becoming more obvious that *less* significant changes could be made without unanimous consent. Nine months

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<sup>48</sup> *Indiana and Ebensburg Turnpike Road Co. v. Phillips*, 2 Pen. and W. (Pa.) 184, 196 (1830); Dodd, *American Business Corporations*, 82-83. In addition to *Dartmouth College v. Woodward*, the key arguments for the defense regarding contract were drawn from *Fletcher v. Peck*, 6 Cranch 87, 136-137 (1810); U.S. Constitution, art. 1, sec. 10; Pennsylvania Constitution of 1790, art. 9, sec. 17.



later, a divided Pennsylvania Supreme Court made the final turn in that direction. And their rationale indicates how the business corporation was coming to be understood, in an important way, as something wholly different from the other voluntary associations of the American social landscape. The prospect of profit was, for the first time, seen to be the only thing holding the members together.<sup>49</sup>

William Irvin subscribed for stock in the Susquehanna and Waterford Turnpike just before it was chartered in 1819. He was particularly pleased by the fact that the turnpike would run right by his property, even crossing the Susquehanna River “at or near the mouth of Anderson's creek,” very near the Irvin estate. His son, who represented him at the time of the stock subscription, was assured by the turnpike commissioners, who cited a statute of 1815 that described with some precision the course of the series of turnpike companies that were being created, that the bridge and road would cross near the mouth of Anderson’s creek. But, as had happened to Thomas Locke and Samuel Swan in Massachusetts, a new law was passed in 1820 that moved the turnpike away from Irvin’s property. The act changed the location of the bridge to “the mouth of Sugar-camp run,” about two miles farther downriver. With the requisite adjustments to the route, the road now passed on the other side of the river from Irvin’s property. He refused to pay into the company coffers: he (actually, his son and legal representative) insisted he had been induced to subscribe by assurances that the road would adjoin his land. That proximity, he said, formed the consideration for Irvin’s contractual agreement to pay, and “the consideration that induced him to subscribe had entirely failed” when the route and thus

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<sup>49</sup> *Indiana and Ebensburg Turnpike Road Co. v. Phillips*, 2 Pen. and W. (Pa.) 184, 196 (1830).

the contract “at the time of subscribing was changed by the subsequent Act of Assembly.”

Interestingly, Irvin lost before a jury, but he probably came with confidence to the Middle District of the Pennsylvania Supreme Court, as the relevant precedents appeared to be stacked in his favor, including not only Locke’s and Swan’s cases from two decades earlier but also the very same court’s decision, not a year old, in *Indiana and Ebensburg Turnpike v. Phillips*. Two justices, indeed, did agree with Irvin’s defense, but three, including Chief Justice Gibson in an elaborate opinion, did not. There were for Gibson two issues that Irvin just did not seem to understand about the consideration for his corporate obligations, and courts from the 1830s forward would permit many kinds of corporate changes as long as a stockholder’s right to corporate *profits* remained unaffected.

First, the consideration for investments such as Irvin’s was, for Gibson, not solely private gain, but also the public good. Here Gibson was echoing a long history of emphasizing the public purposes of corporations, particularly in Pennsylvania: his predecessor, William Tilghman, noted in 1822 in describing the Hibernia Turnpike, for instance, that “there never has been, or certainly never ought to have been, a corporation created with a view solely to the private interest of the incorporators.” Gibson’s language was largely the same. To be sure, Irvin was motivated to invest by the anticipation of personal gain, and indeed such “an expectation of benefit from a rise in the value of property near the route has been a powerful spring, in putting these incorporated bodies in motion.” As New York turnpike promoter Elkanah Watson described the practice of soliciting stock subscriptions in an 1806 essay, agents would “engage the zeal and the

hopes of those who might live on or near the route, by portraying in lively colors...the very important benefits to be derived from good roads,” but to convince each local resident “into action, the road must run through his farm.” Watson had suggested that such conditions were common in early-nineteenth-century New York—“an outright sacrifice of the common, to individual convenience”—but Gibson was certain that in his Pennsylvania the legislature would never have gone so far as “to recognize it as a condition of the contract of subscription.” He declared, “Our acts of incorporation have been moulded to more general interests.”<sup>50</sup>

Second, and crucial to our understanding of the changing conceptions of corporate membership by the end of the first third of the century, Gibson described how the “fallacy” in Irvin’s argument lay in his “confounding the motive for entering into the contract with the consideration of it.” Absolutely “nothing but the benefit to be received *as a corporator* is held out to the subscriber by the corporation or the state.” Irvin had, as members do, engaged himself to certain burdens with the expectation of certain benefits, but he misunderstood what was included in the exchange. In the *Middlesex Turnpike* cases of Massachusetts, Gibson observed, promissory notes were substituted for the legislative charter’s having “had prescribed neither contract nor conditions,” and in those notes parties were “at liberty to establish any terms of responsibility which they might think proper to adopt.” But it was different here, for the details of obligation were spelled out in the original charter. And it was, to Gibson, entirely clear that the liabilities of Irvin to pay the company on demand had “arisen from a promise in consideration of benefits to

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<sup>50</sup> *Hibernia Turnpike Co. v. Henderson*, 8 Serg. and Rawle (Pa.) 219, 223 (1822); *Irvin v. Susquehanna and Phillipsburg Turnpike Company*, 2 Pen. and W. (Pa.) 466, 470 (1831); A Citizen [Elkanah Watson], *Observations on the Real, Relative, and Market Value, of the Turnpike Stock of the State of New-York* (New York: S. Gould, 1806), 20-21; Klein and Majewski, “Economy, Community, and Law,” 475-476; Banner, *Anglo-American Securities Regulation*, 142.

be drawn *from the profits of the corporation*, and not from a location of the road peculiarly beneficial to him as a landholder.” He cannot complain of “a decrease of corporate interest, nor of a change of corporate object or identity; of nothing, in short, but a loss of advantages expected to be realized from the location of the bridge.” His rights and duties, as a corporate member, were unchanged, even if he felt entirely betrayed, because the change was not deemed by the court to be essential or fundamental and because—in theory, anyway—the dividend checks would keep coming.<sup>51</sup>

The ways the jurisprudence on this issue developed over the course of the nineteenth century reinforced Gibson’s observations. In 1841, in *Gray v. Monongahela Navigation*, he was able to elaborate on the distinction between fundamental and non-fundamental charter amendments. Corporators’ obligations were unaffected by the ways in which a corporation may evolve, Gibson declared, “provided it do not extend to a change of the structure of the association.” As Chief Justice Samuel Nelson of the New York Supreme Court observed in an 1843 railroad case, there was actually a great consistency in Gibson’s thought here: in *Gray* and in the *Irvin* case, the “general principle” of *Ebensburg and Indiana Turnpike v. Phillips* was maintained, “that the alteration by the Legislature may be so extensive and radical as to work a dissolution of the contract; but an effort is made so to modify and regulate the application of the

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<sup>51</sup> *Irvin v. Susquehanna and Phillipsburg Turnpike Company*, 2 Pen. and W. (Pa.) 466, 471, 474 (1831) (emphasis added); Burdine, “Governmental Regulation of Industry in Pennsylvania,” 216-234. Gibson insisted that the *Irvin* case was distinguishable from the *Middlesex Turnpike* cases on the basis of the nature of the promissory notes, but I take the view of the chancellor of Vermont in *Stevens v. Rutland and Burlington Railroad Company*, 29 Vt. 545, 557-558 (1851), that “in the one case the court did not consider the alteration in the charter as a fundamental change in the structure of the association, while in the other[s] it was so considered.” On the increasing specificity of charters regarding personal obligations, though, see *Hartford and New Haven Railroad Company v. Kennedy*, 12 Conn. 499, 524-525 (1838).

principle as to admit of improvements in the charter, useful to the public and beneficial to the Company, without this consequence.”<sup>52</sup>

Nelson also noted the crucial, consistent element in the case law regarding corporations’ altering the terms of agreement: “corporations can exercise no power over the incorporators, beyond those conferred by the charter to which they have subscribed, except on the condition of their agreement or consent.” That proposition lay at the foundation of American conceptions of corporate membership, even as courts moved toward a position that assumed, barring any other explicit agreements, that members of profit-seeking corporations joined in order to profit themselves, and for no other reason that could serve as a constraint on corporate change.<sup>53</sup>

The challenges posed by questions of minority rights within institutions directed by majority rule—and the role that legal and political institutions played in the assurance of personal rights within those private organizations—can be found in the histories of virtually every type of American associational activity in the post-Revolutionary and antebellum eras, be it religious associations (chapter 1), mutual insurance (chapter 3), or labor unions (chapter 7). The history of American corporate development, however, is entangled in a unique set of concerns. In the early nineteenth century, when the corporate form was embraced, as James Kent observed, for the “private and special object of assisting individuals in their joint stock operations and enterprising efforts,” there was an economic imperative to define, precisely, when individuals would be freed from their corporate responsibilities and when they would be held fast to them. That imperative,

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<sup>52</sup> *Gray v. Monongahela Navigation Company*, 2 Watts and Serg. (Pa.) 156, 161 (1841); *Hartford and New Haven Railroad v. Crosswell*, 5 Hill (N.Y.) 383, 388 (1843).

<sup>53</sup> *Hartford and New Haven Railroad Company v. Crosswell*, 5 Hill (N.Y.) 383, 386 (1843).

however, found its furthest limits in prevailing political and legal definitions of consent and of private power.<sup>54</sup>

Recent work on entity shielding has illuminated the ways in which people, by law, have been able to make credible commitments to one another, to pursue certain ends in certain ways, thereby making the modern business corporation an especially effective means of consolidating capital. But for Americans of the early nineteenth century the “locking in” of capital to a business enterprise, stressed by today’s scholarship as a vital step toward the success of the modern corporation, was necessarily accompanied by particular definitions of voluntary obligation and by protections for the individual corporate member. The member’s promise that allowed capital to be locked away was met by a guarantee that his or her corporate commitments would be absolved if the corporation became something essentially different. As law professor Nathan Dane noted in disagreeing with the outcome of *Currie’s Administrators v. Mutual Assurance Society*, discussed at length in the previous chapter, “no vote of a majority, nor any corporate vote or legislative act, or these altogether, can vary the terms, and rights, and burdens” of individuals in what he called “property corporations.” There was, as we have seen, immense debate over how best to understand each of those things—the terms of agreement, the rights and the burdens of membership—but there was little dispute over their importance and, thus, the need to understand them.<sup>55</sup>

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<sup>54</sup> James Kent, *Commentaries on American Law*, 2d ed., 4 vols. (New York: O. Halsted, 1832), 2:271.

<sup>55</sup> *Currie’s Administrators v. Mutual Assurance Society*, 4 Hen. and M. (14 Va.) 315 (1809); Nathan Dane, *A General Abridgment and Digest of American Law: With Occasional Notes and Comments*, 8 vols. (Boston: Cummings, Hilliard, and Co., 1823), chap. XXII, sec. 52., in vol. 1, 473-474; Andrew Johnson, “The Influence of Nathan Dane on Legal Literature,” *American Journal of Legal History*, 7 (1963): 28-50.

This examination of the relationship of members to their corporation in the formative period of the laws and practices of American corporations has focused chiefly on the twin issues of consent and authority. It is here that developments in the business corporation not only mirrored but were directly shaped by Americans' experiences and expectations as joiners in other kinds of associations. In the post-Revolutionary era, those who formed and joined associations of all kinds came to believe that some basic principles could and should pervade all efforts at concerted action. In 1819, for instance, a North Carolina contractor by the name of Delacy was stricken off the list of corporate members at a general meeting of the Neuse River Navigation Company for failure to pay the assessments on his twenty shares. Insisting that he had reached an agreement with the directors to do a particular job for the company in exchange for \$1,000 dollars *and* the amount he remained indebted for his shares of stock, he petitioned for a writ of mandamus to compel the company to restore him "to his franchise of a corporator from which he had been wrongfully removed." Most important, Delacy argued, was the fact that he had not been given a chance to state his case. The justices of the Supreme Court of North Carolina all agreed that Delacy had been deprived of "the undoubted right of every man to receive notice of any proceeding against him," and they ordered the company "to restore the applicant to the rights of a corporator." There were, the court determined, certain rights of which no person should be deprived. There was no charter provision on which the court based its decision that "no man shall be condemned or prejudiced in his rights, without an opportunity of being heard." Rather, the right to be heard was deemed to be one of those principles that always merited legal protection in the member-to-corporation relationship. In working out the internal terms and

relationships of the early American business corporation, other beliefs also came to assume a central role, most notably the insistence that express and direct consent was necessary to determine the obligations of corporate membership and the powers of corporate government.<sup>56</sup>

By the 1830s, a profit-centered perspective had begun to occlude those aspects of early national business corporations that made them more akin to than different from other kinds of membership associations. But, between 1800 and 1830, as the first generations of Americans attempted to come to terms with the challenges posed by their hopes for effective, concerted action and their anxieties about private authority and the potential exploitation of voluntary commitments, they came to emphasize express consent, precise agreements, and basic standards of procedural fairness in virtually all domains of formal association that also helped to shape the early American corporation. In the first three decades of the nineteenth century, a period of unprecedented and still unparalleled evolution in the law of corporations, post-Revolutionary ideas about the nature of voluntary participation and assumptions about the rights and duties of membership in any kind of social organization played a vital part in American corporate development.

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<sup>56</sup> *Delacy v. Neuse River Navigation Company*, 8 N.C. 274, 278-281 (1821).



## Chapter 5

### Societies Formed by and for Women: The Culture of Legality in Practice

By the 1830s, Americans were almost incessantly forming associations, for purposes trivial and grand. And women of the early nineteenth century were an integral part of that social phenomenon, for they too were forming reading societies, prayer groups, maternal associations, charitable institutions, missionary and education societies, Sunday school organizations, and moral reform associations in numbers that impressed every observer. But one aspect of women's joining in the early American republic has gone unstudied. Almost from the very beginning, around 1800, the women who organized, led, and joined those associations described and defined the rights and duties of membership in ways that reveal an early-nineteenth-century American society coming to embrace rules, formal procedure, and well-defined benefits and obligations in virtually every collective enterprise that was formed. Women's associationalism in the first decades of the nineteenth century was a world of constitutions and bylaws—and fixed adherence to the both of them, in societies large and small.

Though much has been written about female voluntary societies in this period as having characteristics and serving purposes unique to the position of women in the early American republic, adjusting our frame of reference to focus more on the nature of individual membership in different kinds of societies reveals some astonishing similarities to men's groups. It reveals the move toward legalistic ways of conceiving of most every variety of associational participation that women entered into, and thereby reveals the depth of the turn in early-nineteenth-century American culture toward

emphases on procedural regularity and legalistic modes of thinking about voluntary affiliation of all kinds. This was true of societies affiliated with churches (often organized or at least inspired by men, usually ministers) and of other, often literary, societies organized solely by women. What, exactly, was asked of the members of such women's societies, and how did the women themselves conceive of the obligations of membership in the early decades of the nineteenth century? The answers to those questions display the pervasiveness of the trends under examination in this chapter, for a similar move toward procedural regularity, democratic engagement, and constitutional constraints appeared in both men's and women's societies, from the largest fundraising benevolent society to the smallest reading club. Scholars have shown that the efforts at collective action made by American women in the early nineteenth century opened up opportunities for them to enter the public sphere (or, to use Mary Kelley's broader terminology, to enter civil society) as participating citizens. I will take that view a step further, revealing that the approach to associational membership taken by women in the early to mid-nineteenth century was distinctly and recognizably liberal in its emphasis on procedure, system, and well-articulated statements of rights, duties, and practices.

It had long been assumed that most every women's organization formed in the early national period was directly affiliated with a church. But women in this period also formed and joined "fraternal" societies and literary clubs designed to create a more or less formally organized venue for reading, discussion, and mutual edification. Also, women not only joined existing but also took the lead in forming new benevolent and, after approximately 1820, moral-reform societies. The ways that such groups helped women form an identity of themselves as a female community, with an identity and

shared purposes, has generated a great deal of scholarship in the last three decades. The modes of organization that those women chose also shaped a particular notion for women, not just about how they should cooperate as women, but about how any society should organize itself.

In the first two decades of the nineteenth century, the most common kinds of associations formed by women were charitable and were primarily religious, affiliated with a particular church, predominantly in support of missionary work, widows, and orphans.<sup>1</sup> Though subsequent scholarship has uncovered many unaffiliated women's organizations, Nancy Cott's groundbreaking work was correct in its emphasis on the churchly origins of most women's societies: where she wrote that "women's associations before 1835 were *all* allied with the church, whereas men's also expressed a variety of secular, civic, political, and vocational concerns," we can now see a bit more diversity in the origins and purposes of the earliest post-Revolutionary American women's societies.<sup>2</sup> Nancy Hewitt's intensive study of Rochester, New York, gives an example that accurately describes the course of events in communities throughout the United States. In Rochester, she writes, the "first formal women's association was the Female Missionary Society, established within the First Presbyterian Church in 1818," and the first civic association was founded four years later. So, too, women's associations in many places

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<sup>1</sup> Conrad Edick Wright, *The Transformation of Charity in Postrevolutionary New England* (Boston: Northeastern University Press, 1992), 155-156; Debra Gold Hansen, *Strained Sisterhood: Gender and Class in the Boston Female Anti-Slavery Society* (Amherst: University of Massachusetts Press, 1993), 59; Anne M. Boylan, "Women, Venerable Widows and Dignified Matrons: Life Cycle Patterns Among Organized Women in New York and Boston, 1797-1840," *American Quarterly*, vol. 38, no. 5 (Winter, 1986); 779-797; Kathleen D. McCarthy, "Parallel Power Structures: Women and the Voluntary Sphere," in McCarthy, ed., *Lady Bountiful Revisited: Women, Philanthropy, and Power* (New Brunswick: Rutgers, 1990), 1-31; Anne M. Boylan, *The Origins of Women's Activism: New York and Boston, 1797-1840* (Chapel Hill: University of North Carolina Press, 2002), 17-24.

<sup>2</sup> Nancy F. Cott, *The Bonds of Womanhood: "Woman's Sphere" in New England, 1780-1835* (New Haven, Conn.: Yale University Press, 1977), 132-133.

tended to be formed, first, in affiliation with a church and, second, in more independent charitable forms. A generation later came societies that sought, not the amelioration of particular problems, but the reformation of society. “In 1835 evangelical women founded the Rochester Female Anti-Slavery Society, possibly inspired by a black women’s antislavery society founded a year earlier,” according to Hewitt. A short time later came the “Female Moral Reform Society, active between 1836 and 1845, which claimed 500 members,” and a temperance society for women that “claimed 350 to 450 members during the mid-1840s.” At any one time in the half century beginning in 1822, Hewitt discovered, “approximately 10 percent of Rochester’s adult women were active in public endeavors.”<sup>3</sup> Even where there were men’s or larger mixed societies to join, women chose to form their own, more local association. In Philadelphia in 1814, women meeting with their minister at Sansom Street Baptist Church had “the impression...that the interests of the cause of Christ will be more effectually promoted by the formation of several Female Mission Societies in this city, than by one general Society, as that might become too unweildy [sic] for convenience,” and they thus proceeded to “organize themselves into a Missionary Society.” And some time later it became common for women to form groups of their own, preferring to organize their own societies rather than to join mixed ones: one in three voluntary societies in 1820s and 1830s Utica, according to Mary Ryan, was exclusively female.<sup>4</sup>

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<sup>3</sup> Nancy A. Hewitt, *Women’s Activism and Social Change: Rochester, New York, 1822-1872* (Ithaca, N.Y.: Cornell University Press, 1984), 40-41.

<sup>4</sup> *Origination and Constitution of the Sansom Street Baptist Female Society for Promoting Foreign Evangelical Missions, formed June 27, 1814* (Philadelphia: R. P. and W. Anderson, 1814); Mary P. Ryan, *Cradle of the Middle Class: The Family in Oneida County, New York, 1790-1865* (New York: Cambridge University Press, 1981), chap. 3.

Women's organization in many American communities, then, began as offshoots of churches, in most of which women already comprised the majority of the membership—often by a two-to-one ratio, regardless of denomination. From within the churches women then began to move outward, in organized, formal association, partly owing to encouragement by the ministry, and partly owing to their own initiative in extending their maternal influence to redeem and improve their communities just as they were called to redeem and improve their own households.<sup>5</sup> Most of these groups were small—numbering fifteen to thirty women on the average, according to historian Debra Gold Hansen—with meetings once a month (sometimes more often), at the home of a sponsoring minister, a society president, or rotating among the membership. Since prayer meetings had long been segregated by gender, there was an easy transition to female-only associations to raise funds for support of missions, education of young aspiring clergymen, or charitable sustenance for poor widows and orphans.<sup>6</sup>

Three influences were particularly important in giving shape to these earliest, formally organized women's societies: the ministry, foreign examples, and the spread of the “technology” of association by emulation. Each was, of course, interrelated with the others, but it appears that no one factor alone could have produced the associational landscape apparent among American women by the second decade of the nineteenth century. First, ministers—particularly in New England communities and in the larger urban centers farther south—actively encouraged their female parishioners to form

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<sup>5</sup> Jon Butler, *Awash in a Sea of Faith: Christianizing the American People* (Cambridge, Mass.: Harvard University Press, 1990), 283; Robert H. Wiebe, *The Opening of American Society: From the Adoption of the Constitution to the Eve of Disunion* (New York: Alfred A. Knopf, 1984), 316-317; Cott, *Bonds of Womanhood*, 126-159; Daniel Walker Howe, *What Hath God Wrought: The Transformation of America, 1815-1848* (New York: Oxford University Press, 2007), 190-191.

<sup>6</sup> Hansen, *Strained Sisterhood*, 59; Cott, *Bonds of Womanhood*, 132-135.

societies to raise funds, usually by tiny, individual donations or by sewing, for the support of good Christian efforts such as charity, missions, or the spread of the word of God by tract or Bible. As historians Jane Pease and William Pease noted in early national Boston, most every women's society was ad hoc, associated with a church, and dependent on ministerial leadership, and groups such as the Channing Circle of the United Federal Street Church "rarely made its own unassisted decisions." Nancy Cott describes the 1805 formation of the Female Religious and Cent Society in Jericho Center, Vermont, as typical. A group of women in a church "wished to 'do good' and aid the cause of religion," Cott writes, "but they did not know what path to take. They began meeting for prayer.... With their minister's assistance they formed a society and began to raise money for the missionary movement," after having drawn up formal articles of organization.<sup>7</sup>

There were cases in which women took the lead in forming a particular society. There were even cases in which female organizers successfully resisted efforts by men to assume a leading role, such as when Massachusetts men sought to require a male board of directors for the Boston Female Asylum in 1803 and were rebuffed. But there were many more instances in which women's societies were encouraged and even initiated by male leadership in a church or a denomination. For example, a generic constitution was printed and circulated to spur the new formation of "Female Cent Societies," or clubs for the support of ministry and missions that asked only one cent per week of its members. That constitution included the following section, that "we do hereby unite under the name of the *The Female Cent Society of \_\_\_\_\_*, standing pledged to one another, to conduct

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<sup>7</sup> Jane H. Pease and William H. Pease, *Ladies, Women, and Wenches: Choice and Constraint in Antebellum Charleston and Boston* (Chapel Hill: University of North Carolina Press, 1990), 119; Cott, *Bonds of Womanhood*, 142-143.

ourselves according to the following articles, under which our names may be seen, as annexed....”<sup>8</sup> The Congregationalist Western Association of New-Haven County even printed, in broadside form, a sample constitution for “Female Charitable Societies” after “the General Association at their session in 1813, strongly recommended the formation of female charitable associations for this purpose throughout the state.”<sup>9</sup> There is no better example of the formal description of members’ rights and duties, laid out on the broadside for all prospective joiners to read: membership was open to any woman who met the requirements (no vote of admission was needed) by article 3, which read, “Every person, who will subscribe this Constitution, and pay *one cent per week*, shall be a member of this charitable association.” So too was the mode of exit well described at the outset, by article 10: “Any person may withdraw from this association by paying up all arrearages and procuring her name to be erased from the list of members.” And isolated evidence shows the same sorts of leadership and male sponsorship for associations in factory towns a decade or two later: the Dover Manufacturing Company spurred the development of women’s societies, particularly religious ones, for their workers.<sup>10</sup> The methods of organization that men were becoming most comfortable with after about two decades of experience with the creation and maintenance of voluntary organizations was

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<sup>8</sup> *The Constitution of Particular Cent Societies: For the Purpose of Aiding Pious, Indigent Youths in Attaining an Education for the Gospel Ministry* (Hartford, Conn.: Peter B. Gleason, 1810); Kathleen D. McCarthy, *American Creed: Philanthropy and the Rise of Civil Society* (Chicago: University of Chicago Press, 2003), 81-82; Johann N. Neem, *Creating a Nation of Joiners: Democracy and Civil Society in Early National Massachusetts* (Cambridge, Mass.: Harvard University Press, 2008), 97-98.

<sup>9</sup> *Constitution for Female Charitable Societies, in the District of the Western Association of New-Haven County* (New Haven, Conn., 1813), broadside.

<sup>10</sup> Gordon F. Grimes, “A History of Dover, New Hampshire, 1790-1835” (honors thesis, Bowdoin College, 1971), 139. *Rules for the Regulation of Persons in the Employment of the Dover Manufacturing Company’s Establishment at Dover, N.H.* (broadside, reprinted in Grimes, “History of Dover, New Hampshire,” appendix 5.

finding its way into women's societies at least in part because men of the ministry were taking an active role in guiding the hands of the female joiners of the early republic.

Ministers and their wives played the leading role in many of those groups. In New Hampshire in the 1810s, the New Hampshire Missionary Society encouraged the formation of female cent societies, founding one in the state capital that would serve as a repository for more ad hoc fundraising efforts in towns throughout the state. "To carry into extensive and successful operation this benevolent plan," it was recorded by the society in Concord, "it is farther recommended that some one female friend of Zion, in every town, take this paper, and use her influence to obtain subscribers, receive the money, and pay it over to Mrs. McFarland the Treasurer," the wife of a local minister.<sup>11</sup> The women of Sansom Street Baptist Church in Philadelphia not only met at the home of their pastor to discuss the formation of a women's society for the support of missionary efforts but also had him lead their first meetings. At the time that the Sansom Street Baptist Female Society for Promoting Foreign Evangelical Missions was founded in 1814, "Dr. Staughton after making a few remarks on the design of the meeting, read the 52<sup>nd</sup> chap. of Isaiah—sung an appropriate hymn—and then addressed the throne of grace for the Divine direction and blessing."<sup>12</sup> As Anne Rose has argued, to some extent the proliferation of these kinds of voluntary societies within the churches "corrected for increasingly restricted access to decision making by opening new channels of personal involvement," and there is much to be said for that reading.<sup>13</sup> Scholars have differed on

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<sup>11</sup> Records of the Female Cent Society, 1812-1816, New Hampshire Historical Society, Concord, N.H.

<sup>12</sup> *Origination and Constitution of the Sansom Street Baptist Female Society for Promoting Foreign Evangelical Missions, formed June 27, 1814* (Philadelphia: R. P. and W. Anderson, 1814).

<sup>13</sup> Anne C. Rose, "The Social Sources of Denominationalism Reconsidered: Post-Revolutionary Boston as a Case Study," *American Quarterly*, 38 (1986): 256. Singing or other music societies, Rose notes, were



the origins of associational impulse among both men and women in this period, as described in the Introduction to this dissertation. One important point, however, should not be neglected: women sought and received a great deal of encouragement and even direction from the ministry in the early years of their own efforts at association, in ways that helped to narrow any perceivable distinction between how men and women defined and described the nature of voluntary membership.

Though Anne Scott, a pioneering scholar in the study of American women's societies, has contended that women, not the church hierarchy, actually took the initiative to establish these groups, other scholars have found a more active hand on the part of the ministry, and the archival research into the books of minutes and organizing documents of women's societies done in support of this dissertation supports the latter view. The Reverend William White argued in Philadelphia in 1814 that, even though there was a society for the distribution of bibles that women could contribute to at any time, they still ought to form their own, to combine their own efforts in support of a Scripture that stood as "the charter of the female sex against degradation and oppression." And many times ministers of the early republic not only made such calls for organization, but offered help, models, and even regular participation in making those groups a reality. While the role of ministers in women's societies would decline over time—a sewing circle called the Worcester Female Association, for instance, had a minister open its meetings by prayer for about a decade after its organization in the 1820s, but female officers assumed that

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"the earliest and most common subsidiary groups," and many were open to both men and women. See Wakefield Musical Society, Wakefield, N.H., records, 1815-1825, New Hampshire Historical Society, Concord, N.H.; Records of the Central Musical Society, 1811, Concord, N.H., New Hampshire Historical Society, Concord, N.H. See also the secular societies as described in the Constitution of the Orford and Piermont Hubbard Musical Society, Instituted August 1816, New Hampshire Historical Society, Concord, N.H.; and the Records of the Chester Singing Society, 1834-1838, New Hampshire Historical Society, Concord, N.H., which were open to both men and women, though only men paid dues.

role by 1836—the part played by clerical leadership in the early part of the nineteenth century was important.<sup>14</sup>

A second source of models came from much farther from home. British evangelical women had already begun organizing charitable and benevolent societies in the late eighteenth century, and their experiences were important influences on women in the New World, often quite directly. Isabella Graham, a Scottish immigrant, based her 1796 formation of a Society for the Relief of Poor Widows and Small Children in New York on a London model.<sup>15</sup> Some years later, Quaker activism in Britain was also deliberately utilized as a model for female-led organizations in the United States. As Mary Beth Salerno has found, Benjamin Lundy in his *Genius of Universal Emancipation* reproduced the writing of British Quaker activist Elizabeth Heyrick. “In order to guide American women,” Salerno describes, “one issue of the *Genius* reprinted a British formula for the formation of ladies’ antislavery societies, which included information on the numbers and kinds of officers to select, how to run a meeting, what tasks to take on, and how to present society news to the public.”<sup>16</sup>

Third, voluntary association spread as a technology, through the medium of print, by correspondence among societies, and by personal experiences of women who

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<sup>14</sup> Scott, *Natural Allies*, 13, 193n.11. The contrary view is best articulated in Cott, *Bonds of Womanhood*, 126-159; Beth A. Salerno, *Sister Societies: Women’s Antislavery Organizations in Antebellum America* (DeKalb: Northern Illinois University Press, 2005), 12; Pease and Pease, *Ladies, Women, and Wenches*; Neem, *Creating a Nation of Joiners*, 103-104; *The Constitution of the Female Bible Society of Philadelphia, Instituted the Sixteenth of March, 1814: With an Address by the Right Reverend William White, D.D., Delivered at a Meeting of the Members* (Philadelphia: Printed by Order of the Society, 1814), 6. On the Worcester Female Association, see Carolyn J. Lawes, *Women and Reform in a New England Community, 1815-1860* (Lexington: University Press of Kentucky, 2000), 36-57.

<sup>15</sup> McCarthy, “Parallel Power Structures”; Cott, *Bonds of Womanhood*, 134n.15; Scott Gregory Lien, “The Centripetal Force of Benevolence: Social Unity and Voluntary Associations in the Early Republic,” unpublished paper presented at the Omohundro Institute of Early American History and Culture, Fourteenth Annual Conference, June 2008, pp. 7-8.

<sup>16</sup> Salerno, *Sister Societies*, 15-23; *Genius of Universal Emancipation*, May 12, 1827.

participated in multiple associations or who traveled to new communities. As Johann Neem has argued in his recent work on the spread of civil society in Massachusetts, the spread of the knowledge of *how* to associate—through printed forms and constitutions, through emulation of a nearby town, and through the geographical mobility of the members and organizers themselves—encouraged the forming of new groups.<sup>17</sup> In the first third of the nineteenth century, methods of creating organized, more-or-less permanent societies that would persist even if the original members were replaced by new ones found their way from community to community. The mode of organization that was seized upon was to draw up, approve, and abide by set of written articles of agreement, most commonly called a constitution. As scholars such as Bruce Dorsey have recently noted, historical research long ago “exposed the informal associations of women at tea tables, gossip circles, and early salons,” but what came after the Revolution was something new, for “formal organizations of women were nearly nonexistent before the 1790s.” And, as Anne Scott summed up her wide-ranging study of early-nineteenth-century women’s groups, “No matter where they were, who the members were, or what they called themselves, organizational forms were remarkably similar. Written constitutions were universal: every society established rules about meetings, the uses of money, and qualifications for potential receipts of charity.” To this can be added other universals: women’s societies almost invariably described how one became a member, their duties while a member, and—usually—what one had to do to withdraw. By the early nineteenth century, as this dissertation has charted in chapters 1 and 2, Americans

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<sup>17</sup> Neem, *Creating a Nation of Joiners*, chap. 4; Sidney Tarrow, *Power in Movement: Social Movements, Collective Action, and Politics* (New York: Cambridge University Press, 1994); Mazzone, “Organizing the Republic,” chaps. 2-3; Theda Skocpol, *Diminished Democracy: From Membership to Management in American Civic Life* (Norman: University of Oklahoma Press, 2003).

were quite comfortable with a particular conception of voluntary membership, and women's societies certainly fit the same pattern.<sup>18</sup>

For one, constitutions were virtually ubiquitous. The same minister's wife noted above as spurring the formation of the Female Cent Society in Concord, New Hampshire, at about the same time also took the lead in the establishment of the Female Charitable Society in Concord. Elizabeth McFarland proposed the group "at a social gathering in the Christmas season of 1811," and what she did next was almost universal. She drew up a constitution. Then, with the help of two other women of the community she gathered the signed support of seventeen others in a matter of days, all of whom agreed "to form ourselves into a Society for charitable purposes—to choose such officers, and establish such rules and regulations, as may be necessary for effecting the design of such an institution."<sup>19</sup> In many other clubs, women met once and appointed a committee to draw up a constitution, which was then approved at their second meeting.<sup>20</sup> These societies, in essence, were deliberately organized in a way that replaced friendship with formal association and descriptions of procedure. In McFarland's Concord, a town of 2,500 people, she used a Christmas social event to orchestrate the creation of a society to do

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<sup>18</sup> Bruce Dorsey, *Reforming Men and Women: Gender in the Antebellum City* (Ithaca, N.Y.: Cornell University Press, 2002), 23; Scott, *Natural Allies*, 13.

<sup>19</sup> *Constitution of the Female Charitable Society of Concord* (Concord, N.H.: George Hough, 1824); *Constitution of the Concord Female Charitable Society, and Names of Members* (n.d., n.p.), incorporated on Jan. 5, 1853: see *Acts of Incorporation and Constitution of the Concord Female Charitable Society: Catalogue of Members with Address and Reports at the Centennial Anniversary, 1812-1912* (Concord, N.H.: Ira C. Evans Co., 1912); Henry McFarland, "Concord Female Charitable Society," essay on file at the New Hampshire Historical Society; Sarah Kimball, "Concord Female Charitable Society" [1856], in Kimball-Jenkins Papers, New Hampshire Historical Society, Concord, N.H.; Records of the Concord Female Charitable Society, 1812-1840, New Hampshire Historical Society, Concord, N.H.; Samuel Ayer Kimball, receipts from memberships, subscriptions, etc., in Kimball-Jenkins Papers, New Hampshire Historical Society, Concord, N.H.

<sup>20</sup> See, for example, the Maternal Association of the First Congregational Church, Concord [N.H.], records 1827-1852, New Hampshire Historical Society, Concord, N.H.,

good. The women then paid into the coffers what they almost cheerfully referred to as a “tax,” though a resolution was passed that allowed some of the women “liberty to pay their annual subscription in homespun cloth, of suitable quality to make garments for the poor.”<sup>21</sup> There was even a move, quite early in the history of women’s associations, to open membership up to all comers rather than limiting to those approved of by the existing membership. Johann Neem was the first to observe this development, describing it as part of a larger trend toward membership as a *means* of accomplishing something in the community, not something limited to the elite and thus serving more as a marker of community leadership than as a means to it.<sup>22</sup>

Take Rhode Island, for example. In the late eighteenth century, it was common for women’s societies (and men’s, too) to have prospective members ask approval of the existing membership or its leadership before they could join. So the Providence Female Charitable Society, organized in 1799, limited membership to those approved by “the board of direction.”<sup>23</sup> To achieve any great numbers of donors or to broaden a base of support, however, it was determined that a more open membership policy was more effective. Thus, the Providence Female Tract Society established constitutionally that “Any lady may become of member of this society by adding her name to the list of Subscribers and paying annually fifty-two cents. They who once subscribe, are to be

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<sup>21</sup> Records of the Concord Female Charitable Society, 1812-1840, New Hampshire Historical Society, Concord, N.H.; Samuel Ayer Kimball, receipts from memberships, subscriptions, etc., in Kimball-Jenkins Papers, New Hampshire Historical Society, Concord, N.H.

<sup>22</sup> Neem, *Creating a Nation of Joiners*, chap. 4.

<sup>23</sup> Notice of wish for a relief fund with list of subscribers, ca. 1799, Providence Female Charitable Society, Rhode Island Historical Society, Providence, R.I., which limited membership to those approved by “the board of direction.” Folder 6, Copy of petition of Providence Female Charitable Society to incorporate. *The Charter and Constitution of the Providence Female Charitable Society*, 4<sup>th</sup> ed. (Providence, R.I.: John Carter, 1804).

considered members, until at their own request their names be erased from the list of subscribers.” So too could members of the Wapping Female Missionary Society in Connecticut, according to their constitution, open to all those who agreed to subscribe to it annually, some paying as little as twenty-five cents in dues. As Neem has shown, this was a trend that, over the course of the first third of the nineteenth century, fundamentally transformed how people came to play a part in the associational life of American civil society. Sign the constitution and pay your dues, and you were in.<sup>24</sup>

Thus, women understood what they were doing in terms more formal than friendly and affectionate. As Salerno has noted in her study of antislavery societies, “creating a society meant creating a structure through which women could make regular donations and coordinate their efforts. It required that a group excluded from national politics write constitutions and hold elections for officers. Organization required decisions about who could belong to the group and in what types of activities the association should engage.” Once a society was formed, it began communicating with others throughout the region, with women writing “each other for copies of a society constitution, information on how to raise funds, or a discussion of the best means to promote antislavery.” The same was true of female societies organized to support religious efforts, such as the Boston Female Society for Missionary Purposes, which according to Cott corresponded with 109 similar societies in 1817 and 1818.<sup>25</sup>

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<sup>24</sup> Records of Providence Female Tract Society, 1815-1829, 2 vols., Rhode Island Historical Society, Providence, R.I.; Wapping Female Missionary Society, records, 1839-1861, Connecticut Historical Society, Hartford, Conn. See also the Constitution of the Female Foreign Missionary Society, Franklin, in the commonplace book of Lucy Gibbs, 1817, on two folded sheets of paper, in her handwriting, Connecticut Historical Society, Hartford, Conn.

<sup>25</sup> Salerno, *Sister Societies*, 25, 35; Cott, *Bonds of Womanhood*, 135.

In addition to correspondence among societies, other factors helped to prompt some wide-ranging consistency in how the groups themselves were arranged internally. For one, many members joined multiple groups. Nancy Cott noted that New England women moved with ease “among several evangelical societies, and participated in several at once,” which to her suggested that “associating under the ideological aegis of evangelical Christianity mattered more to them than the specific goals of any one group.” So it should not be surprising that the societies were quite similar, not merely in purpose, but in their modes of operation. Second, women of the early nineteenth century had been and were members of male-led organizations, something apparent not only in membership lists but quite often in societies’ gender-inclusive language. For example, the Bible Society of the State of Rhode Island and Providence Plantations voted in 1817 “That any person subscribing a sufficient sum which when added to his or her former subscriptions shall amount to twenty five Dollars, shall thereby become a member for life, provided such additional sum shall be paid within one year from this Meeting.”<sup>26</sup> Thus, women had models of fundraising charitable societies to follow, not merely from the experiences of their relatives or from published constitutions and bylaws, but from their own participation.

Third, and perhaps most significantly, the technology of association spread in the manner it did in the early nineteenth century because published constitutions were very much the public face of all women’s associational efforts. To organize, it would seem, was to publish a constitution, making it almost unavoidable that new organizers and joiners had a fairly set notion of what an association ought to look like. The *Concord*

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<sup>26</sup> Cott, *Bonds of Womanhood*, 144-145; Resolution of Sept. 4, 1817, Bible Society of the State of Rhode Island and Providence Plantations, Sept. 3, 1813, Rhode Island Historical Society, Providence, R.I.

*Observer* noted with regret that it had not published as many accounts of the organization of new women's societies as were available to readers in other states and regions, where people had frequent descriptions of "the establishment of Female Societies for various charitable purposes" in "the Reports of other Societies, the monthly magazines, the weekly and even daily newspapers." The editor of the *Observer* noted that that had not been the case for women's societies in New Hampshire: "their operations being more local" and women "naturally retiring from publick view, their numerous acts of benevolence have in a measure been private, or known to but a few." But the *Observer* sought to rectify this in a manner that says a great deal about how Americans were conceiving of voluntary association by 1819. The paper did not want to publish accounts of their charitable deeds, or the addresses and speeches given to and by them: the editors opted to do nothing more than "to collect copies of the Constitutions of Female Societies and Associations...for publication in the *Observer*." That was the public face of American associationalism in the early nineteenth century—not mission statements or detailed accounts of the need for a particular charitable effort, but constitutions comprising articles and bylaws.<sup>27</sup>

The consequences of all those aspects of early women's associationalism that made it both possible and likely that there would be a great deal of similarity in how they were organized internally were twofold: first, there was amazing consistency even across regions in what women's organizations looked like. The first southern society was founded in Savannah in 1801, a home for orphan girls, the entire board of managers being female. Anne Scott notes that "the records of southern women's benevolent societies are indistinguishable from other parts of the country, and it is clear that societies

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<sup>27</sup> "Female Charitable Societies," *Concord Observer*, Jan. 4, 1819.



existed even in small communities. Evidently these groups were a response to something more than simply industrialization or ‘modernization.’ There is no case to be made for southern exceptionalism from the voluntary association evidence.” Mary Kelley disagrees to a degree in her discussion of women’s literary clubs, finding southern women more likely than northerners to continue “to display their learning and accomplishments in heterosocial gatherings of friends and family,” but in terms of benevolent societies, in particular, there was far more similarity than difference. And the same can be said for women’s societies in newly settled west: Cleveland and Cincinnati each saw the founding of several women’s benevolent societies much like those found in the East in their first decades of settlement.<sup>28</sup>

Second, the sharing of modes of association—by ministerial supervision, by experiences personal and shared, by correspondence, by print—not only offered models to aspiring organizers and joiners but ultimately offered something approaching a set of culturally resonant suppositions that to form a cooperative endeavor of any kind virtually impelled drawing up a constitution, defining the ins and outs of members’ duties and rights, keeping detailed records, and taking steps to ensure that any new members follow those procedures and practices established by the old.<sup>29</sup> Thus, I argue that our developing understanding of the developing technology of association as it applies to both men’s and women’s associations was integrally related to the broader culture of legality that has

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<sup>28</sup> Scott, *Natural Allies*, 19, 195n.32; Kelley, *Learning to Stand and Speak*, 28-29; Keith Melder, “Ladies Bountiful: Organized Women’s Benevolence in Early Nineteenth Century America,” *New York History*, 65 (1967): 240 (on Cleveland and Cincinnati).

<sup>29</sup> For a good example of women’s awareness that they needed to be clear and specific in order that new members would keep the association in the proper path, see Records of the Maternal Association of Clergymen’s Wives in Cheshire County, N.H., 1835-1870, New Hampshire Historical Society, Concord, N.H., address in folder 5, dated January 1834.

been described in the preceding chapters: the idea that human relationships not only were governed by law, but they *ought* to be governed by law—or, where law as an instrument of state authority did not present itself, by legalistic ways of members' conceiving of their own organization. For example, a constitution would be and should be abided by, operating as a sort of fundamental law from which all associational power derived.

Such a constitutional approach was intimately related to the broader political culture in which these women's societies were situated. Constitutionally organized groups “embodied a critique of rowdier civil gatherings and of the citizens who participated in them,” as Jeanne Boydston has recently noted in her analysis of Mary Kelley's work, which, though focused on literary societies, provides insights regarding all early national women's efforts at formal collective action. “Some gatherings of citizens were far more desirable than others—more refined, more estimable, more equal. The characteristic that determined those selections—sometimes more powerfully than gender—was likely to be rank, class, or race.” These women, noted Boydston, “would not have been caught dead in a mob.” As several scholars have argued in their efforts to connect women's associationalism with the nascent suffrage movement of the mid-nineteenth century, “Associational life prepared many middle-class Protestant women to think more expansively about their own civic obligations and to give more explicit consideration to their rights.” Whether such associational activity allowed women to begin to see themselves as women and thus provided a needed first step to an eventual feminist consciousness, as Nancy Cott has argued, or whether class and kin was more emphasized than gender, as Nancy Hewitt has contended, is beyond the scope of this study. But one thing that does become apparent when one focuses on how women

described and delineated the rights and duties of voluntary membership is that historians may have overstated the significance of distinctions between male and female participation in civil society. For both men's and women's societies embraced this culture of legality, this procedurally and legally defined mode of concerted action.<sup>30</sup>

There is little doubt that women clothed their participation in a wholly different rhetoric, emphasizing their undeniable role in certain benevolent enterprises as “the proper business of women” and a natural extension of “the feelings of mothers.” But in the interior lives of their societies, the commonalities with men's societies—the detailed articulation of the rights and duties of individual membership, the “voluntary, formal, and limited” nature of these purely voluntary relationships, in the words of Conrad Wright—are equally significant in our understanding of how women thought they should form themselves together in order to participate in early American civil society.<sup>31</sup> For many historians of women's social activism, women embodied the separation of civil society and public authority, in that they were extraordinarily active in the former and lacked any voting rights and, therefore, any direct influence in the latter. But there is another element of women's associational activity that opens up fully new avenues of historical understanding of post-Revolutionary American society, one that emphasizes not women's separation from political society but their close relationship with it, in the ways they

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<sup>30</sup> Jeanne Boydston, “Civilizing Selves: Public Structures and Private Lives in Mary Kelley's *Learning to Stand and Speak*,” *Journal of the Early Republic*, 28 (2008): 55-57; Lori D. Ginzberg, *Untidy Origins: A Story of Women's Rights in Antebellum New York* (Chapel Hill: University of North Carolina Press, 2005), 103-104; Cott, *Bonds of Womanhood*, chap. 2; Hewitt, *Women's Activism and Social Change*, chap. 2. On the breadth of associational opportunities, spanning from mob to organized political assembly but inclusive of all those forms of collective action, Mary Ryan's work is seminal: see her “Civil Society as Democratic Practice: North American Cities during the Nineteenth Century,” *Journal of Interdisciplinary History*, 29 (1999): 559-584.

<sup>31</sup> Samuel Stillman, “A Discourse Delivered before the Members of the Boston Female Asylum” (Boston, 1801), quoted in Neem, *Creating a Nation of Joiners*, 104; Wright, *Transformation of Charity*, 150.

organized their own societies by utilizing languages of informed consent, law, and personal rights. It was in those ways that women secured a space of their own.

There is good reason to think that women who organized and joined these associations thought that formal procedure and well-defined, constitutional modes of operation were the ideal ways to eliminate conflict and create unity of purpose. In literary societies, discussed in the following section, the participant women made that point explicitly. In those early societies that were affiliated with churches, too, unity and consensus were paramount goals. When William Patten addressed a group of three hundred women in Rhode Island on “The Advantages of Association to Promote Useful Purposes,” he noted that “The members in general of the Society, especially those who are active in conducting its affairs, will studiously cultivate unanimity. Society denotes union, as well as numbers—without which there is only the name.” And women found that an optimal means to that end was to create the sorts of relationships among one another that, in Conrad Wright’s terms, “were neither as flexible nor as comprehensive as family relationships,” with annual elections, dues, and well-defined levels of participation as “recurring reminders that voluntary relationships were impermanent.” The women who joined were there because they chose to be, with articles of organization and bylaws telling each from the outset what would be expected of her.<sup>32</sup> Quite early there was an emphasis that consensus was easily achieved only in constitutionally organized voluntary groups, formed exclusively as they were of people of shared mind and of formal, constitutional equality. Maternal societies to support and provide spiritual edification for mothers, as Nancy Cott noted, did not leave much evidence of their existence because

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<sup>32</sup> William Patten, *The Advantages of Association to Promote Useful Purposes, Illustrated in a Discourse Delivered in the 2d Congregational Church, Newport, August 1<sup>st</sup>, A.D. 1805, at the Request of the Female Benevolent Society* (Newport, R.I.: Newport Mercury, 1805), 16.

they were small, were organized locally, and did not participate much at all in the print culture of the nineteenth century. But they too were organized with detailed constitutions. One maternal association affiliated with the First Congregational Church in Concord, New Hampshire, had a constitution of nine articles (including article 6, which enjoined its members to pray daily) and kept a book of minutes.<sup>33</sup>

That social unity was a primary goal of this tendency toward formal and constitutional organization is somewhat underscored by one element of the constitutions of women's societies that was more common in women-only associations than it was in other societies: a prohibition on gossip or other malicious talk. The Ladies' Benevolent Society of Roxbury, Massachusetts, explicitly forbade speaking "directly or indirectly against the character of any." The Female Moral Reform Convention that met in New York in 1839 included an article in their constitution to the effect that "no member shall circulate reports derogatory to the reputation of another unless the interests of society require the exposure. Any member, who shall intentionally and deliberately violate either of the above articles, shall forfeit the right of membership, unless the Society has satisfactory evidence of her amendment."<sup>34</sup> There were instances, too, in which it appeared that the women participants in a society followed a certain mode of doing

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<sup>33</sup> Cott, *Bonds of Womanhood*, 149-151; Maternal Association of the First Congregational Church, Concord [N.H.], records 1827-1852, New Hampshire Historical Society, Concord, N.H. See also the encomia about maternal societies in "Maternal Associations," *Observer and Telegraph* [Hudson, Ohio], Aug. 25, 1831, reprinted from the *New York Evangelist*; Richard A. Meckel, "Educating a Ministry of Mothers: Evangelical Maternal Associations, 1815-1860," *Journal of the Early Republic*, 2 (1982): 403-423.

<sup>34</sup> Ladies Benevolent Society, Dudley Street Baptist Church, Roxbury, Constitution and Minutes, 1842-43, Andover-Newton, quoted in Hansen, *Strained Sisterhood*, 60; *Proceedings of the Female Moral Reform Convention, Held in New York, May 8<sup>th</sup>, 9<sup>th</sup>, and 10<sup>th</sup>: With an Address to American Women* (New York: Published by the Convention, 1839), article 5. For a similar prohibition in an African American women's society, see the constitution of the Colored Female Religious and Moral Society of Salem," art. 4, quoted in Dorothy Sterling, ed., *We Are Your Sisters: Black Women in the Nineteenth Century* (New York: W. W. Norton and Co., 1984), 109.

things, not for any particular reason, but because they simply believed that was how voluntary associations worked. Take the Ladies Sewing Society of St. James Church Ledyard in Connecticut, which drew up its constitution and began meeting to do things such as knit socks in 1838. The book of minutes for that club were meticulously kept—though a great number of the entries simply read “not one of the ladies attended,” or “not one attended.”<sup>35</sup> In short, just as the organizers and joiners of fundraising societies might decide that their charitable societies “would become more extensive and permanent, were its benefactions collected in some way, more systematic and uniform,” as a group of New Hampshire women decided in 1812, so too did those who joined many other kinds of voluntary groups in early-nineteenth-century America come to see formal organization, constitutionalism, and detailed record keeping as important to their endeavors.

### Women’s Literary Societies

Recent attention to women’s literary and educational societies, some affiliated with female academies and many not, has convincingly portrayed women as active participants in the civil society of the early American republic. And a study of these groups that focuses upon their conceptions of the meanings and consequences of voluntary membership reveals that the tendencies toward formal organization and emphases on fair procedure traced above were not limited to fund-raising organizations. The work of Mary Kelley, in particular, has shown how women in such groups “fostered in each other the self-confidence that was crucial to the next step they took—the making

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<sup>35</sup> Constitution and minutes of the Ladies Sewing Society of St. James Church Ledyard, drafted Jan. 10, 1838, Connecticut Historical Society, Hartford, Conn.

of public opinion in civil society.” Women had begun creating and joining reading circles as early as the 1760s, according to Kelley, but they took on new significance in post-Revolutionary America, where such groups became far more common and were an important element in the self-fashioning that accompanied and made possible women’s involvement in early national civil society.<sup>36</sup> Similar efforts at self-improvement and training for participation in early-nineteenth-century civil society can be found among African American women. Within the space of about a year, beginning in autumn 1831, black women in Philadelphia, Boston, and Providence organized literary societies to “cultivate the talents entrusted to our keeping, that by so doing, we may break down the strong barrier of prejudice,” in the words of the Philadelphia women.<sup>37</sup> According to a study by Elizabeth McHenry, these societies grew out of the mutual aid organizations formed by African Americans. And by the 1830s, she notes, black women’s literary societies probably outnumbered similar groups formed by men, though they were typically smaller and held meetings in members’ homes rather than in public halls. As Martha Jones recently argued, “For many female activists, single-sex literary societies were a principal training ground. Their female-only character led most commentators to laud such societies as an extension of the domestic realm,” but they nonetheless were “venues for the moral and intellectual improvement of women who had not the

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<sup>36</sup> Mary Kelley, *Learning to Stand and Speak: Women, Education, and Public Life in America’s Republic* (Chapel Hill: University of North Carolina Press, 2006), 114, quotation on 117. A good example is found in Boston in 1778, when young Hannah Mather had organized a ‘woman’s lodge,’ for the purpose of ‘improving the mind, that by *Strength* and *Wisdom*, we might beautifully adorn the female character,...’ but it disappeared when members married and began to have children.” Scott, *Natural Allies*, 12. See also Steven C. Bullock, *Revolutionary Brotherhood: Freemasonry and the Transformation of the American Social Order* (Chapel Hill: University of North Carolina Press, 1996), 158-162.

<sup>37</sup> Constitution of the Female Literary Association of Philadelphia, formed Sept. 20, 1831, quoted in Sterling, ed., *We Are Your Sisters*, 110; Female Literary Association [of Philadelphia], *Liberator*, Dec. 3, 1831; Constitution of the Afric-American Female Intelligence Society of Boston, *Liberator*, Jan. 7, 1832.

opportunity for formal schooling.”<sup>38</sup> They were also constitutional in orientation, and quite detailed in their descriptions of what benefits and obligations a member might expect, owing in part to the fact that, as McHenry observed, they tended to develop out of mutual aid societies. Those groups, because they were financial in nature, were always thoroughly descriptive of members’ rights and duties in their articles of association, and there is little apparent difference in the constitutions of such groups regardless of whether the membership comprised men or women, whites or blacks.

In the case of literary societies, prosopographical studies of early women’s groups have shown how closely connected the members generally were. They generally shared religious backgrounds and social status, and they were often friends or even family.<sup>39</sup> Beginning in about 1800, however, what could begin as a society founded on shared friendships, social networks, and familial relationships would be cast, almost instantly, in constitutional, procedurally bound forms. As was the case with men’s societies, the first order of business—almost invariably—was either the adoption of a constitution or the appointment of a committee to draft one. And such organic documents were not then ignored but were then read often (sometimes at the beginning of each meeting or on the election of new members) and, by all appearances, abided by. And the consequence was a new way of thinking about old relationships, even in voluntary societies founded by women who shared sincere sentimental bonds. This is not to say that participants in

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<sup>38</sup> Elizabeth McHenry, *Forgotten Readers: Recovering the Lost History of African American Literary Societies* (Durham, N.C.: Duke University Press, 2002), 42-57; Dorothy B. Porter, “The Organized Educational Activities of Negro Literary Societies, 1828-1846,” *Journal of Negro Education*, 5 (1936): 555-576; Martha S. Jones, *All Bound Up Together: The Woman Question in African American Public Culture, 1830-1900* (Chapel Hill: University of North Carolina Press, 2007), 31; Kelley, *Learning to Stand and Speak*, 9.

<sup>39</sup> Nancy Isenberg, *Sex and Citizenship in Antebellum America* (Chapel Hill: University of North Carolina Press, 1998), 59; Anne M. Boylan, “Women and Politics in the Era before Seneca Falls,” *Journal of the Early Republic*, 10 (1990): 363-382; Scott, *Natural Allies*.



small, tightly knit female associations of this period cared less for one another after they had drawn up their organizational documents: it is only to say that they made conscious decisions that, in a formal sense, affection was to have little or nothing to do with their membership.

Before the turn of the century, even in men's reading societies, there was a very strong likelihood that formalities and constitutions would not be a central feature. The Friendly Club in New York City, with members such as James Kent and Elihu Hubbard Smith, for instance, had neither.<sup>40</sup> But women's societies aimed at literary exchange and stimulating conversation appear to have moved quite early toward formal founding documents and rules of procedure. Women were more likely influenced by the dominant forms of female associational activity in the immediately post-Revolutionary era: charitable and benevolent societies. In those societies, women had grown quite comfortable by the first decade of the nineteenth century in adopting constitution and bylaws, holding annual meetings where officers such as treasurer would be chosen, and even seeking charters of incorporation. Those same patterns would begin to appear in societies aimed, not at social service, but at sociability. In forming what Mary Kelley calls the first women's reading society to be erected without any connection to a female academy or seminary, Boston's Gleaning Circle in 1805, the women did something different than had the organizers of other groups that came before them: they organized themselves almost exactly in the manner of a fundraising benevolent society. "In both its institutional structure and its constituency," Kelley writes, "the circle, which met for more than two decades, bore a marked resemblance to an increasingly visible organized benevolence. The eighteen women that formed the Gleaners established the more formal

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<sup>40</sup> Kaplan, *Men of Letters in the Early Republic*, 57; Waterman, *Republic of Intellect*.

structures of governance that had been installed in benevolent societies since the late 1780s,” adopting regulations, electing officers, meeting at prescribed intervals (two hours every Saturday), and recording their proceedings meticulously.<sup>41</sup>

Such women were working hard to carve out a space for themselves to engage in stimulating conversation and reflective reading and discussion, and they moved quite quickly toward well-defined procedures and rules as a means to that end. In seeking to fashion themselves as participants in the civil society of the early American republic, they adopted institutional forms and articulated rules that “mandated collaboration in virtually everything they did,” according to Kelley, such as requiring “that all members participate in the selection of books and in the conversations held at meetings.” Much like the church-affiliated religious and charitable societies early national women had formed, they moved progressively toward more prescriptive, textual guidelines for their associations.<sup>42</sup>

Take, for example, the Ladies’ Literary Society of Norwich, Connecticut, founded in 1800. Some ten years earlier, thirty-nine women from the Chelsea Congregational Church had formed an association to sing hymns, pray, and read together. In 1800, the women decided to organize still more formally as a reading society, inscribing in a book of records that “We the undersigned do agree to form ourselves into a Society, by the name of the Ladies Literary Society for the special purpose of Enlightening our understandings, expanding our Ideas, and promoting useful knowledge among our Sex; to this end we propose we assemble ev’ry other Wednesday eve, or ev’ry Wednesday from the first of October, to the first of March from 7 Oclock till 9.” Their first meeting, on January 29, held at one of the founders’ homes, began with a reading from the book of

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<sup>41</sup> Kelley, *Learning to Stand and Speak*, 134-135.

<sup>42</sup> *Ibid.*, 117.

Proverbs and turned next to discuss a history of Christopher Columbus. The women made “suitable comments on the Heroic deed of Queen Isabella, in being his patroness, when in vane did he apply to Kings for assistance for Eighteen years.” At that first meeting, they also “agreed to purchase a blank-book at the Expense of the Society, to minute their proceedings.”<sup>43</sup>

Six weeks later, on March 12, 1800, a committee of six women was appointed “to frame a set of rules to be laid before the society which they approving shall pass into laws binding on every member of the society.” When the rules were reported on March 19, copies were made for all the members to read closely for discussion at the next meeting. At the same meeting—not coincidentally, one can presume—one of the women’s readings was the United States Constitution. By April 2, after some debate, their own constitution “was read and then passed almost unanimously.” The constitution included descriptions of how, where, when, and by whom each meeting was to be conducted (it would rotate among members’ homes, in the order that their names were inscribed on the constitution). And, more important still, the articles reveal the women’s familiarity with the idea of a constitution as serving the purpose, not just of describing the rules, but of constraining even a majority of the members from later changing them at will. The Ladies’ Literary Society had drawn up a constitution that included four articles that, it was explicitly stated, could never be amended: each meeting would begin with a Bible reading; each week, members would make a “contribution” of four pence (more could be

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<sup>43</sup> Constitution and book of records, Ladies Literary Society, Norwich, Conn., Connecticut Historical Society, Hartford, Conn.; Barbara E. Lacey, “Women in the Era of the American Revolution: The Case of Norwich, Connecticut,” *New England Quarterly*, 53 (1980): 539-540; Rosemarie Zagari, *Revolutionary Backlash: Women and Politics in the Early American Republic* (Philadelphia: University of Pennsylvania Press, 2007), 56-57; Christopher Grasso, *A Speaking Aristocracy: Transforming Public Discourse in Eighteenth-Century Connecticut* (Chapel Hill: University of North Carolina Press, 1998), 420n.43.

given voluntarily but could never be required); “Any member dishonoring herself, or the society, shall be expelled, if the opinion of two thirds of the house concur”; and “No religious, or political disputes shall ever enter this Society.” Any other article could be amended with the consent of two-thirds of the members. But, like Ulysses tied to the mast, the women set aside four issues and made sure they could never change their minds.<sup>44</sup>

Why had they come together in the first place? At the first annual address, one of the members, Mrs. Lansmann, made clear that their desire to collaborate and share came naturally, echoing a common refrain in post-Revolutionary America. “The social principal [sic] in human nature is so powerful and so operative that there has not been a period of the civilized world when particular societies have not existed; congenial minds having a similar pursuit will always associate, and the advantages derived from it are so great, that all restrictions, or services, which will benight the society are borne with pleasure.” She noted that “even female societies are not unprecedented,” such as “the amiable and rightly respected widows society in New York” or the “female society also which was instituted at Newport for the Benevolent purpose of Prayer for the universal good of mankind.” Referring, then, to benevolent societies as the closest parallel to what the ladies of Norwich were attempting, she noted how “Our feelings however at this time call us more immediately into our own circle.” Addressing the obvious criticism, she went on: “Some have said, why have the Ladies associated for reading? If they have leisure, why not read at home—we would answer that feeble and desultory are the efforts of one alone, compared to the effect of an united circle of congenial friends.”<sup>45</sup>

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<sup>44</sup> Constitution, Ladies’ Literary Society, Norwich, Conn., Connecticut Historical Society, Hartford, Conn.

A year later, when delivering the second annual address, Miss Mary Tyler made clear, however, that the Ladies' Literary Society of Norwich was, in an important way, something other than a "united circle of congenial friends," friends though they might be. For they were a society that had, quite purposefully, chosen to create rules to give shape to their proceedings. "We shall do well," Tyler said, "if we pay a strict attention to the rules of our institution: they were formed by the most judicious of our society, and calculated for the good of the whole. We have an equal right to petition for an amendment of any of the articles (two or three excepted) when ever we see room but in departing from them while they are in forced—we are sure of creating uneasiness for our selves and others." Indeed, at the very next meeting, they, with no intentional irony, showed a real reverence for their constitutional rules by breaking one: in derogation of their unalterable requirement that each meeting begin with a Bible reading, the women began by reading their own constitution aloud, first, and only then even moving on to read a passage from First Corinthians.<sup>46</sup>

Miss Lydia Harris, giving the third annual address in 1803, echoed Tyler's call for strictly constitutional proceedings: "A strict adherence to our constitution, I would strongly recommend, as a diviation [sic] from it may have a tendency to create uneasiness." And she recommended "to recommend to our secretary in future, more exactness, in recording every event, and transaction, that occurs in the society, as in the course of the past year, many things have been omitted, which may be of consequence at some future period." There was a deliberate effort, here, to use formal rules and constitutional methods to create something more permanent than a mere circle of friends.

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<sup>45</sup> First annual address, Jan. 28, 1801, in *ibid.*

<sup>46</sup> Second annual address, Jan. 28 [27], 1802, in *ibid.*; minutes for Feb. 3, 1802.

According to Harris, the society was no “transitory thing.” It should “be durable as time, and productive of much good to future generations.” Orderly proceedings were a means to that end. A similar attention to order was seen in other women’s reading societies formed in the years to come, such as when the women of the Female Reading Class adopted a set of rules governing their club in Colchester, Connecticut, in 1816, including rules describing how new members could be admitted. Charlestown’s Social Circle in 1845 looked as much like a typical benevolent society as it did a reading club when they elected as their lead officer a “first directress,” a term most commonly used in fundraising and socially active societies. And “annual reports issued by the literary societies at Townsend, Charlestown, and New-Hampton seminaries,” according to Mary Kelley, “read as if they were records of a voluntary association dedicated to benevolence.” There were very formal goings-on in each of these literary societies.<sup>47</sup>

Kelley’s groundbreaking work on female participation in civil society is helpful in understanding why this was the case. Denied access to a public sphere of organized politics, women were free and were even encouraged to participate in civil society, and they chose to do so in remarkably rule-bound ways. Women in the first part of the nineteenth century, in addition to their participation in heterosocial salons and conversation circles, began forming literary societies where, according to Kelley, they “practiced the art of persuasive self-presentation, and instructed themselves in the values and vocabularies of civil society.” One of those vocabularies, the women of Norwich declared directly and repeatedly, found expression in constitutional articles and formal rules. And while recent historians such as Rosemarie Zagarri have given some attention

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<sup>47</sup> Third annual address, Jan. 26, 1803, in *ibid.*; “Records of the Female Reading Class, Colchester, Feb. 14<sup>th</sup> A. 1816,” Connecticut Historical Society, Hartford, Conn.; Kelley, *Learning to Stand and Speak*, 125.

to the subject matter of the conversations of the Ladies' Literary Society for evidence of their engagement with early national politics, the way in which they organized themselves so that they could enter into those discussions evinces something equally important.

First, the women were aware of the broader phenomenon of association, specifically invoking other female societies formed in recent years as being comparable to their own. Revealingly, the societies named by the Ladies' Literary Society as examples were organized charitable and benevolent societies, groups that sought to help those around them more than they sought to improve themselves. And the Norwich women acted on those parallels by establishing strict rules for their own government, even taxing themselves each month. Second, to return to Jeanne Boydston's powerful argument, the choice to adopt such constitutionally ordered modes of proceeding as they began engaging in explicitly political discourse "embodied a critique of rowdier civil gatherings and of the citizens who participated in them." Early national politics were becoming increasingly institutionalized and formally organized, especially after 1800. Political fraternities, partisan volunteer militias, and other modes of political expression were organized and orchestrated, serving to replace the Revolutionary-era mob and bring a new kind of order to the celebratory political culture of parades, processions, and patriotic gatherings of the 1790s. Women's societies, too, made a similar transformation at just about the same historical moment. And, as Rosemarie Zaggarri contends, "Engagement with civil society allowed women to practice a form of civic responsibility that was both an analogue of, and a complement to, male notions of citizenship." We can find a sort of procedural liberalism in how these women chose to organize their societies

in their constitutional manner of organization, their frequent and regular elections, and, most obviously, their expressed beliefs that it was vitally important, not merely to make rules, but to abide by them.<sup>48</sup>

### Women's Societies and the Law of the State

As clear as it is that women came increasingly to think legalistically and constitutionally about their own societies, it is important, too, to determine the extent to which women's voluntary associations were directly shaped and actively superintended by the legal and political institutions of the early American states. In short, women's societies were connected with the legal regime of the state, though it appears they intentionally kept themselves somewhat more separated from any active legal superintendence than did men's voluntary societies of the same period. This reading accords well with the latest scholarship on these first generations of women born into the new United States, such as Mary Kelley's description of a generational shift that saw women retreat into female-only, separate institutions. Boydston was right to determine that, in describing these constitutionally organized women's societies, Kelley has also begun to elucidate "the process of interiorizing and coming to embody certain qualities of the state and certain inequalities of the society they sought to reform." This dissertation greatly extends these recent, as yet undeveloped observations by demonstrating the degree to which women as well as men in their privately organized and voluntarily joined societies embraced formal procedure and legalistic ways of thinking about their

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<sup>48</sup> Boydston, "Civilizing Selves," 55; Rosemarie Zagari, "Politics and Civil Society: A Discussion of Mary Kelley's *Learning to Stand and Speak*," *Journal of the Early Republic*, 28 (2008): 65.



associational relationships. But neither legislatively nor judicially was state legal authority the determining factor in that development.<sup>49</sup>

Unlike those moments of conflict traced in other chapters, there is no appellate record of court involvement of disputes over membership in an exclusively female society, nor did archival work in New York, Virginia, Pennsylvania, New Hampshire, Connecticut, or New York turn up any cases that rose to appellate level, such as a petition for mandamus for restoration of an expelled member. Thus, there is no sense in which the legalistic formalities of women's societies were imposed upon them. The evidence appears to be persuasive that their associations, quite simply, existed within a broader "culture of legality," in Joseph Raz's phrase, that almost impelled upon them a recognizably liberal mode of association in its focus on constitutionally defined and fair procedures.<sup>50</sup>

Now, of course, women's societies were often incorporated by state legislatures. In New York and Massachusetts, according to Anne Boylan's in-depth study of women's societies in both states, legislatures "quickly got used to treating women's associations exactly as they treated other petitioners for incorporation—churches, men's voluntary societies, joint stock companies—and granted most requests automatically." The first instances of female societies' incorporation can be found among those early societies that assumed a level of care over orphans or poverty-stricken widows, with the the Society for the Relief of Poor Widows with Small Children in New York City and the Boston Female Asylum leading the way, and after those incorporations in 1802 and 1803, respectively, it

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<sup>49</sup> Kelley, *Learning to Stand and Speak*, 54, 276; Boydston, "Civilizing Selves," 60.

<sup>50</sup> Joseph Raz, "The Politics of the Rule of Law," in Joseph Raz, *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (Oxford: Clarendon Press, 1994), 377-378.

became almost routine. That process of petitioning for articles of incorporation no doubt played some role in how women came to define in writing—and, one might presume, how they thought about—their own methods of association.<sup>51</sup>

It appears from the evidence, however, that women, just as did men, utilized incorporation to serve their own ends, ends that had as much to do with internal organization as with the association's interactions with the outside world. Indeed, incorporation in at least one women's society was sought as a means to reinforce the formal bonds that united the participant members and, more specifically, to bring delinquent members into line. Suzanne Lebsack's account of the formation of the Female Orphan Asylum in 1812 in Petersburg, Virginia, is particularly revealing. There, women petitioned the general assembly for legal incorporation late in 1812, noting "the fate of other Institutions of a similar description" as having taught them that voluntary "compacts, however ardently entered into, in a moment of enthusiasm, will decline, and finally perish as that enthusiasm abates, unless protected by an Act of Incorporation which will enable the Society to bind and punish refractory members." Within a week of incorporation the women passed "such laws as were deemed necessary for the

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<sup>51</sup> Boylan, *Origins of Women's Activism*, 21; Book of Minutes and original "Plan" of the organization, Society for the Relief of Poor Widows with Small Children, New-York Historical Society, New York, N.Y.; *The By-Laws and Regulations of the Society for the Relief of Poor Widows with Small Children. To Which Is Added a List of the Subscribers and of Donations Made to the Society, From November 1811 to November 1813* (New York: J. Seymour, 1813); Ginzberg, *Women and the Work of Benevolence*, 38, 49-50; Neem, *Creating a Nation of Joiners*, 104. See also Gregory H. Singleton, "Protestant Voluntary Organizations and the Shaping of Victorian America," in Daniel Walker Howe, ed., *Victorian America* (Philadelphia: University of Pennsylvania Press, 1976), 47-58. For an instance of fairly effortless incorporation in 1813 Connecticut, see *A Report of the Hartford Female Beneficent Society for the Year 1833* (Hartford, Conn.: Hanmer and Comstock, 1833).

government of the Society and the School,” and as a formally incorporated society had rights to sue and be sued that the married women of the society lacked.<sup>52</sup>

Thus, the limited ways in which the legal regimes of the state played a direct role in the organization of women’s societies and in their definitions of the rights and duties of membership helped to reinforce the trends charted in this chapter toward increasingly precise and legalistically described interior relationships in women’s societies. The fact that there is no record of a woman’s seeking legal reinstatement to a fraternal or reform society could well be a product of women’s deliberate desire to keep their associational lives separate, distinct, and at least somewhat pure from the taint of partisanship or an adversarial legal system. But the state was useful for women in shoring up their own institutions. And in that limited way the institutions of state authority helped women to demarcate a territory that was their own, in much the same way that political authority in the colonial era had been defined by charters and, in the post-Revolutionary era, was invariably defined by constitutions.

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<sup>52</sup> Suzanne Lebsock, *The Free Women of Petersburg: Status and Culture in a Southern Town, 1784-1860* (New York: W. W. Norton and Company, 1984), Legislative Petitions, Dec. 9, 1812, quoted on 200; *Intelligencer*, Mar. 13, 27, 1812, quoted on 199. Incorporation was not necessary to do a great many things as an association: the Providence Female Tract Society, for instance, held stock and hired attorneys in the name of their unincorporated society. “That we, the undersigned, surviving members of an unincorporated charitable association, formerly existing the city and county of Providence and State of Rhode Island, under the name of the Providence Female Tract and School Society, do hereby constitute and appoint George B. Jastram [?] of said Provd. our true and lawful Attorney to sell, assign, transfer, and set over, five shares in the capital stock of the Mechanics Bank in said Provd. now standing on the books of said bank in the name of the Provd. Female Tract and School Society.” Records of Providence Female Tract Society, 1815-1829, 2 vols., Rhode Island Historical Society, Providence, R.I.

## Chapter 6

### Mutual Benefit Societies and Legal Pluralism

Debates about how to understand the legal and political meanings and consequences of church membership in the post-Revolutionary years had the effect of giving great weight to the idea of informed consent. Debates over the same years about how membership in fraternal political societies should be understood prompted Americans of opposing political persuasions to agree on the basic principle that associations privately formed ought to have little power over individual political choice. In the early nineteenth century, all such groups, whether organized by men or women, began to be arranged internally in ways that emphasized procedural and legalistic bonds over affective ones. Common-law principles about corporate powers of expulsion were applied in ways that were recognizably liberal in a modern sense, extending civil rights into associational life and defining standards about when and how someone could be rejected from an association.

Further, controversies regarding the meanings of membership in mutual fire insurance cooperatives and stock-issuing business corporations echoed some of the same problems that were being worked out in other kinds of privately created, voluntarily joined associations: effective concerted action depended on finding a balance between associational power and the rights of individual members, protecting men and women against abusive claims of authority or derivation from agreed-upon purposes. And legal authorities in the decades immediately after the Revolution played a vital role in determining that balance, one long neglected by historians and legal scholars. So too did

popular perceptions of the appropriate bonds of membership change in the early nineteenth century. Thus it was that by the second decade of the nineteenth century there were widely accepted, even normative ideas about how the rights and duties of membership ought to be defined, delimited, and superintended. But the crucible of conflicts still to come between members and the groups they joined prompted further evolution in popular and legal conceptions of membership in the decades ahead. The experiences and the contests regarding membership in the mutual benefit societies that became so common in the first third of the nineteenth century provide a window into those changes.

Just as the first post-Revolutionary generations had joined, organized, and come to accept as legitimate certain kinds of associations and certain kinds of individual membership, so too did the following generations build on those past efforts to bring about a new regime of associational practices and laws. The steps taken were in some cases incremental, such as the evolution and further development of common-law principles regarding membership first described in the first decade of the nineteenth century, and were in other cases the consequence of radical, unforeseeable changes in American political culture, such as the Antimasonic movement of the 1820s and 1830s. But, in the end, conceptions of voluntary membership in the early United States that had once merely been widely held would become normative and legally delineated. The result was the foundation upon which an associational world would be built that Americans and foreign observers alike would marvel over by midcentury.

Intriguingly, these developments in the law and practice of associational membership are most apparent in one of the oldest kinds of voluntary groups. Mutual

benefit societies, known as “friendly societies” in Great Britain, were in most cases groups that had but one purpose: to collect funds that would then be available to individual members in case of injury or illness, and to their families in case of death. They were by no means unique to the United States: they existed in the Old World and in colonial British America in no small numbers. Indeed, they were not even unique to the modern era; something quite similar to an ordinary early-nineteenth-century mutual aid society existed in the Roman Empire, in Lavinium in A.D. 136, complete with monthly dues and initiation fees.<sup>1</sup> But precisely because so many kinds of associational action were wholly new to the post-Revolutionary era, there is a great deal to be learned from those varieties of concerted action that existed long before and yet, also, found themselves forced to adapt to new social, legal, and political climates.

I will argue that the extension of legally guaranteed rights into these kinds of private associations prompted a new way of perceiving of associations for mutual aid, one that, ironically, culminated by the end of the 1830s in courts’ withdrawal from the immediate superintendence of these groups. The history of mutual benefit societies in the American republic provides powerful examples of how the legal and popular conceptions of the rights and duties of membership continued to evolve in the period between 1810 and 1840. They did so, by and large, in a direction already established in the post-Revolutionary years, with a growing emphasis on legally guaranteed rights and governmental superintendence of the internal workings of private associations of nineteenth-century American life. But by the end of the 1830s courts would begin to withdraw themselves from an active superintendence of matters internal to the

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<sup>1</sup> Ramsay MacMullen, *Roman Social Relations, 50 B.C. to A.D. 284* (New Haven, Conn.: Yale University Press, 1974), 78-79.

associations, setting a precedent that would hold for the rest of the century: members should be careful about the fine print in their agreements to join, for the contractual obligations and other consequences of membership would be upheld.

For the most part, mutual benefit clubs were societies that, like the business corporation and the mutual fire insurance society, never claimed to be an institutional embodiment of brotherly love or close ties of affection. One recent appraisal of these societies as resembling what Ferdinand Tönnies called a *Gemeinschaft*, or a community that coheres by bonds of tradition and mutuality, is substantially off the mark.<sup>2</sup> Procedural regularity and fairly rigid enforcement of previously agreed upon rules were expected. The societies were formed as a way for individuals of no great means to deal with unforeseen hardships, to prepare for the costs associated with their own death and burial, and to provide for their families. It was clearly to the advantage of those who organized these groups to choose their fellows carefully and to take those steps necessary to maintain a certain level of collegiality and financial stability. And thus, unlike other varieties of concerted action in the early American republic, the internal workings of mutual benefit societies did not become increasingly formalized and procedurally precise in the early nineteenth century, for both in Great Britain and in the early United States these societies were already, by the mid-eighteenth century, astonishingly detailed and specific in their descriptions of the rights and duties of membership. Thus, as Conrad Wright has noted, these fraternal societies did not represent the same break with the past that other kinds of voluntary associations, such as moral reform societies, did. Joining

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<sup>2</sup> Elizabeth Kowaleski-Wallace, "The Needs of Strangers: Friendly Societies and Insurance Societies in Late Eighteenth-Century England," *Eighteenth-Century Life*, 24 (2000): 53-72, argues that friendly societies fit the model of Tönnies's *Gemeinschaft*—a community where tradition and mutuality are the dominant forms of cohesion—when juxtaposed with the *Gesellschaften* of insurance firms.

together for mutual aid in these ways “led to structured and enduring relationships among members who would otherwise have dealt with each other informally and in passing,” but the internal modes of organization were long established and did not evolve terribly much in the early decades of the nineteenth century.<sup>3</sup>

There were two reasons for this. First, precedents drawn from British societies provided a model for many American organizations, whose institutional forms were copied again and again. Though British organizations were detailed from a very early date, the 1793 Act for the Encouragement and Relief of Friendly Societies, passed by Parliament as a way to regularize their proceedings, prompted still greater formality of organization and set the pattern for the involvement of the state until 1834. The government in Britain became involved in order both to supervise against any kind of organized subversion (the passage of the act in the midst of the French Revolution was, of course, not coincidental, and it followed a 1792 act on seditious meetings) and to spur the formation of such societies and thus relieve demands on public support for the poor, but the consequence was a direct superintendence over the internal workings of all groups that registered, meaning all such groups looked much the same.<sup>4</sup> What was regarded as the most successful of the British groups, the Castle Eden Friendly Society, whose rules were published in 1798, was a particularly influential precedent in the United States,

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<sup>3</sup> Conrad Edick Wright, *The Transformation of Charity in Postrevolutionary New England* (Boston: Northeastern University Press, 1992), 64-65.

<sup>4</sup> David Neave, “Friendly Societies in Great Britain,” in Marcel van der Linden, ed., *Social Security Mutualism: The Comparative History of Mutual Benefit Societies* (Bern: Peter Lang, 1996), 41-64; Peter Clark, *British Clubs and Societies, 1580-1800: The Origins of an Associational World* (Oxford: Clarendon Press, 2000), 372-377; P.H.J.H. Gosden, *The Friendly Societies in England, 1815-1875* (Manchester: Manchester University Press, 1961); Gosden, *Self-Help: Voluntary Associations in the 19<sup>th</sup> Century* (London: B. T. Batsford, 1973); E. P. Thompson, *The Making of the English Working Class* (New York: Vintage Books, 1966), 418-420, 457-461. On female friendly societies in Britain, see Anna Clark, *The Struggle for the Breeches: Gender and the Making of the British Working Class* (Berkeley: University of California Press, 1995), 35-41.



according to a study by Frank Warren Crow. And throughout the late eighteenth and early nineteenth centuries the published rules of American societies looked much like those of their British counterparts.<sup>5</sup>

A second reason that there was so little evolution in the interior workings of friendly or mutual benefit societies was that all of these groups shared the same problems and tended to respond in the same way. Wright has described it this way: “Monthly or quarterly meetings, which everyone had to attend on penalty of fine, refreshed brotherly affections. To the extent prohibitions worked, regulations against gambling, profanity, and intoxication during meetings ensured that sessions did not become rowdy or vituperative.” Indeed, the basic plan of organization would scarcely evolve at all in the coming decades even as it began to compete with other kinds of disability and life insurance in the nineteenth century, because the mutual benefit society was well adapted to the increased geographical mobility and changing occupational structures of the urban environment in both Britain and in the United States, as economic historian Martin Gorsky has shown.<sup>6</sup> They were generally on the small side: sixty to a hundred members was common for English friendly societies and probably for American groups as well.<sup>7</sup> In early-nineteenth-century Philadelphia, about a hundred such groups existed, all with the same basic idea that initiation fees and monthly dues of about 37 cents each month would entitle a member or his family to support in case of sickness or death. And there was little

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<sup>5</sup> Michael Scarth, *The Rules and Regulations of the Castle Eden Friendly Society: With Extracts from the Proceedings &c. To Which Are Added Explanatory Notes and Observations* (London: W. Clarke, 1798); Frank Warren Crow, “The Age of Promise: Societies for Social and Economic Improvement in the United States, 1783-1815” (Ph.D. diss., University of Wisconsin, 1953), 278-279.

<sup>6</sup> Wright, *Transformation of Charity*, 66; Martin Gorsky, “The Growth and Distribution of English Friendly Societies in the Early Nineteenth Century,” *Economic History Review*, 51 (1998): 489-511, esp. 507-508. See also Walter S. Nichols, “Fraternal Insurance in the United States: Its Origin, Development, Character, and Existing Status,” *Annals of the American Academy of Political and Social Science*, 70 (1917): 109-122.

<sup>7</sup> Crow, “Age of Promise,” 279-280.

to differentiate associations formed by whites from those organized by African Americans, aside from the fact that the first black men's societies were outgrowths of churches: the Friendly Society of St. Thomas's African Church, one of about fourteen black mutual aid societies formed in Philadelphia by 1812, is indistinguishable in form from organizations created by and for whites.<sup>8</sup>

And yet changing conceptions of membership over the first third of the nineteenth century would have effects on how Americans participated in groups that offered mutual aid to their members. By 1820, participants in mutual benefit societies had found that they could claim and receive legal protection for their rights as members by appealing to what can be called an American common law of membership. In chapter 3 the influential decision in *Commonwealth v. St. Patrick Benevolent Society* in 1810 was described, a decision that had held that membership in a fraternal society was to be treated as a legal relationship, with attendant guarantees and rights, as opposed to an affectionate one. Over the next several years, Pennsylvania courts also decided a series of cases arising out of membership disputes in associations formed exclusively for mutual financial aid. And these were developments that had national implications. When James Kent discussed "the various causes that have been adjudged sufficient or insufficient for the removal or disfranchisement of a member of a corporation" in his *Commentaries on American Law*, for instance, he cited only Stewart Kyd's eighteenth-century English treatise on corporate

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<sup>8</sup> Steven C. Bullock, *Revolutionary Brotherhood: Freemasonry and the Transformation of the American Social Order, 1730-1840* (Chapel Hill: University of North Carolina Press, 1996), 194; *The Constitution of the Friendly Society of St. Thomas's African Church of Philadelphia* (Philadelphia: W. W. Woodward, 1797), was the first; see "Private Benevolence and Moral Cures for Poverty," in Seth Rockman, ed., *Welfare Reform in the Early Republic: A Brief History with Documents* (Boston: Bedford/ St. Martin's, 2003), 67-97.

law and three Pennsylvania cases arising out of disputes in mutual aid groups.<sup>9</sup> Thus, in the same relatively brief span of time that saw a great deal of innovation in another kind of association tied together chiefly by pecuniary ties—the profit-seeking business corporation, described in chapter 4—the legal meanings and consequences of membership in mutual benefit societies also found fuller description in a way that meant that Americans could join voluntary groups confident that the internal affairs of all such societies were effectively encompassed by the legal apparatus of the early American state.

In the second part of this chapter, a unique mutual aid society, the Freemasons, will be examined. The Masons often attempted to remain aloof from any formal relationship with governments or judicial institutions—for example, not seeking incorporation when most other mutual aid groups actively sought it—in a way that only compounded their troubles when an Antimasonic movement took hold in the 1820s. Their ideas of mutual support and charitable endeavor also began to ring hollow in a nation populated by so many other mutual aid societies that seemed to ask less of their own members, made no efforts to create something akin to a shadow government and legal order, and seemed less threatening to those not affiliated. This is not an attempt to assert that such beliefs sparked Antimasonry, the first third-party, single-issue movement in American history, but rather to call attention to previously neglected aspects of widely held Antimasonic beliefs that were products of the previous three decades of the law and experience of voluntary membership. Further, precisely because Masonic institutions usually remained unincorporated, their study is important to ensure that the subject of

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<sup>9</sup> James Kent, *Commentaries on American Law*, vol. 2 (New York: O. Halsted, 1827), 239, note D; Stewart Kyd, *A Treatise on the Law of Corporations*, vol. 2 (London: J. Butterworth, 1794), 50-94.

inquiry is voluntary membership broadly defined, not solely voluntary membership in formally incorporated bodies.

In the third and final portion of this chapter, I will address the outcome of the legal and cultural shifts being described here: the embrace of a pluralistic society that allowed and, indeed, encouraged the smaller associations of the American political order to adjudicate their own disputes based upon standards that had been previously agreed upon. As the expectations of those who joined and the workings of the societies themselves increasingly fell within a narrow spectrum of associational practices, courts became willing to withdraw themselves from a direct superintendence in favor of a standard that would prevail through the remainder of the century: what happens in the ordinary course of proceedings in such groups will not be second-guessed by the legal institutions of the state. It was a vital step toward the embrace of a pluralism that many would come to see as quintessentially American, but it was a product of decades of contest and change in the perceptions and legal definitions of voluntary membership.

### The Law of Mutual Aid

The work of Conrad Wright has demonstrated the astonishing growth in the numbers of mutual benefit societies in New England in the post-Revolutionary era. Before the early nineteenth century, such groups were “New England’s most common form of organized charity.” Mutual aid societies appeared in urban centers throughout the new nation, with most formed in the 1790s and the first decade of the next century.<sup>10</sup>

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<sup>10</sup> Wright, *Transformation of Charity*, 53; Bullock, *Revolutionary Brotherhood*, 193-197; Crow, “Age of Promise,” 281.

When James Mease described the social environment in 1811 Philadelphia, he spent several pages describing the city's mutual benefit societies, both in the aggregate and individually. Many were formed for distinct ethnic groups, others for specific occupational groups, and still others had more open membership policies. In sum, he wrote, "The objects, principles, and in general, the rules of these societies are the same." They served the same ends ("to prevent the degrading reflection arising from the circumstance of being relieved, while sick, by private or public charity") by the same means. Those included fines for absences and other forbidden conduct, and "No member receives the benefit of the association unless his quarterly subscriptions, and his fines are paid up; nor until after he has been a certain time a member; from one to two years is the usual time stipulated." As a rule, according to Mease, "Diseases, the consequences of quarrels, drunkenness or vices, are not relieved. Provision is also made for orphans, for impositions on the society; for expulsion for immoralities or crimes, peculation, or omission to pay subscriptions; want of punctuality in this last respect, after two or three meetings, excludes a member from the benefit of the association." To Mease, the general practices of such groups were well established, well crafted, and perfectly appropriate for the workingmen of the city. "Such societies cannot be too strongly recommended," he wrote. "All classes of workmen, and others who depend upon their daily labour for their support; and who in case of their death would leave their families in distress, should be persuaded to form or join benevolent societies."<sup>11</sup>

Many of these groups had been incorporated under Pennsylvania's 1791 general incorporation act for religious, literary, and charitable societies, the same act under which

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<sup>11</sup> James Mease, *The Picture of Philadelphia: Giving an Account of Its Origin, Increase, and Improvements in Arts, Sciences, Manufactures, Commerce, and Revenue, with a Compendious View of Its Societies, Literary, Benevolent, Patriotic, and Religious...* (Philadelphia: B. and T. Kite, 1811), 278-280.

the St. Patrick Benevolent Society had been organized (see chapter 3). But for all their numbers in the late eighteenth and very early nineteenth centuries, it was in the decade immediately following the 1810 decision in *Commonwealth v. St. Patrick Benevolent Society* that the first cases involving members of such groups found their way into Pennsylvania courts, evidence of a new attitude toward the legal adjudication of disputes internal to the societies. Indeed, the first such case came within a matter of months of the *St. Patrick Benevolent Society* case and had immediately recognizable echoes, suggesting that the precedent regarding membership was influential from an early moment. Growing numbers of requests for the intervention of judicial institutions in member-society disputes also shows a newfound attention, on the part of both the members and the jurists of Pennsylvania, to holding these private societies to account in their dealings with their own. By the end of the decade, it was clear that mutual benefit societies were legally obligated to give their members notice and opportunities to mount a defense whenever they were accused of misconduct that threatened their continued membership. According to the Pennsylvania judiciary, anything less would result in compulsory readmission of the aggrieved member. It was an extension of broader, state-enforced standards of justice and fair treatment into voluntary societies long seen to be the epitome of self-help and private mutuality.

In the same month that the decision in *St. Patrick Benevolent Society* was rendered, in March 1810, Joseph Vanderslice became a member of the American Beneficial Society, a group that had 105 members when James Mease recorded their details in 1811.<sup>12</sup> Before the end of 1810, however, Vanderslice had been expelled, and

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<sup>12</sup> *Rules and Regulations of the American Beneficial Society: Incorporated, March, 1804* (Philadelphia: John Hoff, 1804); Mease, *Picture of Philadelphia*, 278.

he sought a writ of mandamus to compel readmission to a mutual benefit society. He gave sworn testimony that he had been “duly elected and admitted a member of the ‘American Beneficial Society’ and has paid into the hands of the Secretary thereof the sum required from every person becoming a member thereof.” He gave the court a copy of the constitution and rules of the society, and swore that he had “not in any particular committed a breach thereof.” The court, as was expected in such cases, asked the president of the American Beneficial Society to give cause for his expulsion. It followed, then, in most every detail the course of events in *Commonwealth v. St. Patrick Benevolent Society*, with Vanderslice even including the same turn of phrase as had John Binns: the society had expelled him and “deprived him of the right of membership in which this Deponent has a beneficial interest.” The Supreme Court of Pennsylvania, faced with Vanderslice’s claim that he “has not to the best of his knowledge and belief any adequate or sufficient mode of relief in the premises other than by a mandamus to be issued by the Supreme Court of the State of Pennsylvania to restore him to his right of membership,” was willing to listen.<sup>13</sup>

The American Beneficial Society had appointed a three-person committee to investigate charges levied against Vanderslice that he had suffered from infirmities at the time of his joining the society that, had they been disclosed, would have precluded his admission. The committee’s report was conclusive that he had deceived them on his application for membership, and the society voted unanimously to expel him. The officers of the society were told by the Supreme Court to recount the proceedings that led to Vanderslice’s expulsion, which they did.

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<sup>13</sup> Affidavit of Joseph H. Vanderslice, *Commonwealth v. American Beneficial Society*, Filed Dec. 20, 1810, Writs of Mandamus and Quo Warranto, Supreme Court, Eastern District, Record Group 33, Pennsylvania State Archives, Harrisburg, Pa.

Joseph H. Vanderslice was, previous to his initiation, in the presence of the society asked the usual questions as has been established from the commencement of the Institution of which the following is the most connected with the present case.

Are you perfectly free from any bodily complaints or infirmities whatsoever. To which he answered, yes. The society have it in their power to prove that he was afflicted with a rupture sometime previous to the initiation, by the person who put on him the truss to prevent any further injury. The society has in one previous case rejected an applicant who was in similar situation on his having the honest to acknowledge his infirmity when the foregoing question was asked.

In their return to the court, too, the officers made sure to spell out to the court what they believed to be the legal basis of their authority to expel Vanderslice: “The society conceive from the 5<sup>th</sup> article of the acts of incorporation 9<sup>th</sup> and latter clauses of the 10<sup>th</sup> articles of the constitution together with the physicians report to have been justifiable in having expelled the said J H. Vanderslice.”<sup>14</sup>

Unfortunately, no further record exists. In this case, the first case since *St. Patrick Benevolent Society* had imported into a Pennsylvania court the common-law principle that the power to expel existed in all bodies corporate but that such expulsions would be reviewable by the courts of the commonwealth, Vanderslice acted with confidence that the courts of Pennsylvania were the appropriate place to seek recourse. So too did the officers of the society that expelled him act with certainty that they were in the right and could prove that fact to the court. They even concluded their return to the court by asking for assurance that “the court will permit them to have a further trial if the situation of the case requires it.” Unfortunately, we cannot know what came next for Vanderslice and the American Beneficial Society.

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<sup>14</sup> Return of the American Beneficial Society, Dec. 26, 1810, *ibid.*; report of committee of Wm Meguire, Henry Snyder, Charles Snyder to American Beneficial Society, *ibid.*



But in the next few years, more cases of precisely this sort would find their way into Pennsylvania courtrooms. And they often centered on the fairness of the proceedings against the expelled member. Records survive of three 1813 cases in which members of these kinds of mutual benefit societies had been expelled and sought to challenge the validity of their expulsion before the Supreme Court of Pennsylvania. Charles Hepburn was one. He had been expelled from the Independent Beneficial Society, an association “for the express purpose of raising a fund sufficient to relieve each other in certain exigencies,” after having been a member for more than a year.<sup>15</sup> He had joined not long after its incorporation in 1811 and in May 1813, “being incapable, by indisposition, of attending to his usual business, applied for the pecuniary assistance of the society.” They denied his claim, believing that he “had feigned himself sick for the purpose of deriving benefit from the Society.” Their grounds for believing this appeared to be fairly solid, according to the return the officers of the society filed to the Supreme Court. Hepburn had not been around when a visiting committee came to check on him. Later, when a doctor examined Hepburn, in accordance with the clause of the constitution calling for a physical examination in cases of doubt, Dr. Isaac Catherall reported that “from the state of his tongue and pulse together with the general appearance of his countenance he believed him not to be so much indisposed as to prevent him from attending to some parts of his business.” Catherall went on to say that “he had forborne to be more explicit in his certificate from a reluctance to injure the character” of Hepburn, but “if he should say what he really thought it would be that the said Charles Hepburn was a lazy skulking fellow.” He was expelled at a regular meeting of the society on August 10, according to

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<sup>15</sup> Return of the Independent Beneficial Society, Dec. 20, 1813, *ibid.*

the second article of the society's constitution, which permitted the removal of members who feigned illness and sought to collect benefits.<sup>16</sup>

According to Hepburn, however, he was expelled "whilst absent" from an August meeting, "and without having any previous notice, or knowledge whatever that a motion would at said meeting, be made and acted upon for his expulsion and exclusion." He therefore believed "that his expulsion was illegal and unjust," and he petitioned the court "to grant to him a rule upon the Society to be directed to the proper officers thereof to appear at such time and place as your honours shall direct and shew cause why a mandamus shall not issue to restore your petitioner to all the rights and privileges of a member of said Society." Unfortunately, no outcome is recorded, but it is important to note the basis upon which Hepburn based his claim. He believed that not having been told that a vote would come for his expulsion was, in itself, enough to make his removal void and illegal.<sup>17</sup>

Even without surviving records of a judicial disposition of the petition, then, there is something to be learned from the way membership was being discussed and the legal remedies being sought. A week after the society filed their formal return to the Supreme Court, they followed it up with an additional attestation that Hepburn's complaint of a lack of notice was a lie. First, according to the account given by society officer Libbeus Whitney, there was no need to even give the man notice of his potential expulsion at the next meeting: no clause in the constitution, no "existing and established practice of the society" required them to. Second, he asserted, they gave him notice anyway that his case

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<sup>16</sup> Ibid.; Petition of Charles Hepburn, Dec. 14, 1813, *ibid.*; *Constitution of the Independent Beneficial Society, of the City and County of Philadelphia* (Philadelphia: Joseph Rakestraw, 1811).

<sup>17</sup> Petition of Charles Hepburn, Dec. 14, 1813, Writs of Mandamus and Quo Warranto, Supreme Court, Eastern District, Record Group 33, Pennsylvania State Archives, Harrisburg, Pa.

would be decided at the August 10 meeting. And though Hepburn “did willingly absent himself” he “did request a member of the said society,” a Cornelius Campbell, “to appear for him and in his behalf.” Indeed, when the society was ready to “postpone the consideration of the case” Campbell made a request on behalf of Hepburn for “a prompt and immediate decision upon his case.” They even included Campbell’s deposition about his conversations with Hepburn. Campbell described the moment when he informed Hepburn of his expulsion: “Hepburn said no more on the subject and made no complaints of want of notice or otherwise.” It appears that all the participants here knew to center upon the question of notice. Unfortunately, there is no way to know what came of the case of Charles Hepburn.<sup>18</sup>

The act of seeking redress in court for questions regarding membership in private societies was becoming increasingly common and, judging from the phrasings found in petition after petition, even routine. Three men expelled from the German American True Loving Brotherhood, for instance—a society of which very little else is known aside from its receipt of a charter in 1801 under the general incorporation act of 1791—each filed nearly identical petitions and depositions to the Supreme Court in seeking a writ of mandamus to compel his readmission. Two were expelled on the same day, in December 1813, noting that each “did well and faithfully discharge all his duties as a member of the said Corporation, and did in all respects conform to the Constitution, rules, articles, and by-laws of the said corporation” before being “unjustly, illegally, and without sufficient cause expelled from the said Corporation.” Another man, a Philadelphia baker named John Stief, was expelled some time later, on August 12, 1815. He filed a petition that was

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<sup>18</sup> Return of the Independent Beneficial Society, Dec. 27, 1813, *ibid.*; deposition of Cornelius Campbell,

substantially the same. He described how he had fulfilled his duties as a member, had been expelled anyway, and had no other “adequate and specific redress in the premises other than a mandamus to be issued by the supreme court of Pennsylvania to restore him to his right of membership.”<sup>19</sup> Again, though, nothing survives to tell of the court’s decisions, but the readiness of people to seek redress in court for alleged mistreatment at the hands of private societies they had voluntarily joined was becoming common.

Indeed, up to this point and even more in the years to immediately follow, something else became routine: the compulsory readmission, on court order, of expelled members. William M. Stewart was one exception that, in the eyes of a Pennsylvania chief justice writing some forty years after Stewart’s case, proved the rule. Stewart had been a member of the Philanthropic Society in Philadelphia, and he reported to the society that he had fallen ill, was unable to work, and needed compensation to cover his doctor’s bills. He showed them a bill for forty dollars, but it was obvious to his fellow members (and, indeed, is still quite obvious on the surviving scrap of paper in the Pennsylvania State Archives) that the doctor’s bill had originally been for four dollars. Stewart had added a zero, and his request was denied. The society then expelled him, invoking the thirteenth article of the society’s constitution, which permitted the expulsion of those “concerned in scandalous or improper proceedings which might injure the reputation of the society.”<sup>20</sup>

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<sup>19</sup> Petitions of William Peter Roerig and Jacob Wolf, Dec. 31, 1813, and affidavit of John Stief, Jan. 13, 1816, Writs of Mandamus and Quo Warranto, Supreme Court, Eastern District, RG-33, Pennsylvania State Archives, Harrisburg, Pa.

<sup>20</sup> *Commonwealth v. Philanthropic Society*, 5 Binn. (Pa.) 486 (1813); William Miner to Jacob Beck, Apr. 1, 1817, folder 7, Mandamus and Quo Warranto Proceedings, Supreme Court of Pennsylvania, Eastern District, RG-33, Pennsylvania State Archives.

By the time Stewart had joined the society in 1808, admission fees had probably already been raised to five dollars, with quarterly dues of a dollar required to remain a member in good standing.<sup>21</sup> Thus, even leaving aside his reputation, Stewart certainly believed that he had a sufficient investment in the Philanthropic Society to seek a remedy for what he believed to be a wrongful expulsion. Following what had become a well-established pattern, he sought a writ of mandamus to compel the society to restore him to “the standing and rights of a member of the Philanthropic Society.” According to Stewart, he was not shown to be guilty “of any of the offences” described in the constitution as meriting expulsion, but rather the charges were “altogether foreign to the interests and no relation to the legal objects of the ~~society~~ said incorporation.” He asserted that the question posed by article 13—whether his conduct had, indeed, injured the reputation of the society—had not been formally decided or noted in the minutes of his expulsion proceedings. And, thus, as it stood, he had expelled for reasons that fell out of the bounds of the authority that the society had over its members.<sup>22</sup>

Stewart’s argument failed. “If this was not forgery, it was very like it,” wrote Chief Justice William Tilghman when the case was decided in 1813. “Did it tend to injure the reputation of the Society? No man can doubt it. A society that would not be injured by such a proceeding as this, on the part of one of its members, must be a society without reputation.” He denied mandamus to compel Stewart’s readmission.<sup>23</sup> But the importance

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<sup>21</sup> Deposition of William M. Stewart, July 22, 1811, folder 7, Mandamus and Quo Warranto Proceedings, Supreme Court of Pennsylvania, Eastern District, RG-33, Pennsylvania State Archives; *Constitution of the Philanthropic Society, Established at Philadelphia, May 6<sup>th</sup>, 1793: Incorporated the Seventh Day of January, 1799* (Philadelphia: Re-printed by Thomas T. Stiles, 1808); Mease, *Picture of Philadelphia*, 277.

<sup>22</sup> *Commonwealth v. Philanthropic Society*, 5 Binn. (Pa.) 486 (1813).

<sup>23</sup> *Ibid.*; deposition of John Dennis, president of the Philanthropic Society, Apr. 3, 1812, folder 7, Mandamus and Quo Warranto Proceedings, Supreme Court of Pennsylvania, Eastern District, RG-33, Pennsylvania State Archives.

of the case would echo for decades. First, the court did not equivocate on its power and its willingness to look into the central questions of the case and into how Stewart's alleged fraud was treated by the society. It even took into evidence a copy of the minutes of the Philanthropic Society from all of the meetings in which Stewart's case was discussed.<sup>24</sup> And two of the most influential treatises of the nineteenth century, James Kent's *Commentaries* and Joseph Angell and Samuel Ames's *Treatise on the Law of Private Corporations* would refer to it as important in helping to establish the legal requirements of a member's expulsion.<sup>25</sup>

But what is most remarkable about the case is how anomalous the outcome, the court's ultimate approval of the expulsion of a member of a private society, actually was. Writing in 1864, another chief justice of the Pennsylvania Supreme Court, George Washington Woodward, attempted to chronicle the long history of cases in English and American law regarding expulsions and the contested rights of membership. For him, Stewart's case provided something "very rare in the authorities, an instance of expulsion that was sustained." In reported appellate cases, courts rarely hesitated to compel the readmission of a member they believed had been wronged. Indeed, every other case cited by Kent on this point—and most every other American case involving a private corporation cited by Angell and Ames—ended with a court order to readmit the expelled person. And they all centered upon the apparent fairness of the proceedings against the expelled man.<sup>26</sup>

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<sup>24</sup> Minutes, Philanthropic Society, Apr. 9-23, 1811, folder 7, Mandamus and Quo Warranto Proceedings, Supreme Court of Pennsylvania, Eastern District, RG-33, Pennsylvania State Archives.

<sup>25</sup> Kent, *Commentaries on American Law*, 2:239n.; Joseph K. Angell and Samuel Ames, *A Treatise on the Law of Private Corporations, Aggregate* (Boston: Hilliard, Gray, Little, and Wilkins, 1832), 243-245, 347.

<sup>26</sup> Woodward, writing *in nisi prius*, Mar. 11, 1864, quoted in *Evans v. Philadelphia Club*, 50 Pa. 107 (1865).

One of the most important of these in the decade following *Commonwealth v. St. Patrick Benevolent Society* was a mandamus hearing about an expulsion from the Pennsylvania Beneficial Institution—again, a voluntary society like dozens of others in its basic operations and mutual-benefit arrangements, this one incorporated on June 3, 1812. John Hansell was expelled for failure to pay dues, which, according to the officers of the society, “ipso facto forfeits the right of membership.” It was, the officers said, “neither customary nor necessary to take a vote upon the subject as the delinquency carries with itself necessarily the exclusion of a member.”<sup>27</sup> But in a unanimous opinion of the Pennsylvania Supreme Court, Tilghman determined that the society’s own articles of association called for something else: the fourteenth article, section 2, read that “should any member neglect to pay his arrearages for three months, he shall be expelled.” For Tilghman, this meant that “There must be some act of the society, then, declaring the expulsion, and this cannot be without a vote of expulsion”—but, he went on—“after notice to the member supposed to be in default.” The member may well have an explanation, Tilghman reasoned, and justice required that such explanation be heard. Simply put, according to the chief justice, “no man should be expelled in his absence without notice.”<sup>28</sup>

Important for the outcome, it appears, was the fact that Hansell did indeed have “an excuse to offer,” according to Tilghman: “the society was indebted to him, for his services as secretary, in a larger sum than the amount of the arrears of his monthly contribution.” Had he had an opportunity to make this point clear to his fellow members,

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<sup>27</sup> “Return of George Ireland, late president, William Freeman now president, John Seisinger vice president, and Thomas Cotes junior secretary of the Penn. Ben. Inst.,” Mandamus and Quo Warranto Proceedings, Supreme Court of Pennsylvania, Eastern District, RG-33, Pennsylvania State Archives.

<sup>28</sup> *Commonwealth v. Pennsylvania Beneficial Institution*, 2 Serg. and Rawle 141, 141-142 (1815).

Tilghman thought, they may well have decided differently. “Be that as it may,” wrote Tilghman, “he ought to have had the opportunity.” Tilghman followed this up with a summation that made his argument sound more grounded in Pennsylvania law than it really was: “The terms of the charter have not been complied with.” But coming as it did after an exposition of the apparent unfairness of Hansell’s expulsion, the chief justice appeared to be masking a decision based on substantive justice by invoking the society’s charter.

There was, however, a common-law foundation for the decision, one that was traceable back to the English law governing municipal corporations. But it was being quite deliberately extended by the justices of the Pennsylvania Supreme Court to protect the rights of individual members of the vastly growing assortment of voluntary societies being found in and around Philadelphia. Notice should always be given before a decision was made affecting the rights of any part of the corporation, even a solitary member. On the back of the return filed by the officers of the Pennsylvania Beneficial Institution, Tilghman or another justice wrote the citation of an English precedent relevant to the proceedings: *Rex v. May*, a case decided by Lord Mansfield that reinforced a longstanding common-law rule that no man is to be deprived of an opportunity to be heard in his own defense in any matter affecting his interest in a municipal corporation.<sup>29</sup>

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<sup>29</sup> *Rex v. May*, 5 Burr. 2681, 2682 (1770); *Rex v. Hill*, 4 B. and C. 426, 442 (1825); Angell and Ames, *Treatise on the Law of Private Corporations, Aggregate*, 244-246, 276-277; J. W. Willcock, *The Law of Municipal Corporations: Together with a Brief Sketch of Their History, and a Treatise on Mandamus and Quo Warranto* (London: William Benning, 1827), 46-47. Angell and Ames drew upon Willcock’s treatise heavily in their expositions on the right of notice, even quoting one particularly powerful passage at length: “To a neglect of this notice alone, can be attributed those unconstitutional innovations which have crept into corporations, by which the body at large has in most cases been stript of their incidental rights, and the power of election, amotion, and disposing of corporate property, vested in them by their incorporation, have been arrogated to themselves by the select classes, until at length the antiquity of the usurpation has given them a semblance of right” Willcock, *Law of Municipal Corporations*, 46-47, quoted by Angell and Ames on 278n.3).



Pennsylvania jurists, however, were willing to extend to wholly voluntary societies standards that had to that point only been enshrined in the common law for governmental or quasi-governmental bodies, such as municipalities. Just as would be decided a few years later in a case involving a profit-seeking business corporation in North Carolina discussed in chapter 4, these private societies, when deciding a case involving one of their own members, were and ought to be treated as courts of justice.<sup>30</sup> Tilghman made a deliberate effort to extend to them the same standards and expectations governing the conduct of any judicial tribunal. One of those—the right to be heard in one’s own defense—was fundamental, and no member was to be deprived of it under any circumstances.

#### Freemasonry, Mutual Aid, and the Law of Membership

The idea that membership was and ought to be a relationship secured by and defined by law in the post-Revolutionary era was not a belief developed in isolation in Pennsylvania courtrooms. American political culture evinced a great number of people who insisted upon fair treatment within voluntary groups or who, from the outside, demanded the groups such as the Freemasons adhere to certain standards in how they treated their own. The vastly increasing numbers of mutual aid societies that appeared to be hybrids, of sorts, between mutual insurance companies and more recognizably fraternal societies spurred change in how all kinds of fraternity and voluntary affiliation were perceived. The ubiquity of those groups, the ways they organized themselves, and

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<sup>30</sup> *Delacy v. Neuse River Navigation Corporation*, 1 Hawks. (8 N.C.) 274 (1821); Angell and Ames, *Treatise on the Law of Private Corporations*, Aggregate, 244-246.

the ways they were treated at law all prompted a convergence of expectations about the nature of post-Revolutionary fraternity among their members, prospective members, and outsiders.

Freemasonry, for many reasons, was unique in the associational landscape of the early American republic. First, in many states, Masons were slow to form any sort of formal relationship with state governments. Though some Grand Lodges (each state had its own) did ultimately seek incorporation as a way of shoring up their property rights, most Masonic lodges operated without a charter from the state into the 1810s, precisely because they did not want to place themselves in a subservient role to an elected government. Virginia's Grand Lodge decided in 1803, unanimously, that "it is highly *inexpedient* and *dangerous* to apply to the legislature, for any act of incorporation of the Grand Lodge of Virginia, or of any officers or members thereof, either for general purposes." In the research of a committee to investigate incorporation, chaired by William Waller Hening, who later became the renowned compiler of all of Virginia's laws, "the opinions of many of the Lodges, and instructions to their representatives on that subject, were read, which opinions and instructions were almost unanimously opposed to such incorporation."<sup>31</sup> Kentucky Masons, too, reported to their Virginia brethren in 1804 that they had chosen to operate as an unchartered club. The inconveniences of merely having a group of Masons hold their property in trust, without a charter, was nothing compared to the risks associated with incorporation, they decided: "At present, as a Society, we acknowledge no superior.—If we should make an Application to the Legislature, it would be acknowledging ourselves under the law; and

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<sup>31</sup> Grand Annual Communication, Dec. 15, 1803, John Dove, ed., *Proceedings of the M. W. Grand Lodge of Ancient York Masons of the State of Virginia; From Its Organization, in 1778, to 1822...*, vol. 1 (Richmond, Va.: James E. Goode, 1874), 311, 324.

the legislature would become our Legal Creators. Whenever, therefore, that body should think proper, they would have a right (acknowledged by us in the application to them) to enquire into all our Workings.”<sup>32</sup>

In New England, too, almost all clubs and societies formed for the purposes of mutual support were incorporated, but not the Freemasons, though they began to in the 1810s, such as the Massachusetts Grand Lodge in 1817. South Carolina Masons incorporated their Grand Lodge early in the nineteenth century, receiving a charter that even allowed the body to incorporate lesser lodges of its own authority. Where Masons did seek a charter, such as the Massachusetts Grand Lodge, the decision undoubtedly shaped how the organization functioned. One Massachusetts grand master, looking back a decade later at that incorporation, noted its effects: “an amended code of by-laws being required in consequence of that act, the Grand Master, then presiding, was induced to examine fully all the transactions of the Grand Lodge, view them in every possible relation, and adopt a system for the management of its various interests, which should be just to all, while it should require a faithful discharge of duty in all. This system has since been steadily and uniformly followed.” But the charter also opened the Masons up to a lengthy investigation in the early 1830s, for failure to adhere to their terms, and the Masons agreed to surrender it in January 1834.<sup>33</sup> In the post-Revolutionary and

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<sup>32</sup> Daniel Bradford, Grand Lodge of Kentucky [Lexington] to the Grand Lodge of Virginia, Sept. 29, 5804 [1804], Freemasonry Collection, Grand Lodge of Virginia, Robert Alonzo Brock Collection, Henry E. Huntington Library, San Marino, Calif.

<sup>33</sup> Wright, *Transformation of Charity*, 140; Albert G. Mackey, ed., *Encyclopedia of Freemasonry*, vol. 1, rev. and enl. by Robert I. Clegg (Chicago: Masonic History Company, 1929), 478; “An Act to Incorporate the Grand Lodge of Ancient Free Masons of South Carolina...,” no. 2203, in David J. McCord, ed., *The Statutes at Large of South Carolina*, vol. 8, *Acts Relating to Corporations and the Militia* (Columbia, S.C.: A. S. Johnston, 1840), 301-303; John Abbott, *An Address Delivered before the Grand Lodge of Massachusetts, at the Annual Communication, December, 5826* (Cambridge, [Mass.]: Hilliard, Metcalf, and Co., 1826), 4-5; Johann Neem, *Creating a Nation of Joiners: Democracy and Civil Society in Early National Massachusetts* (Cambridge, Mass.: Harvard University Press, 2008), 111-112.

antebellum periods most lodges did not want to take the risks associated with incorporation. Indeed, Connecticut's Grand Lodge did receive a charter in 1821, and some ten years later, in the height of the Antimasonic movement, that fact was seized upon by critics of Masonry as entitling the legislature to "enter into an inquiry relative to the nature and tendency of the Institution, particularly the nature of its oaths, obligations, and penalties." The petitioners noted that the charter (as was almost always the case) stated explicitly that the corporation could do nothing "repugnant to the constitution and laws of this State and those of the United States."<sup>34</sup>

Masons quite consciously opted out of a plan of legal incorporation that they believed would open, as it so clearly did in Pennsylvania in the case of expulsions from other mutual benefit societies, the possibility of court intervention in every effort at Masonic discipline. According to Richard Rush, addressing an Antimasonic State Convention in Pennsylvania in 1832, the Masons had deliberately opted not to seek incorporation in the commonwealth, leaving its opponents with no other option than to go to the people directly to bring the state's grand lodge to account: "If the Lodge existed by act of incorporation from any legislative power the facts proved upon its members on the Morgan trials would long since have led to a forfeiture of its privileges under a writ of *Quo Warranto*. But it stands upon no such footing, and society cannot have the benefit of this legal corrective." The grand lodge, he said, "is self created. It rides in a sphere of its own. . . . It is above the Judiciary." This, to Rush and to many other non-Masons in the late 1820s and 1830s, was simply unacceptable. Much Antimasonic scholarship has focused on states in which local or grand lodges did have charters of incorporation, such as

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<sup>34</sup> *Antimasonic Pamphlets No. 1: Memorial against the Masonic Incorporations of Connecticut: Together with the Report and Some of the Debates, in the General Assembly, May Session, 1832* (found at Connecticut Historical Society, printed but not bound), quotations on 2-3.

Massachusetts and Connecticut. Thus, John Brooke can observe that an important part of the perceived problem with Masonry in Massachusetts was that Masons operated “with the legal sanction of the government” and with “a state charter.” Owing to the influence of this scholarship, there has been little attention to a common Antimasonic criticism in other states: the problem was not that Masons had a charter, but that they did not.<sup>35</sup>

Second, Masonry was simply much bigger than any other club. Though it was never really one, united organization, it was often seen as one by Masons and non-Masons alike. In the 1770s and 1780s, it first had to survive a division with the growing appeal of Ancient Freemasonry over the, ironically, older version known as Modern Freemasonry, but by 1792 the newer competitor had won the day in most states.<sup>36</sup> And there was great growth for Masonry across the new nation, particularly in the 1790s. From approximately two hundred lodges in 1793, the number grew to five hundred by 1800 (or more than doubled to 11 grand lodges and 347 subordinate lodges by a more conservative count), and they spread far outside of the few urban centers into much smaller communities.<sup>37</sup> By 1822, the number of Masons in the United States has been estimated, again probably conservatively, at 80,000, or about 5 percent of the adult white male population of the day.<sup>38</sup> And one necessary (though clearly not sufficient)

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<sup>35</sup> “Mr. Rush’s Letter,” *The Independence*, Apr. 4, 1832; Brooke, *Heart of the Commonwealth*, 327.

<sup>36</sup> Mark A. Tabbert, *American Freemasons: Three Centuries of Building Communities* (New York: New York University Press, 2005), 45.

<sup>37</sup> John L. Brooke, “Ancient Lodges and Self-Created Societies: Voluntary Association and the Public Sphere in the Early Republic,” in Ronald Hoffman and Peter J. Albert, eds., *Launching the “Extended Republic”: The Federalist Era* (Charlottesville: University of Virginia Press, 1996), 273-377, at 274; Bullock, *Revolutionary Brotherhood*, 188; Dorothy Ann Lipson, *Freemasonry in Federalist Connecticut* (Princeton, N.J.: Princeton University Press, 1977), 90-91; William Preston Vaughn, *The Antimasonic Party in the United States, 1826-1834* (Lexington: University Press of Kentucky, 1983), 11.

<sup>38</sup> Charles Thompson McClenachan, *History of the Most Ancient and Honorable Fraternity of Free and Accepted Masons in New York...*, 4 vols. (New York: The Grand Lodge, 1888-1894), 2:342; Bullock, *Revolutionary Brotherhood*, 371n.16.

explanation for this growth was the post-Revolutionary expansion of Freemasonry outside of the realms of the social elite and its embrace of the participation of people from almost all ranks of society. Indeed, where most mutual benefit societies strictly limited their membership—by age, health, occupation, religion, ethnic background, or neighborhood—the Freemasons aimed at something much more universal.<sup>39</sup>

Though Freemasonry was always deemed by its participants to be unique and especially conducive to the enlightenment of humankind, Masons in the decades following the American Revolution certainly saw their association as part of a broader constellation of post-Revolutionary American collective endeavor. DeWitt Clinton, while serving as mayor of New York City, was elected as grand master of Freemasons in the state of New York in 1806. His address on the occasion of his installation that June, which was published later that year, went on at great length about the natural desire of men to join together, which was already becoming a commonplace around the turn of the nineteenth century. He noted for his fellow Masons that the “propensity to associate may be observed in every stage of society, from the rude hunter of the forest to the polished inhabitant of the city.” Its origins, “Whether it is an instinct or a habit; whether it is the dictate of powerful unerring nature, operating for the benefit of the subject, or the result of prudence and reason,” Clinton noted, “it is not necessary to investigate,” for “its spirit is good and its object beneficent.” But the United States in the present age was witnessing the phenomenon of association to a degree not before known. Though he was addressing Freemasons and reserved his highest praise for the advantages of the Craft, he noted, too,

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<sup>39</sup> Bullock, *Revolutionary Brotherhood*, 194-195.

“voluntary societies springing up in a thousand shapes, for the improvement of our physical, mental or moral faculties” across the nation.<sup>40</sup>

Without doubt, that changing context had effects for how Americans both within and outside of the Masonic lodges perceived the institution of Freemasonry. As there were more and more groups that sought to improve the world around them, and as there were more groups that provided fraternity to their members and vowed to support one another if times grew tough, American Freemasons were conscious that the world around them was changing.<sup>41</sup>

This section will focus on how the changing associational landscape and newly influential perceptions of the meanings and consequences of voluntary membership affected how Americans perceived of Freemasonry. It will do so by focusing especially on one aspect of membership in a Masonic lodge and how it changed in the half century following the American Revolution: mutual financial support.

Masonry always attempted to separate itself from the society in which it existed, even the post-Revolutionary American society in which it thrived. It did so in three ways: secrecy, ritual, and law. The lodges acted publicly, of course, in processions, parades, and cornerstone-laying ceremonies throughout the post-Revolutionary era. But there was always a level of secrecy about what took place in the blue light of the lodge, its door guarded by a man wielding a sword. Most men who joined had only a loose idea of what

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<sup>40</sup> DeWitt Clinton, *Address Delivered by the Most Worshipful the Hon. De Witt Clinton, Esq., to the Grand Lodge of the State of New-York...19<sup>th</sup> of June, 1806* (New York: Brothers Southwick and Hardcastle, 1806), 8-9.

<sup>41</sup> The description in this section of the larger transformations taking place in American Freemasonry in the early republic is largely based on Bullock, *Revolutionary Brotherhood*, 137-273, though he is less interested in the changes in the individual experience of membership in a Masonic lodge than in broader, cultural shifts in the Craft and in American society. For the British experience, see Clark, *British Clubs and Societies*, 312-324.

it would entail. Second, initiation rituals also helped to draw a line between those who belonged and those who did not, a distinction that would become still more profound in the early nineteenth century as there came to be a new focus on complex, lengthy rituals and the invention of wholly new levels of Masonic membership, in the York Rite and the Scottish Rite. Third, Masonry had always been a constitutional regime, with well-articulated constitutions, bylaws, and judicial procedures to govern the interior proceedings of each lodge. In early-eighteenth-century England, as Steven Bullock has observed, “Instead of the often informal rules governing most clubs, Masonry created a *Book of Constitutions*. Even in 1723, Masonic regulations filled eighteen printed pages.”<sup>42</sup>

All three of these modes of separation would provoke some skepticism and, ultimately, hostility toward the institution. There were worries about dark and immoral oaths and concerns about what passed behind the veil of secrecy. But the existence of a fully fledged code of laws, far removed and intentionally kept separate from the laws of the state, produced concerns of particular importance for this study. For Freemasons were elaborate and specific in delineating the rights and duties of membership, in a way that created its own legality in a post-Revolutionary American culture that put great weight upon the idea of the rule of law. One does not need to look very far into the minutes of any lodge or grand lodge to see this: the Virginia Grand Lodge described a complicated appellate process in cases of expulsion, noting the right of the expelled man to file an appeal with a superior lodge in a 1799 resolution: “*Resolved*, That the power of

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<sup>42</sup> Bullock, *Revolutionary Brotherhood*, 31; Paul Goodman, *Towards a Christian Republic: Antimasonry and the Great Transition in New England, 1826-1836* (New York: Oxford University Press, 1998), 12-13; *St. John’s Lodge, No. 1, F. and A. M., Portsmouth, New Hampshire, Constituted 1736: By-laws of 1739 and 1755 with Names of Subscribers Thereto...* (Portsmouth, N.H.: Randall Press, 1973).



suspension and expulsion, in such cases, always hath been, and now is, inherent in every Lodge within this jurisdiction: provided always, that the right of appeal to the Grand Lodge can in no wise be weakened or affected.” By 1818, the number of appeals had grown so tiresome that a new appellate system was put into place, with the “District Deputy Grand Master” now having “jurisdiction of all appeals within his district.”<sup>43</sup> And Masons in other states, too, put great emphasis on procedural legitimacy and fairness in disciplinary cases, particularly those meriting expulsion.<sup>44</sup>

Ordinary Masons very much expected to be guaranteed certain rights and protections when their brothers made decisions affecting their interest. One case coming out of Farmington, Connecticut, provides an instance clearer than most. In 1795, when Josiah Holt was accused of misconduct toward the wife of a fellow Mason by his compatriots in his local lodge, he wrote a formal response to “the Brethren of Frederick Lodge No. 26,” noting that he had very much expected to have had a formal reading of the charges against him and an opportunity to respond: “In such a case it is natural to expect that my accusers who are my brethren and who are under the strongest obligation to support the reputation of the Craft and guide by the plumb line of virtue a wandering brother—would have taken me by the cable of tow and led me to that body to whom I am amenable for my conduct and there exhibit such charges against me as would justify their proceedings and the Lodge in passing such Censure on me as my Crimes deserve—had this taken place I should have had opportunity to made [*sic*] my defense and related those circumstances that I presume would in some measure have extenuated my crimes and

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<sup>43</sup> Dove, ed., *Proceedings of the M. W. Grand Lodge of Ancient York Masons*, 1:210, 540-541; John Dove, *The Masonic Text Book...* (Richmond: Shepherd and Colin, 1847), 258.

<sup>44</sup> Louisiana Grand Lodge to Virginia Grand Lodge, Aug. 12, 1824, Freemasonry Collection, Grand Lodge of Virginia, Robert Alonzo Brock Collection, Huntington Library.

rendered less aggravated the Injury I have done the Lodge.” But this had not yet happened, and Holt was certain of his right to a fair hearing, and “under these considerations I have the presumption to arraign myself before you” by letter to confess his wrongs in hopes of remaining a member in good standing but also to tell his own side of the story.<sup>45</sup>

This feature of Masonic organization—its very constitutionalism and legalism, complete with appellate procedures internal to the Masonic hierarchy—was only to become more pronounced in the nineteenth century. Bullock has examined Masonry’s “growing institutional infrastructure” and a “language of legality” that came increasingly naturally to Masonic brothers in the early 1800s. And Dorothy Lipson has argued that the system was somewhat akin to church discipline: Like a church, Masons punished in order to bring the errant back into the fold or, in cases of expulsion, to rid themselves of them, and like churches they “employed confessions, repentance, and forgiveness to bring about a reformation.” It was a legalism that, as the case of Josiah Holt made evident, Masons themselves all desired. Bullock tells a story of an 1801 alleged infraction in a Massachusetts Masonic lodge in which the accused “defended himself...by citing Masonic legalities.” And that interest in Masonic law and procedurally fair disciplinary mechanisms would only grow in the nineteenth century.<sup>46</sup>

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<sup>45</sup> Josiah Holt to the Brethren of Frederick Lodge No. 26, Mar. 16, 1795, Records of Frederick Lodge No. 26, Farmington, Conn., Masonic Papers, Connecticut Historical Society, Hartford, Conn. The lodge was organized in 1787 and finally ceased operations in 1850, surrendering the charter to the state’s Grand Lodge, having been hit hard by the Antimasonic movement in the 1830s. Article 13 of the adopted bylaws required members to be ‘very cautious of their behaviour, both within the Lodge and without, that no unjust reflections may be thrown on the Masonic art.’ Quoted in Christopher P. Bickford, *Farmington in Connecticut* (Canaan, N.H.: Phoenix Publishing, 1982), 281-282.

<sup>46</sup> Bullock, *Revolutionary Brotherhood*, 273; Lipson, *Freemasonry in Federalist Connecticut*, 224-225.

Indeed, this is where the Masonic lodge as a mutual benefit society becomes crucial to our understanding the institution of Masonry and its existence in post-Revolutionary American political culture. For legal structures, fair hearings, and legalistic language were absolutely expected by all participants in this, the largest fraternal society of the early American republic, even though in most states it had no formal relationship to governmental institutions of legislative or judicial authority. There was simply no other way for participants to conceive of how to resolve internal disputes and to administrate themselves in a voluntary society of such size and scope. For instance, decisions were made quite early to give each lodge in New England exclusive rights to admit members over a geographical region, with Masonic laws prohibiting a lodge from admitting a man who lived closer to another lodge without first receiving the approval of that nearer body. Virginia, too, was still tweaking its internal appellate procedures occasionally throughout the period under review, setting up a district system between the local lodges and the state's grand lodge. Moreover, the steps taken by the organizers of Masonry throughout the United States were not without great success. As has been shown, Masonry continued to grow up until the moment that an Antimasonic backlash began in 1826. And though post-Revolutionary Masonry was wracked with divisions, most would not persevere long.<sup>47</sup>

As a mutual benefit society, however, Masonry would lag behind the prevailing understandings of how the member-to-society relationship ought to be defined. That is,

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<sup>47</sup> Wright, *Transformation of Charity*, 143. One founded on race did last, to the present era, after the creation of Prince Hall Freemasonry during the American Revolution gave black Americans an opportunity to form and join their own lodges. And no efforts to create a Grand Lodge of the United States were ever successful. See Charles H. Wesley, *Prince Hall: Life and Legacy* (Washington, D.C.: United Supreme Council, Southern Jurisdiction, Prince Hall Affiliation, 1977); David Gray, *Inside Prince Hall* (Lancaster, Va.: Anchor Communications, 2000).

Masons remained, in the words of one nineteenth-century writer on benefit associations, “explicitly charitable.” Members who fell on hard times could hope for the support of their fellow Freemason, but they could not expect it. They could not claim it as a right of membership. Masonic lodges in the nineteenth century were doing less and less in terms of philanthropic endeavors for the general, non-Masonic public and increasingly limited charitable support to fellow Masons. But still this mutual support remained discretionary. In a world of increasing anonymity and growing numbers of young men experiencing life as a stranger without a home, Masonry offered a great deal: contacts for personal advancement, a place of warmth and affection among brothers, and, ideally, a helping hand in times of distress. But what it would not offer—and what growing numbers of mutual benefit societies of the sort examined in the first section of this chapter went out of their way to offer—was a guarantee.<sup>48</sup>

By the 1820s, after the spread of societies organized around the principle of guaranteed benefits for indigent or ill members, many—particularly non-Masons—had begun to expect that Masonry too would operate in this more definite mode of mutual insurance and support. Facing hard times, Jesse Bradley, a Mason in Connecticut, wrote to the King Hiram Lodge No. 12 that if “poverty and misfortune can claim a donation,” he ought to be entitled to “ask of you some small charity.” But when George Bradley took up his pen the next year after his father received no response, his tone was different: having been “a member of your chapter & having paid his money,” it was “Just and Reasonable that he could (sins he has become Poor and penalis) have something Either in

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<sup>48</sup> Bullock, *Revolutionary Brotherhood*, 189-191; Wright, *Transformation of Charity*, 161.

money or clothing.” As Lipson recounts this moment, George Bradley regarded his father’s dues as “an insurance premium.”<sup>49</sup>

That mode of thinking about Masonic membership would resonate among critics of the institution. It is apparent in Antimasonic literature that the experience of membership in organizations founded as joint-stock or mutual insurance companies had effects on how they conceived of Masonry. One critic in 1828 pointed out that the chief kind of support a Masonic lodge offered to its members—help in times of distress—was better performed by a proper mutual aid company. For one thing, in those clubs and fire insurance firms, the writer in the *Anti-Masonic Review* noted, a person joined for a set period (not for life) and paid into the coffers. For another, that citizen then had a legal claim for support from the society in case of disaster. He would come, then, “as a freeman should come, demanding his right under guaranty of the laws of the country,” not as an oath-bound member hoping for the charity of his fellow Masons.<sup>50</sup> Such parallels prompted a generation of Americans to set certain kinds of limits to the legitimate bonds of voluntary membership, ones that ultimately made all species of voluntary affiliation increasingly alike in their well-defined rights and duties and, importantly, their encompassment in a larger law of voluntary membership.

The problem, then, from the perspective of Masonry as an institution for mutual support, was not that Masonry was conducted without law, but that it operated within its own legality. Masons could make claims of their fellows, but they need not expect fair treatment, since their claims did not fall “under guaranty of the laws of the country.”

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<sup>49</sup> Derby [Shelton], King Hiram Lodge No. 12, letter from Jesse Bradley, Newton, 1823, and letter from George Bradley, Mar. 18 1824, quoted in Lipson, *Freemasonry in Federalist Connecticut*, 209-210.

<sup>50</sup> *Anti-Masonic Review, and Magazine*, Jan. 1, 1828, 4, 15.

There was no shortage of laws to which Masonic lodges, grand lodges, and individual members were required to adhere, but these laws, unlike the rules of other mutual benefit societies, were kept at a remove from a larger regime of civil rights that members carried into each private association.

The apparent existence of what appeared to be a shadow government, complete with its own shadow legal system, was important to how Masonry was perceived in the wake of the alleged murder of William Morgan in Canandaigua, New York, in September 1826. A former Mason who intended to publish many of their secrets, Morgan disappeared, and it was widely believed that he was a victim of kidnapping and murder by Freemasons in upstate New York who then covered up the whole affair. No body was ever found. More frighteningly, some twenty grand juries and a series of trials and legislative investigations all made such little headway in investigating the Morgan affair that more and more Americans came to believe that Masons were obstructing the pursuit of justice.<sup>51</sup> According to one of the most complete studies of the Antimasonic movement in New York, those who began to fear Freemasonry turned first to courts, then to political process and efforts to shape public opinion via the press. Within a space of two years, a full-fledged movement had begun to take shape, one centered on new modes of voluntary association to effect social and political change.<sup>52</sup> Johann Neem's work has emphasized how "the new civil society was premised on enhancing popular control over politics" by

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<sup>51</sup> Vaughn, *Antimasonic Party*, chap. 1; Goodman, *Towards a Christian Republic*, 3-9; Ronald P. Formisano, *For the People: American Populist Movements from the Revolution to the 1850s* (Chapel Hill: University of North Carolina Press, 2008), 95-115; Ronald P. Formisano and Kathleen Smith Kutolowski, "Antimasonry and Masonry: The Genesis of a Protest, 1826-1827," *American Quarterly*, 29 (1977): 139-165; John L. Brooke, *The Heart of the Commonwealth: Society and Political Culture in Worcester County, Massachusetts, 1713-1861* (1989; rpt., Amherst: University of Massachusetts Press, 2005).

<sup>52</sup> Elizabeth Bruchholz Haigh, "New York Antimasons, 1826-1833" (Ph.D. diss., University of Rochester, 1980), 81-82.

the 1820s, and “the Masons seemed to challenge the new civil society’s democratic ideals.”<sup>53</sup> Thus, Antimasons were not at all averse to organizing and forming membership organizations in order to make their voice heard; they formed clubs, drew up constitutions and bylaws with abandon, organized conventions and named honorary members. But they did all these things in a manner that adhered to prevailing trends in associational practices in the 1820s and 1830s, eschewing oaths, secrecy, and lifelong commitments in favor of plans based on low membership dues and shared commitment to a single cause. The Young Men’s Anti-Masonic Association in Boston, for instance, admitted men with payment of dues of fifty cents, made it clear in their constitution that meetings would be open to any and all spectators, and spelled out every one of their relevant beliefs in a lengthy, published preamble.<sup>54</sup>

Certainly, a difference of opinion about what individual membership ought to look like was not enough to explain the fervor of the Antimasonic movement. There were powerful cultural impulses that led many to oppose Freemasonry in the 1820s and 1830s, most powerfully described by Paul Goodman as a desire to preserve the young United States as a Christian republic. That is, some reacted to Masonry as a threat to church and family, and others focused more on purging governments of Masonic influence and sought to preserve republican government and equal justice before the law.<sup>55</sup> But this is not the place to reexamine what factors allowed opposition to Freemasonry to gather the popular support that it did, allowing it to become the first third-party movement in

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<sup>53</sup> Neem, *Creating a Nation of Joiners*, 109.

<sup>54</sup> *Constitution of the Young Men’s Anti-Masonic Association for the Diffusion of Truth* (Boston: Pollok Press, 1832); Papers of the Antimasonic Party in Suffolk, Mass., 1821-1834, Henry E. Huntington Library, San Marino, Calif. See Brooke, *Heart of the Commonwealth*, 327.

<sup>55</sup> Goodman, *Towards a Christian Republic*; Formisano, *For the People*, 94.

American history. Rather, I have sought to show that some crucial elements of an Antimasonic persuasion were a direct product of Americans' growing experience with voluntary affiliation and collective action. The Antimasonic literature reveals to extent to which many Americans had come to embrace a conception of how the relationship between individual member and voluntary society ought to be well defined, limited, and effectively constrained by law. Antimasons adored associations that asked little of likeminded individuals and were governed by articles of agreement that, unlike Masonic laws and regulations, were fully a part of a larger, all-encompassing rule of law. But they could not abide a Masonic regime of law, shielded from the will of the people by secrecy, oaths, and even violence.

Just in terms of its scope and *potential* influence in the early national United States, Masonry was not an organization like any other, something the Morgan affair had shown without doubt. People began to fear the abstract, potential power of Freemasonry, the privileges it gave to its own, protected by secrecy and bloodcurdling oaths. Even men who remained as distant from the Antimasonic movement as they could for as long as they could, such as John C. Spencer in New York (he had even served as counsel for the defense in the first Morgan abduction trial in January 1827) had by 1830 decided that the rule of law and, thus, the security of the republican experiment was threatened by the power of Freemasonry. As Elizabeth Haigh has put it, Spencer "was of the generation which watched for untested strains on the new institutions and on the union," and he was most alarmed by the fact that "the supremacy of the laws was challenged by masonic obligations." Oaths or other Masonic obstructions that stood in the way of investigations into wrongdoing of any kind, for men such as Spencer, ought to be combated in every



way.<sup>56</sup> Massachusetts and Rhode Island passed laws prohibiting the administration of extra-judicial oaths in this period, directly aimed to limiting the ability of Masons to ask members and potential members to swear any kind of allegiance to the Craft. There were fears, as was argued in Connecticut, that the oaths asked of members “an unqualified surrender of natural and civil rights,” something that no organization ought to be able to do to anyone, member or no. As Conrad Wright has noted, it was the apparent strength of Masonry that mattered more than any single detail of its internal operations in arousing these kinds of suspicions: “Many other mutual organizations also used passwords and signs to preserve their privacy and draw the boundary between members and outsiders,” he observed, but Masonry had a power and a prominence that made potential threats appear to be, not abstract, but imminently looming.<sup>57</sup>

There was a complexity, then, to Antimasonic beliefs that become especially apparent when focusing on their conceptions of Masonic membership, Masonic laws, and mutual aid. Masons were, on the one hand, believed to have shielded themselves from the rule of law and from the power of the people through their elected governments. They were not lawless, by any means, but rather had erected their own legal system that Antimasonic critics saw as being completely unacceptable in a republican nation. The extremes to which critics of Masonry would go to prove this point bordered on the ridiculous. The Vermont Antimasonic Convention in 1831, for example, made one of its very first orders of business the creation of a committee to examine the degree to which

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<sup>56</sup> Haigh, “New York Antimasons,” 324-326.

<sup>57</sup> Charles W. Moore [g. sec. of grand lodge of Mass.], *Address Delivered on the Centennial Anniversary of St. John's Lodge, No. 1, at Portsmouth, N.H., June 24, 1836* (Boston: Tuttle, Weeks, and Dennett, 1836), 78n.26.; *Truth's Proofs that Masonic Oaths Do Not Impose Any Obligations* (Norwich, Conn., 1830), 13, quoted in Lipson, *Freemasonry in Federalist Connecticut*, 310; Wright, *Transformation of Charity*, 165.

Masons lived by their own legal code, and they quoted everything they could get their hands on to show the depth of this Masonic legality, even a line in a song: “Our *laws* all other laws excel.” From this, the committee drew the conclusion that “Here we are not only told, that masons have laws, but it is more than intimated that other laws cannot counteract them, and that the summum bonum of those laws are in the secrets of the art.” The conclusion, then, was no joke.<sup>58</sup>

Masonic legalism, growing as it did in the nineteenth century, cut both ways for Masons who hoped for their institution to coexist peacefully and benevolently with the world around them. They, like so many other organizations, turned to procedure and well-articulated internal regulations to help their lodges function, but, as Dorothy Lipson has observed, they were then “vulnerable to the charges that they overlapped the jurisdiction of the civil courts, competed with the discipline of the churches, or invaded individual rights.”<sup>59</sup> They sought nothing less than real fraternal discipline, attempting to build better men. All mutual benefit societies distinguished themselves from charitable organizations by asking members to participate in fraternal functions, not merely to sign up as insurance beneficiaries. Bringing men together as equals was important as a way to foster participation, encourage reciprocity, and allow such groups to be perceived as a joint affair among equals. And Masons certainly believed that those mutual benefit societies based more on financial contribution than on fraternal ties could never improve their members the way that Masonry could.<sup>60</sup> But the repercussions from the ways that

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<sup>58</sup> *Proceedings of the Antimasonic State Convention, holden at Montpelier, June 15 and 16, 1831. With Reports, Addresses, &c.* (Montpelier: Gamaliel Small, 1831), 5-6.

<sup>59</sup> Lipson, *Freemasonry in Federalist Connecticut*, 226-227.

<sup>60</sup> Bullock, *Revolutionary Brotherhood*, 194-195, 197. See also the discussion, though it is focused on the late nineteenth century, in John Fabian Witt, *The Accidental Republic: Crippled Workingmen, Destitute Widows, and the Remaking of American Law* (Cambridge, Mass.: Harvard University Press, 2004), chap. 3.

they did choose to organize themselves were deeply felt in the 1820s and the 1830s, when Freemasonry emerged as a shell of its former self: New York's five hundred lodges in 1825 were dwindled to 75 a decade later, and the number of Masons nationwide was probably more than halved to 40,000 by 1835.<sup>61</sup>

In important ways, notions of what membership ought to look like were a factor in this decline. Lebbeus Armstrong, a minister and former Mason who became an outspoken critic of the Craft, saw that "men may live in a free country, be bound by righteous laws to observe truth and justice, be entitled to all the natural rights of citizenship" and yet find themselves "bound with chains of masonic despotism...to fulfil masonic obligations, and to escape the desert of masonic vengeance." To allow this, Armstrong told his readers, was to allow a "total dereliction of the rights of man." The murder of William Morgan—and, still more, the concealment of that murder—"shows the lodge to be too strong for the Law," according to Antimasonic politician Richard Rush.<sup>62</sup>

Strong evidence of this conclusion comes from the success of Odd Fellowship occurring simultaneously with the decline of Masonry. Odd Fellowship shared many features with Freemasonry, yet it swelled in numbers in the 1820s and 1830s. Begun in England in the late eighteenth century, Odd Fellows lodges were a part of the first confederated mutual benefit society, with local lodges all a part of a national network of Odd Fellows clubs. The first American lodge appeared in Baltimore in 1819, a gathering

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<sup>61</sup> Vaughn, *Antimasonic Party*, 187.

<sup>62</sup> Lebbeus Armstrong, *The Man of Sin Revealed; or, The Total Overthrow of the Institution of Freemasonry, Predicted by St. Paul...to Which is Prefixed, Correspondence, shewing the Manner of the Author's Exclusion from His Pulpit, and Expulsion from the Royal Arch Chapter...* (Waterford, N.Y.: J. C. Johnson, 1829), 29; "Mr. Rush's Letter," *The Independence*, Apr. 4, 1832.

of working-class immigrants affiliated with the Manchester Unity in England. During the 1830s, in part fueled by exiles from Freemasonry, the Odd Fellows grew in numbers and in social standing, beginning to comprise lawyers, doctors, merchants, prosperous tradesmen, and other members of an American middle class, all part of a deliberate effort to bring a new, refined tone to Odd Fellowship led by the only native-born American to join in the first decade, Augustus Mathiot. In many ways, the Odd Fellows resembled Freemasonry, and they were in some ways becoming more, not less, alike. Odd Fellows made no attempt to dispense with secrecy and ritual, and their rites, degrees, and secret knowledge would only grow. They also made deliberate attempts to create a governing system, even establishing a Grand Lodge of the United States, in 1825, before there were many members to speak of, giving the still-immature organization a federal structure.<sup>63</sup>

What the Odd Fellows did not have, from the perspective of outsiders, was the same potential as Masonic institutions to infringe upon the rights of members and nonmembers. For one, and most obviously, they did not have the same breadth and potential power as did Freemasonry. For another, the Odd Fellows, early in their history, made a decision that made them more akin to the local mutual benefit society than to Freemasonry, despite all the Odd Fellows' interest in secrecy, ritual, and initiatory rites: they replaced charity, or passing the hat to help fellow members, "with a system of fixed weekly assessments" (probably instituted in Baltimore as early as 1825) and made a point to teach lodge treasurers "double-entry bookkeeping and money management."<sup>64</sup> This

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<sup>63</sup> James L. Ridgely, *History of American Odd Fellowship: The First Decade* (Baltimore: James L. Ridgely, 1878), chap. 4 (on grand lodge) and chap. 11 (on secrecy and ritual).

<sup>64</sup> Mark C. Carnes, *Secret Ritual and Manhood in Victorian America* (New Haven, Conn.: Yale University Press, 1989), 26; Aaron B. Grosh, *The Odd-Fellow's Manual: Illustrating the History, Principles, and Government of the Order, and the Instructions and Duties of Every Degree, Station, and Office in Odd-Fellowship...* (Philadelphia: H.C. Peck and Theo. Bliss, 1853), 22n.

meant that Odd Fellowship, both in appearance and in function, was more a club for mutual support than a society creating its own law and holding its members oath-bound while guaranteeing the down-and-out nothing at all.

One way to read the success of Odd Fellowship amid the decline of Freemasonry, then, is to emphasize its closer adherence to prevailing norms of voluntary membership in 1820s and 1830s America, though focusing on those matters to the exclusion of all others would produce a reading that is far too simplistic. Masonry evoked the responses that it did for reasons that were peculiar to its size and scope as well as factors under examination here, such as changing notions of how the group life of civil society ought to be superintended by the legal and political institutions of the state. But the importance of conceptions of voluntary membership should not be neglected. The Antimasonic movement may have come to pass, but it would have looked very different without the decades of experience and evolution in the practice and the law of individual, voluntary affiliation.

#### The End of Direct Legal Superintendence of the Rights of Members

Attention to the mutual benefit associations of the early to mid-nineteenth century reveals that Americans' beliefs about voluntary membership continued to evolve in the Jacksonian era. In fact, one important aspect of the Masonic response to the Antimasonic fervor of the 1820s and 1830s played a role in the drift toward something new in popular and legal conceptions of membership: an increasingly contractual understanding of individual affiliation, one in which more and more people were beginning to accept the

premise that men in the United States should be able to enter those groups that they wished, and be governed by those groups in the ways that they wished, unlimited by the state.

Charles Moore, grand secretary of the Massachusetts Masonic Grand Lodge, provided a good expression of this view in an 1836 address to fellow Masons of a New Hampshire lodge. He argued that one truth firmly established over the course of the recent Antimasonic crisis was that the state ought not to limit the ability of each individual to enter into agreements with his fellow men. Masonry's survival in the face of fervent opposition made the point more clearly than it had been seen before, though it had always been true in the American republic. He argued that "the Legislature has not the power to regulate, or interfere with the conventional obligations of private individuals, or associations," as long as "those obligations do not militate against their allegiance and duties as good and faithful citizens." Government "has not the power either to prohibit or to dictate the terms in which an individual may pledge himself to his fellow, whether that pledge assume the solemnity of an oath, or the ordinary form of a promise. In either case, it is a matter of conscience, the full and free enjoyment of which is secured to every citizen of this Republic, by the Constitution under which he lives."<sup>65</sup> To allow these sorts of private commitments to be made and to be enforced by the groups themselves was a good and salutary thing, men such as Moore would begin to argue in the 1830s, precisely at the same time that men in labor unions were assuming a conspicuous role in the American associational landscape, making substantially the same arguments, as will be seen in the next chapter. As long as those associational commitments did not go *too* far,

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<sup>65</sup> Moore, *Address Delivered on the Centennial Anniversary of St. John's Lodge*, 78n.26.

intruding on the ability of each member to function as a citizen in the republic, people ought to be allowed to enter those groups they wished to enter.

Such a belief was integral to the development of the associational pluralism so long seen as an integral feature of nineteenth-century American culture. But it was founded on the struggles described in this work, conflicts over how to understand individual membership. By the end of the 1830s, however, there was coming to be widespread agreement about what that membership ought to look like, to the extent that courts would begin to withdraw themselves from a direct superintendence of the internal affairs of such societies. Instead, they would begin to insist that each man who joined a voluntary society ought to acquaint himself with the rights and duties of membership, and if he entered into that group he ought to consider himself bound by those previously agreed upon rules. Disputes arising out of mutual benefit societies in Pennsylvania are powerful evidence of this turn, for beginning in 1837 courts would no longer intervene to restore expelled individuals to membership if there was no evidence that the group's decision-making *process* was improper, that it deviated from the group's own constitution or bylaws. Where the early nineteenth century saw cases in which courts clearly intervened to weigh the merits of a man's claim to "the right of membership," the 1830s and 1840s would instead see explicit denials by Pennsylvania justices that they had a right to intervene in these internal, associational matters.

Indeed, it was this turn in the late 1830s that has long obscured the earlier, post-Revolutionary tendency of courts to interest themselves and even to intervene in the internal workings of early American membership societies such as mutual benefit clubs. Since the time that Isaac Vandyke was denied in his attempt get the Pennsylvania

Supreme Court to intervene in his expulsion from the Black and White Smith's Society in Philadelphia in 1837, it has been accepted as the prevailing jurisprudential standard that courts ought not to intervene in cases of expulsion from private societies if the proper procedures were followed by the proper associational authority. No attempt should be made to weight the merits, to determine the justice or injustice, of that decision.

The Journeyman Black and White Smiths' Beneficial Society of the City and County of Philadelphia had been incorporated in 1829, under the same general incorporation statute that facilitated the incorporation of the mutual benefit societies discussed above. Isaac Vandyke had been a member for "several years" before he was expelled on November 1, 1834. He had begun receiving sick benefits earlier that year, until the committee of stewards charged with supervising such matters determined "that his sickness was caused by intoxication and other outrageous conduct of his own," and they suspended his benefits and brought charges for his expulsion by the whole society. Vandyke had been given notice that his case would be decided at a coming meeting, and though he did not appear at the hearing "his guilt was voted by twenty-five to four, and his expulsion pronounced by twenty-three to six." He went to the alderman, then to court of common pleas, filing an action on the case for the sick benefits due him, arguing that he had been illegally expelled and was entitled to the monies.<sup>66</sup>

In perfect accordance with post-Revolutionary legal standards governing American voluntary groups, Vandyke won at the trial level. He was declared by the lower court to be entitled to twenty dollars in wrongfully withheld benefits. The court had closely read and entered into evidence the relevant bylaws, especially article 10, section 1,

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<sup>66</sup> *Black and White Smith's Society v. Van Dyke*, 2 Whart. (Pa.) 309, (1837)



which read: “No member shall be entitled to receive any benefits from the society, whose complaints or disease has been the effect of debauchery, intoxication, wilful fighting, or any outrageous conduct of his own, which it shall be the duty of the stewards at all times particularly to investigate; and on proof thereof, such member or members shall not receive any benefits: and the stewards shall report thereof to the society at the next stated meeting; when, on sufficient proof thereof, such member or members shall be expelled.” And according to the appellate records, the court had charged the jury to determine the truth of the charges against Vandyke, as had long been the rule in Pennsylvania courts’ superintendence of expulsion proceedings. When the society appealed the decision against them to the Pennsylvania Supreme Court, they objected to five aspects of the lower court’s charge to the jury, all relating in one way or another to truth of the allegations against Vandyke.

They objected to the charge “that if the defendant was expelled from the society for an alleged cause which was not founded in truth, he was entitled to recover benefits, alleged to have become due even after the date of such expulsion, in this form of action.” They objected to the court’s decision to admit any evidence relating to Van Dyke’s intemperance. And they objected especially to the idea that the power to decide this case, granted to the Black and White Smiths’ Society by their constitution, bylaws, and charter, was to be held null if a court decided they had reached the wrong conclusion. Thus, they strenuously objected to the court’s charge “that although the society, under the constitution and by-laws, had a right, at the meeting of the 6th of September 1834, to receive the charge of the stewards against the defendant, and by a vote founded on that

charge, to direct that the defendant should not receive further benefits; yet, if in this action that charge be proved to have been untrue, the defendant may recover.”<sup>67</sup>

With a powerfully worded opinion written by Chief Justice John Bannister Gibson, the state supreme court overturned the lower court’s decision in favor of Vandyke. In an often-quoted passage at the close of his opinion, Gibson succinctly described the new approach that courts would take in such matters: “he was convicted and expelled by the requisite majority. Into the regularity of these proceedings, it is not permitted us to look. The sentence of the society, acting in a judicial capacity and with undoubted jurisdiction of the subject-matter, is not to be questioned collaterally, while it remains unreversed by superior authority.” He went on to expand the implications of the court’s decision, in order to encompass all the cases, discussed above in part 1 of this chapter, in which mandamus had been the remedy sought: “If the plaintiff has been expelled irregularly, he has a remedy by mandamus to restore him, *but neither by mandamus nor action, can the merits of his expulsion be re-examined.*” Vandyke had opted to join this society, which operated according to “the charter to which the plaintiff expressly assented at his initiation; and he is consequently bound by everything done in accordance with it.” The proper assembly of men had heard his case, according to the proper, charter-prescribed mode, and they had reached a conclusion that Gibson’s court would not then question. Mandamus, Gibson made clear, was now to be limited only those cases in which there was an “open disregard of the prescribed forms of procedure,” regardless of whether that process had led to a just outcome.<sup>68</sup>

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<sup>67</sup> Ibid.

<sup>68</sup> Ibid., 312-313. Emphasis added.

In 1844, a petition for a writ of mandamus came to the Pennsylvania Supreme Court that reinforced the turn made late in the preceding decade. John Bryan had been a member in good standing of the Pike Beneficial Society, but he had been expelled for violating the tenth article of the club's constitution, which held that "should any member, while deriving the benefit allowed by the society, be engaged at his usual business or occupation, or any other employment (except giving the necessary directions to those employed by him), he shall, on being convicted thereof, be expelled." On June 28, 1841, Bryan had been seen by members of the society, according to the lower court's recounting of the fact of the case, in violation of the article. The society, in accordance with the eleventh article of their constitution, notified Bryan that he was to be brought up for expulsion at the next meeting. The requisite two-thirds of the Pike Beneficial Society then voted to expel Bryan. He took them to court.

The judge at the court of common pleas gave Bryan a sympathetic ear. Noting especially the fact that Bryan had not, in fact, done much work at all—"The only act of which it is alleged he has been guilty, is that of painting a latch to his own gate, or, to use the language of some of the witnesses, the 'handle' to the gate, a piece of wood used for its fastening, about ten inches long and three inches wide"—Judge Parsons informed the jury that they did not need to limit themselves in this case. "The plaintiff denies that he did paint it himself; but the evidence seems to be tolerably clear that he did. The cause mainly turns upon a question of law to be decided by the court. Hence we instruct you, that even if the jury believe that Bryan did do the painting to the gate, as testified to by the witnesses, he has not so far violated the laws of that association as to warrant his expulsion." Parsons told them that Bryan "simply took a porringer of paint, and with a

brush painted the latch or fastening to his gate, that had got soiled; can it with propriety be said that he had been labouring for himself for gain, following his own business for profit, or doing any act which brings him within the provision of that article?" And so he instructed them "that, under the whole evidence in the cause, the law of that society has not been violated, in this instance, by the plaintiff, and that your verdict ought to be in his favour."<sup>69</sup>

The Supreme Court of Pennsylvania, however, decided to use this case to put to rest any further attempts to have courts reexamine cases of expulsion on the merits. In a succinct, one-paragraph opinion, Justice Thomas Sergeant writing for the court, insisted that "This case cannot be distinguished from that of *White and Black Smith's Society v. Vandyke*" [*sic*]. Because "the charter to the defendants below provides for the offence, directs the mode of proceeding, and authorizes the society, on conviction of the member, to expel him," they had a right to determine Bryan's case for themselves. Seeing as "there is no allegation of the irregularity of the proceeding," the determination and the sentence of the Pike Beneficial Society "is conclusive on the merits, and cannot be inquired into collaterally either by *mandamus* or action, or in any other mode. It is like an award made by a tribunal of the party's own choosing; for he became a member under and subject to the articles and conditions of the charter, and, of course, to the provisions on this subject as well as others. The society acted judicially, and its sentence is conclusive, like that of any other judicial tribunal." His court would intervene if the previously-agreed-upon rules for resolving disputes in cases such as expulsion were not followed, but only in those cases. But if the right procedures were followed, a man such as Bryan had no

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<sup>69</sup> *Commonwealth ex. rel. Bryan v. Pike Beneficial Society*, 8 Watts and Serg. (Pa.) 247, 247-249 (1844).

recourse at law. “The courts entertain a jurisdiction to preserve these tribunals in the line of order, and to correct abuses; but they do not inquire into the merits of what has passed *in rem judicatam* in a regular course of proceedings.”<sup>70</sup>

These outcomes, in which courts began to withdraw themselves from any direct superintendence of the internal workings of mutual benefit societies, set the standards for judicial intervention in private associations for the remainder of the nineteenth century. By the late 1800s, associational disputes were consistently resolved or ignored by jurists on the premise that the matter was a purely contractual one, embodied in an agreement that in itself contained the terms for (usually internal) modes of resolving the conflict.<sup>71</sup> Strictly contractual understandings of association faced substantial criticism by those emphasizing an organic, corporate reality to collective action in the early twentieth century, and equitable relief took central place.<sup>72</sup> But throughout the nineteenth century it was an accepted truth that members of such societies had all agreed upon the ways in which any decisions made regarding their rights and duties as members would be

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<sup>70</sup> *Ibid.*, 250.

<sup>71</sup> *Otto v. Journeyman Tailors’ Protective and Benevolent Union*, Note, *American State Reports*, 7 (1889): 160-170; *Baird v. Wells*, 44 Ch.D. 861 (1890); *McGuinness v. Court Elm City, No. 1*, Note, *American and English Annotated Cases*, 3 (1906): 211-217; *Del Ponte v. Societa Italiana*, Note, *American State Reports*, 114 (1907): 24-30; *Tarbell v. Gifford*, Note, *American and English Annotated Cases*, 17 (1910): 1145-1146; *Boston Club v. Potter*, Note, *American Annotated Cases* (1913C): 398-401; “Expulsion of Member of Club,” *Solicitors’ Journal and Weekly Reporter*, 70 (July 24, 1926): 828-829; Roscoe Pound, *Equitable Relief Against Defamation and Injuries to Personality*, 2d ed. by Zechariah Chafee, Jr. (Cambridge, Mass.: Z. Chafee, Jr., 1930), sec. III; *Robinson v. Templar Lodge*, Note, 117 Cal. 377 (1897); Seymour D. Thompson, “Expulsion of Members of Corporations and Societies,” *American Law Review*, 24 (1890): 537-558. Related here is the extent to which the distinction between incorporated and unincorporated associations became increasingly important in associational jurisprudence, beginning in many ways with *White v. Brownell*, 2 Daly (N.Y.) 329 (1866).

<sup>72</sup> On pluralist thought in the early twentieth century, see John Neville Figgis, *Churches in the Modern State* (London: Longmans, Green, 1913); Paul Q. Hirst, ed., *The Pluralist Theory of the State: Selected Writings of G.D.H. Cole, J.N. Figgis, and H.J. Laski* (New York: Routledge, 1989); Cécile Laborde, *Pluralist Thought and the State in Britain and France, 1900-25* (New York: St. Martin’s Press, 2000); Arthur J. Jacobson, “The Private Use of Public Authority: Sovereignty and Associations in the Common Law,” *Buffalo Law Review*, 29 (1980): 599-665; Harold J. Laski, “The Personality of Associations,” *Harvard Law Review*, 29 (1916): 404-426; and David Runciman, *Pluralism and the Personality of the State* (Cambridge: Cambridge University Press, 1997).

determined, and so they ought to consider themselves bound by the outcome. A modern conception of contracting as private lawmaking had come to prevail, in which the parties, free and capable, created a legal regime to govern future conduct. And the outcome of decisions made within that regime would not be reexamined on the merits.

This was an important step in facilitating the creation of a pluralistic social landscape that observers foreign and domestic would comment upon in the middle third of the nineteenth century. It meant that, within important limits, by the end of the 1830s William Novak's description of the diverse legal terrain confronting individuals held true, in which, as Novak has written, a person's rights and duties were determined "through the elaboration of a great hierarchy of very specific and highly differentiated legal statuses, his bundle of rights and duties the product of a very complicated and varied tally of the rules, regulations, and bylaws of the host of differentiated associations to which he belonged," including families, churches, unions, mutual benefit clubs all the way up to cities, counties, and states.<sup>73</sup> But it took a great deal of struggle and uncertainty to arrive at the conclusion that people ought, by and large, to be left alone to create their own clubs and to enforce their own rules without substantive review. And this dissertation is an attempt to show that Novak's description of the nineteenth-century legal landscape as it concerned associations and other privately formed organizations was, not a constant, but an outcome of post-Revolutionary efforts to understand what membership ought to look like. Only once they had come to some conclusions on that question would the direct superintendence of the member-to-group relationship in the private associations of the early United States begin to come to an end.

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<sup>73</sup> William J. Novak, "The Legal Transformation of Citizenship in Nineteenth-Century America," in Meg Jacobs, William J. Novak, and Julian E. Zelizer, eds., *The Democratic Experiment: New Directions in American Political History* (Princeton, N.J.: Princeton University Press, 2003), 95, 101.

By the 1840s, one widely agreed upon element in that understanding was that individuals ought to be trusted to come to their own articles of agreement *and* that they ought always to know what those rules included. Many societies, from the eighteenth century into the nineteenth, had included in their bylaws a requirement that members ought always to have their copy of the constitution at hand, sometimes under penalty of a small fine.<sup>74</sup> In 1842, the Pennsylvania Supreme Court even seized upon that idea as justifying them in a decision against a member of a Franklin Beneficial Society in a dispute that “is undoubtedly calculated to excite sympathy, and to enlist feelings in favour of the plaintiff.” Although that plaintiff, a man who was denied benefits because he was unable, physically, to apply for them, “was so injured as to be deprived of the power of applying, there seems no sufficient reason why he might not have had it done for him by another, according to the forms prescribed in the pamphlet containing the constitution and laws, a copy of which every member as he has a deep interest in its contents, ought, in common prudence, to have always in his possession.” By the 1840s, it seems, courts in Pennsylvania had grown willing to accept what might be seen as unfair or even cruel outcomes, under the pretence that the members of these societies had known—or, at least, ought to have known—the nature of their agreements and to have acted accordingly. It was a legal and a cultural shift that would help to shape American society well into the twentieth century.<sup>75</sup>

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<sup>74</sup> See, for example, *The Rules and Regulations of the Attentive Fire Society...* (Boston: Gilbert and Dean, 1803), 8.

<sup>75</sup> *Breneman v. Franklin Beneficial Association*, 3 Watts and Serg. (Pa.) 218, 220 (1842).

## Chapter 7

### Labor Unions and an American Law of Membership

This chapter is based upon a simple hypothesis: post-Revolutionary Americans' experiences with voluntary membership were absolutely integral to popular and judicial conceptions of legitimate labor organization. The very first man to take the stand in the very first conspiracy trial against a labor union in the United States was asked: "Did you join the society of you [*sic*] own free will, or were you compelled to join it?" The very next man was asked, "Did you join it voluntarily, or was you compelled?" In summing up the position of the prosecution, Jared Ingersoll condemned the union with the argument "that to force man to become a member of any society whatever, is inconsistent with the imprescriptable rights of man."<sup>1</sup> To understand voluntary membership in the early American republic, we must also understand how contemporaries conceived of compulsion and consent. And in so doing, I will argue, we can see that the growing acceptance of particular kinds of voluntary membership in the first four decades of the nineteenth century helped to shape judicial and popular attitudes toward labor organization in the early United States.

Thus far, this dissertation has explored several forms of collective enterprise that share the common features of being, first, voluntarily joined and, second, of being especially significant and increasingly widespread in the post-Revolutionary era.

Following a study of the move toward the fully "voluntary principle" in early national American churches in chapter 1, this dissertation proceeded in chapters 2 through 6 to

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<sup>1</sup> Direct examinations of Job Harrison and Anthony Bennet and closing statement of Ingersoll in *Commonwealth v. Pullis* (1806), in John R. Commons et al., eds., *A Documentary History of American Industrial Society*, vol. 3, *Labor Conspiracy Cases* (Cleveland: Arthur H. Clark Co., 1910), 72, 88-89, 212.



examine conceptions of membership in groups that, quite simply, comprised only those people who chose to join: politically oriented fraternal societies; mutual insurance cooperatives;<sup>2</sup> profit-seeking business corporations; women's mutual-support and literary societies; and mutual-aid groups. The study of those groups has revealed a drift in the late eighteenth and early nineteenth centuries toward increasingly legalistic and procedure- and even rights-oriented ways of conceiving of the relationships created by the voluntary act of joining.

The present chapter explores a category of American associationalism that perhaps ought not to be included in a study of American attitudes toward *voluntary* association. Some Americans of the early nineteenth century believed that there were degrees of compulsion among workingmen to join labor unions that made such groups something distinctly different from the other sorts of voluntary associations heretofore studied. Labor organizations faced allegations throughout the early to mid-nineteenth century that they were not to be classed with the other voluntary associations that Francis Wayland called "the peculiar glory of the present age," for the simple reason that many people did not believe that membership in them was voluntary for all concerned.<sup>3</sup> And that perception is exactly why the matter must be examined.

People in the early American republic frequently asked to what extent men (and, in some cases, women) really were free to choose their membership in laborers' organizations. And they wondered, too, how the answer to that question ought to change

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<sup>2</sup> In the case of the Mutual Assurance Society of Virginia, of course, there were a few instances in which people appeared to have been enlisted into the ranks of the mutually insured without their consent, much to the astonishment of both those "members" and jurists called on to adjudicate the disputes. See chapter 3.

<sup>3</sup> Francis Wayland, *The Limitations of Human Responsibility* (Boston: Gould, Kendall, and Lincoln, 1838), 90-91.

the way such groups were superintended by the legislative and judicial institutions of the state. The literature on the early American labor movement is immense and varied. But historians and legal scholars have thus far discussed early labor organizations and the legal and political debates regarding such associations without reference to contemporary discussions and beliefs regarding the meanings and consequences of voluntary membership. By examining the varieties of labor organizations that were formed in the late eighteenth and early nineteenth centuries as well as the labor trials for criminal conspiracy from the first such case, in Philadelphia in 1806, through the seminal decision of Lemuel Shaw in Massachusetts in 1842, we can derive a better sense of how Americans in the early republic came to define what constituted compulsion, what constituted consent, and how the answers to both helped to draw a line among associations, between the innocuous and the unacceptable. What is more, it opens up a hitherto unexplored aspect of the debates about the applicability of the common law crime of conspiracy to a post-Revolutionary American republic. The common law and an emerging jurisprudence regarding voluntary membership appeared to many to offer the best means to guarantee that each American citizen had access to the same rights and remedies, regardless of whether he worked in a particular trade or had joined a particular society. And even when Shaw decided in 1842 that a journeymen's society did not, necessarily, commit a crime when they induced nonmembers to pay or work only for certain wages, he did so by deliberately evoking the examples of other kinds of associations—a temperance society, a joint-stock bakery—and asking, how are these things different? By 1842, as Americans were coming to agree on what membership in all

of these kinds of associations ought to look like, Shaw could give an answer that his predecessors had not been able to give: they were not different at all.

#### General Societies and Masters' Trade Associations in Post-Revolutionary America

William Manning was an uneducated but remarkably aware political observer from Billerica, Massachusetts, when he drafted a series of radical commentaries on the new American republican order in the 1790s. One of the ideas that Manning hoped to bring before the reading public was that self-organization was a ubiquitous and even inevitable development of distinct interests in late-eighteenth-century society, and it ought to be encouraged among the as-yet poorly organized multitudes of the uneducated and nonelite. He referred specifically to bar associations and societies of ministers, even to the Society of the Cincinnati organized by Revolutionary War veterans and discussed in chapter 2 above, but he did not declare that such groups were dangerous or at all regrettable. "I would not be understood to be against the associations of any orders of men, for to hinder it would hinder their improvements in their professions, & hinder them from being servisable to the Many," that is, to those who were neither professionals nor well-to-do. Their need ondy one Society more being established," a society of the Many, what Michael Merrill and Sean Wilentz describe as "a national membership organization, with state, county, town, and neighborhood chapters." It would be called the Labouring Society, and he offered a constitution for its organization. He was only one of a very many people in the early American republic that looked around them, saw the organization that appeared to strengthen the positions of the elite—the merchants,

doctors, ministers, and lawyers—and drew the conclusion that, perhaps, the lower orders of society ought to organize, too.<sup>4</sup>

Men who worked with their hands never did form a society that had national reach in the early American republic. Locally, however, there were a growing number of mechanics' societies from the 1780s onward, usually organized according to trade and city but also including larger “general” societies that admitted men from any mechanical trade. We will look briefly at three kinds of labor organizations that became increasingly active in American society in the late eighteenth and, still more, the early to mid-nineteenth centuries: the general societies that had open membership policies (though they often included only the well-to-do); tradesmen's societies that tended to be formed by masters but often sought to include all practitioners of a particular craft; and societies organized solely for journeymen. Then, in part 2 of this chapter, we will examine the conspiracy trials faced (almost solely) by journeymen's societies in an attempt to understand how the changing experiences and conceptions of voluntary membership helped to shape the relationship between law and labor.

The general societies of the early national period began to be formed in the 1780s. The General Society of Mechanics and Tradesmen was founded in New York in 1785 (it would be incorporated in 1792), the same year that the Mechanics and Manufacturers of Boston sent a circular letter to mechanics in various cities in the new United States, hoping to form like organizations throughout the nation. They had a variety of goals in mind, but most significant was their hope to push forward a protectionist political agenda.

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<sup>4</sup> Michael Merrill and Sean Wilentz, eds., *The Key of Liberty: The Life and Democratic Writings of William Manning, “A Laborer,” 1747-1814* (Cambridge, Mass: Harvard University Press, 1993), 180; Michael Merrill and Sean Wilentz, “‘The Key of Libberty’: William Manning and Plebeian Democracy,” in Alfred F. Young, ed., *Beyond the American Revolution: Explorations in the History of American Radicalism* (DeKalb: Northern Illinois University Press, 1989), 264-265.

Some years later, in 1789, while officially still removed from the new federal union by Rhode Island's tardy ratification of the Constitution, the Providence Association of Mechanics and Manufacturers formed. They happily informed the Boston mechanics that, although they were responding four years late, they were ready to join "with you as a 'Band of Brothers,' in a general Association...that we might thereby become one of the links in the chain, with our highly esteemed Brethren, the Mechanics and Manufacturers, of our Sister States." They were pleased to be able to describe their new charter of incorporation, and they sent their own letters out to the cities of the union, such as Philadelphia, hoping to further the spread of these new general societies of mechanics and manufacturers. The Providence group would number two hundred in the 1790s; the New York society had six or seven hundred members in the decade following.<sup>5</sup>

General societies in the 1790s had wide-ranging purposes but made fervent efforts to create a real sense of unity. The difference between Baltimore's general association of the decade of the 1780s and the one that formed in the 1790s is telling. There, in 1785, an Association of Tradesmen and Manufacturers had been formed that, by and large, sought only the passage of protective tariffs. Once its goal was achieved, the Association disappeared. But in 1792, a Baltimore Mechanical Society was formed to include the city's "mechanics and manufacturers," and it had for its stated purposes a much broader agenda. They met in January 1793 to draw up and ratify a constitution, one that included

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<sup>5</sup> Howard B. Rock, *Artisans of the New Republic: The Tradesmen of New York City in the Age of Jefferson* (New York: New York University Press, 1979), 131-132; Gary John Kornblith, "From Artisans to Businessmen: Master Mechanics in New England, 1789-1850" (Ph.D. diss., Princeton University, 1983), 49-130; Letter to the Mechanics and Manufacturers of Boston, Providence, April 30, 1789, Minutes, 1789-1877, Providence Association of Mechanics and Manufacturers, Series II, Box 5, Rhode Island Historical Society, Providence, R.I.; John S. Gilkeson, Jr., *Middle-Class Providence, 1820-1940* (Princeton, N.J.: Princeton University Press, 1986), 14-17, 95-96. This discussion of general societies is, of course, not intended to include the broader Workingmen's Party movement of the 1830s or the General Trades Union, formed in 1833, which had much broader goals, some of which will be addressed in the discussion of journeymen's societies in the present chapter, below.

not only political activism in behalf of favorable trade policies but also the establishment of a benefit fund for its members. The General Society in New York also came to include aspects that made it something much more than a politically oriented association.

According to Howard B. Rock, they instituted “Masonic-like secrecy and mystery, fostering a sense of exclusivity” and thereby enhanced “the prestige and esteem of the honored mechanic membership,” and their iconography and language spoke with great power about the ties that bound the members together. Their use of formal ritual, in fact, was a forerunner to the sorts of fraternal elements that became ubiquitous in the later nineteenth century among labor unions and cooperative self-insurance associations, which found that handshakes and passwords could help to forge a level of solidarity necessary to their thriving.<sup>6</sup>

The Providence Association also “hoped to enhance both the social solidarity and economic security of the mechanic interest,” according to Gary Kornblith, by asserting its right to adjudicate disputes among its members and by mandating that members agree to abide by “any Regulations” set up by their own craft, including tables of prices. In short, the general societies of mechanics of the post-Revolutionary era sought to create real bonds among their members, using mutual aid funds, ritual, and claims of judicial authority over their own to create a cohesiveness among tailors, blacksmiths, cabinet makers, tanners, printers, bakers, carpenters, and coppersmiths (to name a few) that had not before existed. It is a perfect example of what Johann Neem has described as “the

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<sup>6</sup> Charles G. Steffen, *The Mechanics of Baltimore: Workers and Politics in the Age of Revolution, 1763-1812* (Urbana: University of Illinois Press, 1984), chap. 5; Rock, *Artisans of the Republic*, 131-132; Howard B. Rock, “‘All Her Sons Join as One Social Band’: New York City’s Artisanal Societies in the Early Republic,” in Howard B. Rock, Paul A. Gilje, and Robert Asher, eds., *American Artisans: Crafting Social Identity, 1750-1850* (Baltimore: The Johns Hopkins University Press, 1995), 155-175. On ritual and solidarity, see John Fabian Witt, *The Accidental Republic: Crippled Workingmen, Destitute Widows, and the Remaking of American Law* (Cambridge, Mass.: Harvard University Press, 2004), chap. 3.

technology of association”—the simply know-how regarding what groups could do and should do—being applied to new purposes to achieve collectively defined ends. When the mechanics of Petersburg, Virginia, came together to form a general society in 1825, they adopted a constitution in every way similar to the ones adopted in northern manufacturing centers: it had many of the same features as, for example, the Concord Mechanick’s Association of New Hampshire, formed and incorporated just a few years later, in 1828. And the Petersburg mechanics were confident that their society, as they stated in the preamble of their founding document, would help them to “live together in harmony, be governed by the same rules...like members of a well-ordered household.” The way to achieve that end, they declared, was to adopt a constitutional mode of association and to invite the master mechanics of the city to join ranks. No element of compulsory membership—the idea, say, that members would not trade with nonmembers—was ever introduced.<sup>7</sup>

A sampling of the constitutions and charters of the general societies reveal a fairly consistent approach toward the definitions of membership, including both the manner in which men were to be admitted and the expectations regarding their behavior as members. In the case of the Albany Mechanics’ Society, for example, tradesmen who were resident in the city could be proposed by at least two current members and, with a

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<sup>7</sup> Gary J. Kornblith, “‘Cementing the Mechanic Interest’: Origins of the Providence Association of Mechanics and Manufacturers,” *Journal of the Early Republic*, 8 (1988): 355-387, quotation on 363; Bylaws proposed Mar. 30, 1789, Providence Association of Mechanics and Manufacturers, Series II, Volume 1, 1789-1794, Rhode Island Historical Society, Providence, R.I.; Johann Neem, *Creating a Nation of Joiners: Democracy and Civil Society in Early National Massachusetts* (Cambridge, Mass.: Harvard University Press, 2008), chap. 4; constitution of Petersburg Benevolent Mechanics Association, Virginia Historical Society, quoted in L. Diane Barnes, *Artisan Workers in the Upper South: Petersburg, Virginia, 1820-1865* (Baton Rouge: Louisiana State University Press, 2008), 44; Concord Mechanick’s Association, Records, New Hampshire Historical Society, Concord, N.H.; *Constitution and By-Laws of the Concord Mechanic’s Association: Founded, A.D. 1828* (Concord, N.H.: Hill and Barton, 1834); *Report of the Concord Mechanics’ Association, at a Quarterly Meeting, April 6, 1830* (n.d., n.p.).

vote of two thirds, admitted upon their payment of dues. The Associated Mechanics and Manufacturers of New Hampshire, organized in 1802, required that its members be mechanics or manufacturers, be approved of two-thirds vote, pay dues, and sign the regulations before being admitted. Similar restrictions were called for in Petersburg, Virginia. The New York General Society followed much the same policy, though it further limited membership to “citizens of the United States.” The Providence Association was somewhat more thorough in its descriptions of who qualified as prospective members, noting precisely that no journeyman could be admitted unless he had served an apprenticeship and could be recommended by a local master; those new in town “shall produce a Certificate or Letters of Recommendation from three known Masters of the same Craft in the Town where he served his time.” For all members, the Providence Association required that any member “depend solely for his support on some mechanic or manufacturing Business,” a deliberate attempt to maintain a close unity of purpose within the society. Similar policies to limit the membership to tradesmen who had served an apprenticeship within a craft, according to Steffen’s account of the Baltimore Mechanical Society, were part of efforts that had been going on for quite some time “to make their fellow craftsmen a self-conscious community.”<sup>8</sup>

In many ways, all of these trends were related to a particular way of looking at the world, that people of a chosen livelihood ought to look after one another. As Thomas

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<sup>8</sup> *Charter of Incorporation of the Albany Mechanic’s Society, Granted by the Legislature of the State of New-York, 6<sup>th</sup> March, 1801* (Albany, N.Y.: C. R. and G. Webster, 1803), 9; *Constitution of the Associated Mechanics and Manufacturers of the State of New Hampshire: Instituted November 4, 1802. Incorporated June 11, 1803* (Portsmouth, N.H.: Beck and Foster, 1820); Barnes, *Artisan Workers in the Upper South*, 42-43; *The Charter and By-Laws of the General Society of Mechanics and Tradesmen, of the City of New-York* (New York: J. Seymour, 1814), 10; bylaws 15, 16, Minutes, 1789-1877, Providence Association of Mechanics and Manufacturers, Series II, Box 5, Rhode Island Historical Society, Providence, R.I.; Steffen, *Mechanics of Baltimore*, 113. See also the mutual aid programs set up by the Mechanics Society of Hartford, incorporated nine years after their initial formation: *Act of Incorporation and By-Laws of the Mechanics Society of Hartford, Revision of 1829* (Hartford, Conn.: P. B. Gleason and Co., 1829).



Mercein of the General Society told an audience in 1820, “There seems to be a moral propriety in each class superintending the immediate concerns of the members of its distinct profession and pursuit, as well as of their Widows and their Orphans. Humanity, as well as labour, then has her divisions, and her discriminations become more specific and acute.” The general mechanics’ societies of the early national era embraced associational practices, ranging from mutual support to formal ritual, that were derived from other kinds of groups but also evoking a preindustrial, guild-like past. They engaged in (noncoercive) membership drives, such as when the Providence Association appointed a committee “to wait on such the Mechanics and Manufacturers of this Town as have not yet joined the Association.” They followed virtually identical organizational practices as did the mariners who were also setting up voluntary associations in the same seaport cities. And the constitutions they drew up became increasingly detailed and attentive to providing thorough descriptions of the member-to-society relationship. The New York General Society, for one, set up formal policies dictating the exact procedures to be followed in cases of proposed expulsion, with full articulation of the rights of the accused.<sup>9</sup>

Masters’ craft societies, or those groups that were limited to practitioners of a specific trade, such as hatters or shoemakers, were also changing in ways similar to the general societies. Such societies date to the colonial era, of course, with among the best known being the Carpenters Company of Philadelphia, formed in 1724 “to obtain instruction in the science of Architecture, to assist such of its members, or the Widows and Children of members, as should by accident be in need of support,” and, most

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<sup>9</sup> Tho. R. Mercien, *An Address Delivered on the Opening of the Apprentices’ Library of the City of New-York...* (New York, 1820), 4-5; Wright, *Transformation of Charity*, 144-147, quotation on 146; *Charter and By-Laws of the General Society*, 11.

important of all, the adoption of a table of prices. Not incorporated until 1790, at a time when other masters' societies, such as the Stone Cutters' Company, were also being formed in Philadelphia, the Carpenters' Company was one of the most exclusive associations in the city: membership was limited to men who had been master carpenters for six years and had paid very high dues.<sup>10</sup> They provided a library of pattern books for their members, had built Carpenters Hall in 1773 (which would host the First Continental Congress), and was one of a relatively small number of such groups that, according to Frank Warren Crow, "carried to early America the form, and, in degree, the substance, of the medieval guild." But organized artisanal societies became far more common after the Revolution, and they evolved quite quickly in the post-Revolutionary years. Especially after 1800, the bulk of these groups were formed with mutual assistance as a primary purpose: in addition to anniversary celebrations and appearances as a group in local festivities and parades, they offered sick and death benefits to their members, widows, and children.<sup>11</sup>

Charles Steffen in his study of Baltimore mechanics notes three other functions that were generally shared among late-eighteenth- and early-nineteenth-century tradesmen's groups: setting prices; adjudicating disputes among members; and education. Such goals, when added to their hopes to provide mutual-assistance funds for indigent members, widows, and children, make it apparent that organizations such as the

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<sup>10</sup> Leonard Bernstein, "The Working People of Philadelphia from Colonial Times to the General Strike of 1835," *Pennsylvania Magazine of History and Biography*, 74 (1950): 323; Carl Bridenbaugh and Jessica Bridenbaugh, *Rebels and Gentlemen: Philadelphia in the Age of Franklin* (New York: Oxford University Press, 1962), 198.

<sup>11</sup> *The Carpenters Company of the City and County of Philadelphia: Celebration of the 200<sup>th</sup> Anniversary of Company and 150<sup>th</sup> Anniversary of the Meeting of the First Continental Congress* (Philadelphia, 1925), 5-6; Frank Warren Crow, "The Age of Promise: Societies for Social and Economic Improvement in the United States, 1783-1815" (Ph.D. diss., University of Wisconsin, 1953), 337-339; Rock, "All Her Sons Join as One Social Band," 159-160.

Carpenters' Society of Baltimore (probably organized in 1791) sought unity in order both to support one another and to regulate “the internal workings of their crafts, setting prices and keeping their members abreast of technological advances in America and abroad.” In the city of Baltimore, Steffen writes, the Carpenters' Society would soon have about two hundred members and became a model upon which later masters' societies of diverse trades would be formed. As more and more work has been done on tradesmen's groups in the immediate post-Revolutionary decades, it has become clear that most were formed along similar lines and for similar purposes. Their creation of well-defined mutual assistance funds, their constitutional organization with its strict delineation of the rights and duties of membership, their professed purposes of education and internal mediation—all evinced a trend toward mutual support and improvement founded upon well-tested associational practices.<sup>12</sup>

In spite of all these ways in which the masters' craft societies and the general societies of mechanics were beginning to adopt practices and policies that resembled countless other voluntary groups of the period, there remained a deep-set fear of even these benevolent societies for mechanics in the early American republic. The reason was simple: the potential that they could organize to regulate their trades in a way that harmed the community. When the Boston mechanics formed a general society in 1785, they gained eighty-five members within their first three weeks and were able to announce to the world that Paul Revere would serve as their first president. And yet when they petitioned for incorporation in 1795 and again in 1796, they were denied. Only in 1806,

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<sup>12</sup> Steffen, *Mechanics of Baltimore*, chap. 5, esp. 102-105; Steven J. Ross, *Workers on the Edge: Work, Leisure, and Politics in Industrializing Cincinnati, 1788-1890* (New York: Columbia University Press, 1985), chap. 1; Sean Wilentz, *Chants Democratic: New York City and the Rise of the American Working Class, 1788-1850* (New York: Oxford University Press, 1984).

with a name change (from the Associated Mechanics and Manufacturers of the Commonwealth of Massachusetts to the Massachusetts Charitable Mechanic Association) that emphasized benevolent over commercial goals, would it pass muster in the General Court and receive a charter.<sup>13</sup> Associations of mechanics in Virginia, too, faced similar suspicions. Before 1819, according to legal scholar Bruce Campbell, “only two charters related to economic affairs contained general reservations of power to alter, amend, or repeal the act of incorporation”: a marine insurance group in Norfolk (for uncertain reasons) and the Mechanical Benevolent Society of the Borough of Norfolk. The Mechanical Benevolent Society was forbidden explicitly in their charter from passing any bylaw that regulated “trade, or the wages of labor” or that restricted the “number of apprentices to any trade or craft,” but the reserve clause appears to have been intended as an additional level of security. Explicit denials of powers to regulate trade were actually more common than not: the Albany Mechanics were chartered with a blanket denial that they could do anything other than collect and disperse benevolent funds. So too were the Mechanics and Tradesmen of the County of Kings in New York restricted, upon penalty of dissolution, from using funds for “any other purpose than such for which the institution has been expressly made and created.” There was certainly worry that, in the words of one Massachusetts writer in 1806 (Christopher Tomlins has identified him as Peter Oxenbridge Thacher), “we frequently find brethren of the same craft constituting communities, enacting by-laws, and sanctioning them by the severe penalties of

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<sup>13</sup> Neem, *Creating a Nation of Joiners*, 42-43; Wright, *Transformation of Charity*, 146; Kornblith, “From Artisans to Businessmen,” 110-111.

ignominy and ruin to the disobedient.” Such groups “frequently contravene the rights and are very vexatious to other classes of citizens” and, simply put, “should be repressed.”<sup>14</sup>

The economic pressures of a rapidly evolving market economy caused the further divergence of the interests of the employing masters and wage-earning journeymen in the cities of the new United States, and it ultimately led many journeymen’s societies to become trade unions in the late eighteenth and early nineteenth centuries. They would face fierce opposition. We will now examine the late-eighteenth and early-nineteenth-century evolution of the journeymen’s societies—and the law of criminal conspiracy that would be used to attempt to press them into submission.

#### Journeymen’s Societies and Criminal Conspiracy

Seymour Martin Lipset once observed that the American labor union had needs that most organizations simply did not have. Thus, it made special demands of what might fairly be called its rank and file: “Because of its ultimate character as a combat organization whose usefulness to its members lies in its collective strength in relation to management,” he wrote, “the trade union has demanded more control over its individual members than do most types of associations.” The post-Revolutionary history of that development—and the controversies it evoked—is a vitally important subject, and it has

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<sup>14</sup> Bruce Arthur Campbell, “Law and Experience in the Early Republic: The Evolution of the Dartmouth College Doctrine, 1780-1819” (Ph.D. diss., Michigan State University, 1973), 255; *Charter of Incorporation of the Albany Mechanic’s Society*, 6; *New York Laws, 1804-1805*, p. 410, quoted in John R. Commons, et al., *History of Labour in the United States*, 4 vols. (New York: Macmillan Company, 1918-1946), 1:86-87; [Peter Oxenbridge Thacher], *Monthly Anthology and Boston Review*, 3 (1806): 609-610, quoted and identified in Christopher L. Tomlins, *Law, Labor, and Ideology in the Early American Republic* (New York: Cambridge University Press, 1993), 102-103.

too long been divorced from an understanding of broader developments in how Americans conceived of voluntary association and individual autonomy.<sup>15</sup>

As Howard Rock has written, journeymen of the early nineteenth century saw the beginnings of industrialization and wage-labor capitalism and “possessed at least an awareness of the coming industrial age. They understood that self-control and self-reliance were necessary if they were to prove effective against the considerable capital resources of the masters and merchants.” No less, their actions reveal that they came to believe that they must combine in order to withstand the forces that appeared to be uniting against them.<sup>16</sup> In Boston, New York, Baltimore, and Philadelphia, the first journeymen’s societies began to form between the end of the Revolution and early years of the nineteenth century, as class tensions somewhat akin to what the Old World was witnessing had begun to intrude. As Sean Wilentz has summarized the development, “The established customs, hierarchies, and solidarities of craft—based on the presumption that all honest and sober skilled tradesmen would some day earn their independent competence—crumbled under a rearrangement of work and a spreading permanent dependence on wages.” The growing amount of wage work was largely a product of migration into the cities (both from abroad and from the countryside) and of commercial investment into large-scale industrial enterprises that were intended to include more wage-earning workers. Those workers had apparently dim prospects of ever becoming masters themselves.<sup>17</sup>

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<sup>15</sup> Seymour Martin Lipset, “The Law and Trade Union Democracy,” *Virginia Law Review*, 47 (1961): 11.

<sup>16</sup> Rock, *Artisans of the New Republic*, 317, 319.

<sup>17</sup> Sean Wilentz, *The Rise of American Democracy: Jefferson to Lincoln* (New York: W. W. Norton, 2005), 210.

It was the nature of the journeymen's response, however, that has most fascinated historians in the last three decades. In large part owing to the influence of Wilentz's influential *Chants Democratic*, historians have come to see the protests by mechanics during the late eighteenth and early nineteenth centuries as being less about narrow self-interest or worsening prospects and working conditions than it was about a deeply held worldview shared among workingmen, a set of beliefs that has been called "artisan republicanism." That is, they saw an increasingly exploitative market system that posed threats, not only to their well being, but to the ideals of community and mutuality exemplified by the traditional workplace. And they saw these changes as affecting their own livelihoods and effecting the demise of a world of independence and virtue.<sup>18</sup>

So journeymen joined together, beginning in the last decade of the eighteenth century. In 1790, for example, journeymen carpenters in Philadelphia created an association and in 1791 struck for better wages, declaring to the people of the city that "*Self-preservation* has induced us to enter into *indissoluble union with each other.*" A deterioration in relations between journeymen and master craftsmen that began in the 1790s and grew worse in the early nineteenth century caused journeymen to form their own trade associations and even to "turn out," or strike, in struggles against their employers, who were also forming associations among themselves. These trends were largely confined to what have been called the "conflict trades," or those industries most affected by what Rock calls "the emergence of modern business practices": shoemaking,

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<sup>18</sup> Wilentz, *Chants Democratic*, 107-142; Bruce Laurie, *Artisans into Workers: Labor in Nineteenth-Century America* (New York: Noonday Press, 1989), 35-46; Richard Stott, "Artisans and Capitalist Development," in Paul A. Gilje, ed., *Wages of Independence: Capitalism in the Early American Republic* (Madison, Wisc.: Madison House, 1997), 101-116; Leon Fink, "Labor, Liberty, and the Law: Trade Unionism and the Problem of the American Constitutional Order," *Journal of American History*, 74 (1987): 907-909.

cabinetmaking, tailoring, carpentry, masonry, and printing. Perhaps the first instance of rival associations being formed by masters and journeymen came in 1790, when master cordwainers formed a society in Philadelphia. The best evidence suggests that the journeymen of their trade responded in kind, though it was to be a short-lived association. In 1794, however—the same year that a journeymen’s society of cordwainers was also formed in Baltimore—the journeymen cordwainers of Philadelphia formed something more permanent, an association that survived up through the conspiracy trial of 1806.<sup>19</sup>

Within those trades, journeymen’s societies quite quickly began to move beyond their benefit and price-setting roles to become trade unions, and many journeymen in the conflict trades banded together for fraternal and benevolent ends but especially to attempt to shore up their positions vis-à-vis their employers, against whom they were beginning to define themselves. The journeymen printers in New York, for example, amended their constitution in 1817 to note that “the interests of journeymen are separate and in some respects opposite to those of employers,” and thus “when any member... shall become an employing printer he shall be considered without the limits of this society.”<sup>20</sup>

In short, because the economic transformations of the early nineteenth century looked very bad for journeymen, who once could aspire to become masters in their own right, they began to see cooperation and combination as being necessary to prevent a further degradation. In Boston in 1790, for example, 45 percent of journeymen carpenters eventually became masters, according to a study by Lisa Beth Lubow; by 1825, the

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<sup>19</sup> Steffen, *Mechanics of Baltimore*, 108-109; Rock, *Artisans of the New Republic*, 68, 243; Bruce Laurie, “Nothing on Impulse: Life Styles of Philadelphia Artisans, 1820-1850,” *Labor History*, 15 (1974): 337-366; Ian M. G. Quimby, “The Cordwainers Protest: A Crisis in Labor Relations,” *Winterthur Portfolio*, 3 (1967): 88-89.

<sup>20</sup> Quoted in Laurie, *Artisans into Workers*, 51.



number was 11 percent and falling. It was one example of one trade in which, in the period between 1790 and the 1820s, there was to be witnessed nothing less than the transformation of craftsmen into a class of permanent wage laborers. As industrialization expanded, more and more workers did not even have the traditional, artisan background and could not personally use the old relationships of the shop as the basis of comparison, but powerful appeals were nevertheless made by their peers to an older, less exploitive way of work. Places of work were changing and becoming, in many cases, sites of large-scale production that depended on a permanent population of skilled or semiskilled wage labor: one of the masters who was struck in the turnout that spawned the first labor conspiracy trial, in Philadelphia in 1806, employed from twenty to twenty-four men—hardly the close relationship between master and journeyman or apprentice that had once been the rule. Many journeymen were by this time becoming confident that they needed to unite in order to exclude unqualified cheap labor and to preserve both their wellbeing and their idea of what the workplace ought to look like.<sup>21</sup>

They not only combined, therefore, but they used a variety of tactics to try to improve their position, some of which might result in criminal prosecution. They utilized some noncoercive methods, such as appeals to employers and to the public, and even in some cases sought to form journeyman-operated shops. And in many cases they struck,

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<sup>21</sup> Ronald Schultz, *The Republic of Labor: Philadelphia Artisans and the Politics of Class, 1720-1830* (New York: Oxford University Press, 1993), 121-122; Daniel Walker Howe, *What Hath God Wrought: The Transformation of America, 1815-1848* (New York: Oxford University Press, 2007), 547; Cynthia Shelton, "The Role of Labor in Early Industrialization: Philadelphia, 1787-1837," in Ralph D. Gray and Michael Morrison, eds., *New Perspectives on the Early Republic: Essays from the Journal of the Early Republic, 1981-1991* (Urbana: University Press of Illinois, 1994), 214-243; Rock, *Artisans of the New Republic*, 272-273; Lisa Beth Lubow, "Artisans in Transition: Early Capitalist Development and the Carpenters of Boston, 1787-1837" (Ph.D. diss., University of California-Los Angeles, 1987), 199, 209; testimony of John Bedford, in *Commonwealth v. Pullis* (1806), in Commons et al., eds., *Documentary History of American Industrial Society*, 3:99; Andrew Shankman, *Crucible of American Democracy: The Struggle to Fuse Egalitarianism and Capitalism in Jeffersonian Pennsylvania* (Lawrence: University Press of Kansas, 2004), 162.

leaving the employment of uncooperative employers in some cases, and calling for general turnouts in others. But masters held the advantage: a surplus of labor meant they could simply eliminate and ignore rebellious employees and their associations as quantity production and large-scale industry grew more common.<sup>22</sup>

So if journeymen were to succeed, it was apparent, they needed not only to work together but also to prevent journeymen from working against them. It has been estimated that less than 3 percent of nonagricultural free laborers were members of labor unions during the 1830s, and though the “contest trades” were more unionized than workplaces of other kinds there was, nonetheless, a great pressure on union members to remain united and steadfast against employers who in many cases had a large pool of potential workers from which to draw.<sup>23</sup> And thus it was that the nature of early American labor activism was, not simply based on voluntary affiliation, but out of necessity also somewhat coercive in form. And I will argue that as Americans were becoming more and more comfortable with certain kinds of voluntary association, they came to be less and less comfortable with coerced collective action. Even in 1842, when Lemuel Shaw stated conclusively that labor unions can and ought to do what they can to encourage others to join their cause, there was an unwillingness to embrace the closed shop in any conclusive way. And, up until that year, the declarations that labor unions violated basic principles of consent-based government both reflected and helped to consolidate a particular way of thinking about voluntary membership.

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<sup>22</sup> Rock, *Artisans of the New Republic*, 273, 279-280.

<sup>23</sup> Maurice Neufeld, “The Size of the Jacksonian Labor Movement,” *Labor History*, 23 (1982): 599-607; Howe, *What Hath God Wrought*, 547-548.

In 1805, eight Philadelphia cordwainers were arrested after a failed strike. A demand for higher wages had ended in failure, with the cordwainers forced to return to work at the old rate. But in an attempt to bring the pressure of the law on the journeymen to prevent such a turnout from happening again, the masters sought criminal charges against the shoemakers. The defendants were charged with a criminal conspiracy, that is, they were charged with trying to exact “great sums of money” from their employers by refusing to work at the “usual prices and rates” but rather forming themselves into a club, refusing to work for anything below a given rate and pressuring other workmen to join their cause by means of “threats, menaces, and other unlawful means.” Jared Ingersoll and Joseph Hopkinson argued the case for the prosecution, contending for what appears to have been the first time in an American courtroom that, although there was no statutory proscription making combining to set wages a crime, it fell under the common law prohibition on combinations for private benefit that either injured the public welfare or violated the private rights of another citizen. That is, everyone agreed that it was both legal and ethical for one man to decide to work only for a certain wage and for nothing less. The crime was in the combination.<sup>24</sup>

One aspect of this has, rightfully, garnered a great deal of scholarly attention: labor associations that sought to achieve, through collective action, certain minimum wages were made illegal under the *common law* crime of criminal conspiracy. The defense in virtually all of the conspiracy cases, from *Commonwealth v. Pullis* in 1806 Philadelphia through the explosion of conspiracy charges in the urban centers of 1830s

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<sup>24</sup> Quimby, “Cordwainers Protest,” 91-92; Commons et al., eds., *Documentary History of American Industrial Society*, 3:62-67; Robert Samuel Wright, *The Law of Criminal Conspiracies and Agreements: To Which Is Added the Law of Criminal Conspiracies and Agreements as Found in the American Cases*, by Hampton L. Carson (Philadelphia: Blackstone, 1887); John V. Orth, “English Combination Acts of the Eighteenth Century,” *Law and History Review*, 5 (1987): 175-211.

America, challenged the idea that a common law crime of conspiracy could possibly exist in republican America. They sought to limit courts to the punishment of crimes that were made so by the people or by their representatives. Christopher Tomlins argues that common law prosecutions for conspiracy were far more controversial in the United States than they ever were in England, despite the fact that there was great similarity in both labor unions and conspiracy cases between the Old World and the New. For there were two distinct ways to conceive of the locus of legal authority in the United States—the discourse of the common law, which existed outside of the constitutional structures of the post-Revolutionary polity; and the constitutionally ordained governing authority of the state and federal governments—and throughout the early nineteenth century that issue was fiercely contested. Even if it had been conceded by the defense in *Pullis* that what the cordwainers had done was a crime under English common law (and it undoubtedly was not conceded), then, there was real debate about whether conspiracy was a common law crime at all relevant in an American environment of greater liberty and much greater commitment to the principle of popular sovereignty.<sup>25</sup>

The discussions about rival sources of authority in the first half century of American labor conspiracy trials, however, also occurred in another register, one that will be the focus of this chapter and that helps us to understand that emerging legal and cultural conceptions of voluntary membership helped shape debates about collective action among laboring men in the early republic. Prosecutors, defendants, and judges were also forced to confront questions both about private, unsanctioned associational authority over a group's own members and about compulsion to force the unwilling to

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<sup>25</sup> Tomlins, *Law, Labor, and Ideology*, 32-33, 38n.9, 94n.119, 114-127; Walter Nelles, "The First American Labor Case," *Yale Law Journal*, 41 (1931): 174-175.

join.<sup>26</sup> And the ways that they cast those matters for the jury show a strong inclination toward applying the common law as the best mode to ensure that all citizens were protected in their rights and had access to the remedies of the post-Revolutionary legal and constitutional order. The journeymen would contest that claim on the basis that economic reality necessitated their combinations and that they acted fairly toward one another in behalf of personal independence. And radical democrats would claim that only law as expressed by the people through their constitutional governments ought to bind anyone. But the course of early American labor conspiracy trials provide evidence that jurists were appealing to what appeared to them to be an emerging consensus as to what personal affiliation ought to look like and as to what role legal institutions ought to play in superintending the relationships created by the act of joining.

There were twenty-three trials of labor associations on charges of criminal conspiracy in six of the United States between 1806 and 1850. The first (and there were no colonial cases of this kind) came in Pennsylvania in 1806 and ended with the conviction of eight shoemakers. The very formation of a society of this sort among mutually agreeing men was deemed by the judge in the case, Recorder Moses Levy, to be criminal, though the prosecution spent a great deal of time arguing that the means used by the cordwainers were also arbitrary, coercive, and illegal. In 1842, the *Commonwealth v. Hunt* case in Massachusetts was decided in favor of the defendant shoemakers, with Justice Shaw declaring that the simple creation of an association to attempt to solicit

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<sup>26</sup> Both Tomlins (*Law, Labor, and Ideology*, 131-137) and Johann Neem (“Freedom of Association in the Early Republic: The Republican Party, the Whiskey Rebellion, and the Philadelphia and New York Cordwainers’ Cases,” *Pennsylvania Magazine of History and Biography*, 128 [2003]: 259-290) have explored this issue. The present work, however, will be the first intensive analysis of how these labor debates were situated within contemporary discussions about compulsion, consent, and legitimate and illegitimate forms of association.

higher wages was not in itself a criminal act. Unlawful purposes or unlawful means to gain a lawful purpose must be shown. By examining several of the key cases in the first half of the nineteenth century for what they had to say about what membership ought to look like (and where the tradesmen's societies were thought to have gone wrong), we can gain a new insight into attitudes toward voluntary affiliation in the early American republic—and how those attitudes played into restrictions on alliances among the workers of a trade but ultimately developed in a way that came to include them.<sup>27</sup>

The central questions to be answered by courts as early as the first labor conspiracy trial in 1806 had to do with associational authority. As the prosecutor Joseph Hopkinson asked the jury that year in Philadelphia, “Shall these, or any other body of men, associate for the purpose of making new laws, laws not made under constitutional authority, and compel their fellow citizens to obey them, under the penalty of their existence?” He went on: “if private associations and clubs, can make constitutions or laws for us...if they can associate and make bye-laws paramount, or inconsistent with state laws; What, I ask, becomes of the liberty of the people, about which so much is prated; about which the opening counsel made such a flourish!” Such questions were not merely rhetorical arguments. Although the conviction of the cordwainers for conspiracy did not necessarily hinge on whether the prosecution could show an illegitimate exercise of authority over individual shoemakers (it was enough, Recorder Levy said, to show that their joining together damaged the public good in some way, perhaps by raising the prices of goods), Hopkinson was explicit that the jury should “see the present cause in this double point of view,” considering both “the general policy, as it relates to the good

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<sup>27</sup> A full listing of cases can be found in Tomlins, *Law, Labor, and Ideology*, 128n.1; Walter Nelles, “*Commonwealth v. Hunt*,” *Columbia Law Review*, 32 (1932): appendix, 1166-1169.

of our community,” and this question of compulsion and associational authority. He said simply, “shall a secret body exercise a power over our fellow-citizens, which the legislature is not invested with? The fact is, they do exercise a sort of authority the legislature dare not assume.” The jury was asked to decide whether the laws and constitution of the state ought to permit such claims of private governing power.<sup>28</sup>

Hopkinson had prefaced his case against the cordwainers by announcing to the jury that “We will shew you the nature of the pains and penalties they affix to disobedience; we shall also shew the mode by which they compel men to join their society, and the fetters with which they afterwards bind them.” It was not as if they could even claim to be “an incorporated society,” operating under the imprimatur of the state, he said. Rather, they were “merely a society for compelling by the most arbitrary and malignant means, the whole body of journeymen to submit to their rules and regulations; it is not confined even to the members of the society, it reaches every individual of the trade, whether journeyman or master.” The “private confederacies” of laboring men, as Hopkinson called them, appeared to him to be a great threat to the consistent application of consent-based law and “the enjoyment of common and equal rights” thereby secured.<sup>29</sup>

The journeymen’s society claimed a power to govern the journeymen of the trade, and from their perspective they did so in a way that was utterly democratic. Historians have long noted how democratic the early American journeymen’s societies were in practice: the printers’ organizations that formed at about the same time and in the same cities as the journeymen cordwainers’ societies were obsessively democratic and participatory in their modes of operation. For example, the Franklin Typographical

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<sup>28</sup> Commons et al., eds., *Documentary History of American Industrial Society*, 3:135, 142.

<sup>29</sup> *Ibid.*, 70, 68, 142.

Society formed in 1790s Philadelphia drew up an 1802 constitution that gave the bulk of its power to twelve directors, who were divided into four classes of three men, and elections were held quarterly. To an even greater extent than many of the contemporary associations discussed in the preceding chapters, theirs was a system that was, as labor historian Ronald Schultz has written, “designed to blur the distinction between leader and led.”<sup>30</sup> It was an intensely democratic arrangement. The Journeymen Cordwainers of the City of New York, who faced conspiracy prosecutions of their own between 1809 and 1811 and whose constitution survives, also elected officers annually and committee members twice annually. All evidence shows that in New York and Philadelphia both, the journeymen made decisions to strike based entirely on direct democratic action.<sup>31</sup>

Andrew Shankman has recently examined *Pullis* from the perspective of rival political discourses in early national Philadelphia politics. Among the insights that such a perspective brings to the case is that, as Shankman writes, the accused journeymen had formed an association that “put many of the Philadelphia Democrats’ theories into practice.” That is, in a manner quite similar to the more radical of the Jeffersonian Republicans in the city, the journeymen believed that “majority will was law, and once it was declared, the minority of the cordwainers were expected to follow the majority’s declaration.” Thus, Shankman observes, “Much of the testimony of the trial concentrated on the cordwainers’ efforts to force individual journeymen to strike against their

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<sup>30</sup> Schultz, *Republic of Labor*, 122; Ethelbert Stewart, *A Documentary History of the Early Organizations of Printers* (Indianapolis, Ind.: International Typographical Union, 1907); George E. Barnett, “The Printers: A Study in Trade Unionism,” *American Economic Association Quarterly*, 3d Ser., 10 (1909): 3-379; Theodore W. Glocker, *The Government of American Trade Unions*, Johns Hopkins University Studies in Historical and Political Science (Baltimore: Johns Hopkins Press, 1913).

<sup>31</sup> Commons et al., eds., *Documentary History of American Industrial Society*, 3:364-365.



wishes.”<sup>32</sup> And the prosecutor Joseph Hopkinson did indeed spend a fair amount of time challenging the notion that the democratic form of the association—the fact that “the last turn-out was carried by a small majority...60 against 50, or thereabout”—did anything to change the fact that the association claimed an unjust and, as it were, illegal authority over its members when it told the minority that they too could not work for anything less than the demanded rate. “Let the 60 put what price they please on their own work,” he said, “but the others are free agents also: leave them free, or talk no more of equal rights, of independence, or of liberty.” The defendants’ attorney Caesar Rodney had argued the point directly, that “When you become a member of any institution, you engage to obey its rules.” But Hopkinson would have none of it: the rules themselves must not abridge rights of the members that were and ought to be inviolable, in this case, the right to work for whatever wage one asked.<sup>33</sup>

And that was the key point. Hopkinson contended that the common law proscription on combinations for private benefit was vital to prevent that sort of tyranny, however democratically arrived at, and Recorder Levy would embrace that argument in his charge to the jury. But Hopkinson paired this with the argument that the association was also formed illegitimately, that it compelled participation rather than allowing people to join or refrain from joining as they wished. Even if you posit “that when men enter into a society, they are bound to conform to its rules,” that “the majority ought to govern the minority,” argued Hopkinson, “they ought to leave a man free to join, or not to join the society. If I go into a country I am bound to submit to its laws, but surely I may judge, whether or not I will go there. The society has no right to force you into its body, and

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<sup>32</sup> Shankman, *Crucible of American Democracy*, 161.

<sup>33</sup> Commons et al., eds., *Documentary History of American Industrial Society*, 3:139, 178.

then say you shall obey its rules under severe penalties.”<sup>34</sup> Both arguments were grounded in an emerging set of beliefs regarding the legitimate exercise of associational authority in the group life of the early American republic. There can be no doubt that the arguments also furthered a pro-capitalist agenda in that it left individual workingmen relatively powerless to respond to the economic and organizational changes of the early nineteenth century. But the arguments themselves accorded quite well with the attitudes and practices of American jurists regarding what voluntary affiliation and private governing power ought to look like in a wide array of other kinds of associations. The labor disputes of the era only helped to further a growing commitment to the idea that people ought always to have access to legal remedies against illegitimate claims of associational authority.

Recorder Levy made different claims at different times about what authority was really being usurped by the journeymen cordwainers and where the injury lay: they claimed authority over nonmembers and coerced unwilling men into joining; they exercised an excessive amount of authority over their own members, even those there willingly; and they sought a price-fixing power (to set their own wages) that was dangerous to the public at large. As Christopher Tomlins and Robert Steinfeld have each observed, the corporatist claims of the journeymen to speak collectively appeared to Levy to be an associational authority too great to let be, in that it prevented any individual worker from taking work at a rate that suited him. As for the nonmembers, Levy believed that the journeymen’s society left “no individual at liberty to join the society or reject it”

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<sup>34</sup> Ibid., 139-140.

but rather “compel[s] him to become a member.” Levy asked the jury, “Is there any reason to suppose that the laws are not competent to redress an evil of this magnitude?”<sup>35</sup>

On the second point, Levy agreed with Hopkinson that majority rule in this instance was a patent violation of the rights of the individual members, who were being told by their society that they must remain steadfast to a cause that they may or may not personally support any longer: “In the turn-out of last fall, if each member of the body had stood alone, fettered by no promises to the rest, many of them might have changed their opinion as to the price of wages and gone to work; but it has been given to you in evidence, that they were bound by their agreement, and pledged by mutual engagements, to persist in it, however contrary to their own judgment.” And it was by those two means—those two questionable elements of associational authority—that the journeymen had the power to make demands of the community at large. As long as the society held fast to its rule that it would not work with any man who accepted a lesser wage, thereby compelling the master cordwainers to either abide by the union’s demands or go unstaffed, they were in essence saying, according to Levy, that “no one should work unless they all got the wages demanded by the majority; is this freedom?”<sup>36</sup> Levy honed in on the fact that the journeymen’s society appeared to be claiming a power to make law and to dictate to member and nonmember alike what the marketplace should look like. And he did so in order to draw a line between legitimate and illegitimate collective action, between the innocent and the criminal combination. “The laws of this society are

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<sup>35</sup> Tomlins, *Law, Labor, and Ideology*, 131-138; Robert J. Steinfeld, “The *Philadelphia Cordwainers’ Case* of 1806: The Struggle over Alternative Legal Constructions of a Free Market in Labor,” in Christopher L. Tomlins and Andrew J. King, eds., *Labor Law in America: Historical and Critical Essays* (Baltimore: Johns Hopkins University Press, 1992), 20-43.

<sup>36</sup> *Ibid.*, 231, 234; Wythe Holt, “Labour Conspiracy Cases in the United States, 1805-1842: Bias and Legitimation in Common Law Adjudication,” *Osgoode Hall Law Journal*, 22 (1984): 623-624.

grievous to those not inclined to become members...they are injurious to the community, but they are not the laws of Pennsylvania.” Besides our own legislature, Levy said, we seem now to have “a new legislature consisting of journeymen shoemakers.”<sup>37</sup> The jury agreed with Levy, and they fined George Pullis and the seven other cordwainers on trial eight dollars each, plus costs.

If *Commonwealth v. Pullis* stood alone, it might seem as if these arguments regarding associational authority were merely rhetorical flourishes on a decision that had no other purpose but to protect capital from the combined power of labor. But three years later, when a journeyman shoemaker named Edward Whittess was expelled from the Journeyman Cordwainers’ Society of the City of New York for not paying fines and for “raising a rumpus” at a meeting, the matter of how to define and delimit associational authority again played the central role. Again, both sides spent a great deal of their time arguing whether the common law prohibition on conspiracy was applicable in the legal regimes of the new United States, in this case, in the courts of New York. But the question of the role of the common law again appeared to focus on what part the common law ought to play in constraining private claims to authority. And, again, the language of the prosecution and, in the end, of the court was one that emphasized individual rights over and against the power of a workingmen’s society.

Some time in 1809, Edward Whittess’s employer, Charles Aimes, was told by members of the society that he must fire Whittess or face a walkout of all the society members who worked for him. Aimes complied initially, but when he would not dismiss

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<sup>37</sup> Commons et al., eds., *Documentary History of American Industrial Society*, 3:231, 234-235. Karen Orren’s reading of the case also notes that Levy emphasizes the different levels of legal authority claimed by associations and by the state legislature, all subsumed within an omnipresent common law: Karen Orren, “Labor Regulation and Constitutional Theory in the United States and England,” *Political Theory*, 22 (1994): 109-110.

an apprentice that the society insisted was also working in breach of their rules, they walked out. It became a general, citywide strike when the society learned that other master shoemakers were taking in his work. Nine separate counts, all alleging a criminal conspiracy, were filed against twenty-four journeymen shoemakers at the city hall in New York. The case was tried in late 1809 and was reargued in the summer of 1810. In that trial, according to the defense attorney (and reporter of the case) William Sampson, the prosecution summed up its position by making points quite similar to the arguments made by Joseph Hopkinson three years earlier in Philadelphia. They stressed that the journeymen violated the individual rights both of members and nonmembers, and they by those means formed an illegal combination strong enough to injure the common weal. The prosecutor, noted Sampson, made “strong remarks upon the imperious and tyrannical edicts of the constitution and by-laws of the society, and asked whether it was possible for any workman to enjoy without molestation, the indisputable rights of peace, neutrality, and self-government, in his own private and particular concerns.” Second, just as had been the case in the Philadelphia trial, the prosecution in the New York case emphasized the point that journeymen infringed on the rights of nonmembers to decide for themselves whether they wished to join. Workingmen were “neither free to refuse entering into the society, nor at liberty, having done so, to leave it, without incurring ruin or unmerited disgrace,” noted the prosecution. By these means, the journeymen’s society “had exercised an aristocratic and tyrannical control over third persons.”<sup>38</sup>

The journeymen’s attorneys, William Sampson and Cadwallader Colden, read the situation differently, of course. But they too focused upon the exact nature of

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<sup>38</sup> Rock, *Artisans of the New Republic*, 275-277; Commons et al., eds., *Documentary History of American Industrial Society*, 3:378-379.

associational authority being claimed by the journeymen's society. Sampson made the point this way: "Whitess had become one of their society, and agreed to their regulations. They are charged with combining not to work with Whitess (for such is the substance of it) till he should pay the fine he had agreed to pay for breaking their rules and orders. What is there indictable in all that, supposing it ever so true?" The members of the society had made an agreement to work neither with him nor for those who would employ him because Whitess had violated "the rules and ordinances, to the observance of which he had bound himself." That is, the defense put great weight on the argument that Whitess has consented to be governed by certain rules, rules that were neither arbitrary nor tyrannical but rather were fair and democratically conceived. Where the prosecution contended that individuals' rights were violated by the society—specifically, Whitess and those who would otherwise employ him—the defense insisted that individuals were obliged to join together: "How a solitary poor workman shall resist a wealthy and powerful combination of masters I know not," argued Sampson. Collective action was essential, and the modes that were agreed upon by the workmen were both republican and just.<sup>39</sup>

The prosecution in the 1810 rehearing, however, argued powerfully that the modes of associated action that the journeymen had agreed upon were, simply put, criminal. And though no statute made it so, the common law was sufficient to provide a remedy for people like Whitess or the master shoemakers by breaking up this claim at associational authority. Thomas Addis Emmet, an Irish exile and Democratic Republican

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<sup>39</sup> *People v. Melvin*, 1 Yates Sel. Cas. (N.Y.), 112 (1809). Though they initially balked at allowing a printed copy of their constitution to be submitted as evidence, they ultimately "thought proper to admit it," and it became part of the record. See Commons et al., eds., *Documentary History of American Industrial Society*, 3:364.

who closed the case for the prosecution, contended that “the constitution of the society” had provisions that tended “to erect an *imperium in imperio*, and overbear the rights of the citizen, and the law of the land.” And the court would agree with Emmet, reading a charge to the jury to the effect that “the society of journeymen, of which the defendants were members, had established a constitution, or certain rules for its government, to which the defendants had assented, and which they had endeavoured to enforce. The rules were made to operate on all the members of the society, on others of their trade who were not members, and through them on the master workmen, and all were coerced to submit, or else the members of the society which comprehended the best workmen in the city, were to stop the work of their employers.” The journeymen’s society on this reading had used illegitimate methods of association in the pressure they put on nonmembers to either join or suffer. Tomlins has noted that the court never did decide whether it would be the case that an agreement simply to seek higher wages constituted a criminal conspiracy, and so these discussions of illegal, coercive means to that end were central to the successful prosecution of the case. And the common law appeared to offer a means of restricting the association from being able to compel those outside of the association from being forced to yield to its demands, be they journeymen (prospective members), master cordwainers (the injured employers), or the shoe-buying public. The court, in the end, did not want to come down terribly hard on the journeymen, who appeared to have “erred from a mistake of the law, and from supposing that they had rights upon which to found their proceedings.” Each defendant was fined one dollar.<sup>40</sup>

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<sup>40</sup> Commons et al., eds., *Documentary History of American Industrial Society*, 3:382, 384-385; Tomlins, *Law, Labor, and Ideology*, 139. See Barnett, “The Printers,” 358, for how the New York journeymen described the course of events to another labor union.

What is to be made of the fact that questions about what the member-to-society relationship ought to look like were a frequent refrain in the first two labor conspiracy trials in American history? The answer to that question can be elucidated by looking at what came next for the New York journeymen cordwainers. Not even one year after the conclusion of *People v. Melvin*, members of the same journeymen's society were forced to defend themselves in court yet again, according to court documents unknown to historians before the 1980s. And, again, the case centered on the plight of one workingman who claimed to have been injured by the actions of the Journeymen Cordwainers' Society. William Dougherty had taken on some outwork to make a pair of boots when he was visited by members of the society, who informed him that a strike against the city's master cordwainers had begun. He claimed to have then finished only the work he had on hand, taking on no new projects until the strike was ended successfully. Impressed by their effectiveness and "knowing there was a Difficulty in obtaining work without being a member of said Society," Dougherty chose to join the union. Upon paying his initiation fee, he was charged by some thirty or forty members with having worked during the recent strike. Although he had not been a member at the time, they still voted to fine him three dollars. He refused to pay, and he was refunded his initiation fee and told to go on his way. From that time forward, however, when Dougherty sought work, he was denied because, as one master said in a deposition, "those Journeymen who were there at work for him would quit working and also prevent others from working." Though some employers were deposed to support the charges of Dougherty, historian Sean Wilentz, who uncovered the court documents, notes that they provide no evidence that this was "an elaborate ruse with a willing journeyman" on the



part of the city's master cordwainers. Thus, it appears that twice in a year New York City's journeymen cordwainers were forced to defend themselves in court based on charges brought by a member who disputed their authority over him. This time the journeymen's association won, and the charges were dismissed. But, once again, the nature of the charges reveals a great deal about American conceptions of legitimate and illegitimate bonds of membership.<sup>41</sup>

Though there is limited evidence extant, journeymen's societies of the first two decades of the nineteenth century appear to have almost always taken steps to coerce the unwilling practitioners of their trade to join. The constitution of a society of cabinetmakers in Baltimore formed at about the same time as the New York journeymen cordwainers included a clause almost identical to one in the New Yorkers' constitution, one that required any journeyman cabinetmaker to join the society within six weeks of arriving in the city, or face monthly fines.<sup>42</sup>

And the Pittsburgh cordwainers, who faced the next recorded conspiracy prosecution, in 1815, appear to have adopted practices quite similar to those of the Philadelphia journeymen. An initiation fee of 50 cents and monthly dues of 25 cents were required, and they took an oath not to "work for any employer who did not give the wages and beside any journeymen who did not get the wages" that they set as a minimum. Like the Philadelphia cordwainers, they did not establish a permanent strike fund, but appeared to allow money to distressed members, allowing them to "take three or four dollars out of

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<sup>41</sup> Sean Wilentz, "Conspiracy, Power, and the Early Labor Movement: The People v. James Melvin et al, 1811," *Labor History*, 24 (1983): 572-579, quotation on 578

<sup>42</sup> "Constitution and Bye-Laws of the United Society of Journeymen Cabinet and Chair-Makers of the city of Baltimore," in Charles F. Montgomery, *American Furniture: The Federal Period* (New York: Viking Press, 1966), 21-22.

the box.” When they struck in 1814, they opted to compromise, end the strike, and pay the court costs. In 1815, they were again brought into court on charges of criminal conspiracy.<sup>43</sup>

Again, the focus of the prosecution and the court was as much on the methods of association as on their intended purposes. And in the case of *Commonwealth v. Morrow*, the definition of conspiracy itself was beginning to become more refined from what had appeared in earlier cases. It was defined as “an agreement of two or more to the prejudice of the rights of others or of society.” The freedom of each journeyman to decide for himself at what wage he would work was deemed as both a private and a public right, according to the court’s summation for the jury: “It is the interest of the public, and it is the right of every individual, that those who are skilled in any profession, art, or mystery, should be unrestrained in the exercise of it.” Admittedly, it was clear from how the court presented the case that the actual use of violence or threats of violence to pressure a journeyman to join need not be shown: the crime was complete if it could be shown that the agreement necessarily tended to impoverish another. Nonetheless, the prosecution and the defense argued at great length over whether the acts of the Pittsburgh cordwainers allowed men to act freely.

The prosecution believed that the actions of the journeymen’s society compelled any man of their trade to either become a certificate-bearing member or suffer the consequences of unemployment. And the prosecutor “trusted that every man was a freeman in this country—without a certificate from the journeymen cordwainers of this place.” The defendants’ attorney, on the other hand, told the court that the journeyman’s

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<sup>43</sup> Commons, et al, eds., *Documentary History of American Industrial Society*, 4:26, 34-35, 55, 87.

oath and his “payment of the initiation fee are merely voluntary acts, the result of free will, the result of contract.” Where one side insisted that the journeymen did not leave outsiders free to decide whether to join, the other stated quite clearly that all those who had joined had chosen to do so, in an exercise of their own free will. In one sense, of course, both sides were right: the members had made a deliberate choice to become members, but the prosecutor emphasized that the choice they made was between membership and poverty. And the court embraced that view, noting that it was clearly indictable “to conspire to compel men to become members of a particular association” even though “the means used was not in physical force, but exclusion from employment.” And if the city of Pittsburgh lacked the authority to compel men to become members of a given association, the judge declared, surely the journeymen lacked it, too. The jury agreed, and the Pittsburgh shoemakers were fined one dollar apiece, with costs.<sup>44</sup>

There then came a lull in conspiracy prosecutions against journeymen’s societies for more than five years, and in 1821 a society of master ladies shoemakers actually found themselves in the position of defendant in a criminal conspiracy trial. The journeymen ladies shoemakers of Philadelphia charged them with conspiring to lower their wages. In a habeus corpus hearing, Justice John Bannister Gibson examined the precedents before him and determined that the motive of combination must play a role in determining its criminality. In a stunning turn in a case that would shape all subsequent conspiracy trials in Pennsylvania and probably beyond, Gibson announced that “the mere act of combining to change the price of labour is, perhaps, evidence of impropriety of intention, but not conclusive.” Simply joining together and demanding a certain wage

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<sup>44</sup> Ibid., 4:72, 75, 81-83, 85.

was not in itself a crime, for it was becoming clear to many jurists such as Gibson that *both* sides in labor disputes were combining to attempt to check the other. And if it could be shown that one side had combined simply to return the going wage rate to what it would be “if it were left without artificial excitement by either masters or journeymen,” that would make a good defense. For example, if the masters on trial could show that they had merely combined to “foil their antagonists,” that is, their employed journeymen, from combining and raising their wage to “a value which it would not otherwise have, they will make out a good defence.” It was a powerful statement that associations of employers or employees—even associations that had the stated aim of setting wages—were not guilty of criminal conspiracy *per se*. A specific injury, either to the public or to particular individuals, must be shown.<sup>45</sup>

Despite all of the arguments between defense attorneys and prosecutors in the earlier labor conspiracy trials about whether individual journeymen were harmed by the acts of the journeymen’s society, there was always a question about whether those individual injuries really mattered, whether their threats to prevent a poor journeyman from finding work were really crucial to determining guilt or innocence. In *Pullis* in 1806, as Gibson quoted Recorder Levy, the simple fact that the cordwainers had agreed among themselves to work only for a given wage was enough, regardless of whether their motive was “to *resist the supposed oppression of their masters*, or to insist upon extravagant wages,” and—what is more important for this study—regardless of the means they used to achieve that end. Simply show that they had agreed to work only for a certain wage, and the crime was complete. Gibson disagreed. For him, under the common

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<sup>45</sup> “The Commonwealth ex relatione Joseph Chew et al. v. John Carlise,” *Journal of Jurisprudence*, 1 (1821): 225-230, quotations on 229.

law an association of men that agreed among themselves to work only for a certain wage could be deemed a conspiracy only if one of two things was shown: that they raised the wage unnaturally high *or* that their actions necessarily tended to injure a specific person, e.g., a fellow journeyman who would not join a union. That this was Gibson's key point became clear when he noted that the cordwainers in 1806, in his reading, *still would have been guilty* of conspiracy because of the charge relating to "third persons," specifically, the charge that the cordwainers "would by threats and menaces and other injuries, prevent any other workmen or journeymen from working" for masters who paid a lesser wage. In the end, Gibson noted that he could not make a decision on the crucial question in the case before him, for it was a question of fact that only a jury could answer. The prosecution was probably dropped.<sup>46</sup>

Gibson had contended that conspiracy ought to hinge on questions of motive and specific injury. Courts should not pretend that they were protecting the public weal by condemning any and all combinations. Because the relationship between employer and employee was, quite naturally, competitive (and could even descend into war<sup>47</sup>), there may well be times when an association of men may voluntarily and collectively agree to work only for a certain wage and no less (or, in the case of employers, to pay a certain wage and no more) and, in doing so, commit no crime. But if it could be shown that the combination was something other than a voluntary society, that there was some

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<sup>46</sup> *Ibid.*, 229; Thomas Lloyd, *The Trial of the Boot and Shoemakers of Philadelphia, on an Indictment for a Combination and Conspiracy to Raise Their Wages* (Philadelphia: T. Lloyd and B. Graves, 1806), 6; Nelles, "Commonwealth v. Hunt," appendix, 1167.

<sup>47</sup> In a fascinating (if slightly paraphrased) passage, Gibson used a quotation from Thomas Jefferson's Annual Address to Congress of December 3, 1805, in which Jefferson described war as "the unprofitable contest of trying which party can do the other the most harm." Gibson noted that journeymen may well be "compelled to enter, with their employers, into 'the unprofitable contest of who can do the other most harm'" ("Commonwealth ex relatione Joseph Chew et al. v. John Carlisle," 229).

compulsion exerted on nonmembers to abide by the edicts of the society, the outcome was usually a guilty verdict. This was the case in the next two recorded instances of labor conspiracy trials: a prosecution against New York hatters in 1823 and one against Buffalo tailors in 1824. In both, it was held that the crime was in the conspiracy to prevent a fellow journeyman from finding work and not simply in the agreement to work only for a certain wage. In the 1823 case, the defendants' refusal to work alongside a nonmember journeyman named Acker, thereby preventing his employment and impoverishing him, was the crime. In the 1824 Buffalo case, the crime was described this way: "A singular custom among the Jours. to coerce the refractory was proved to exist throughout the United States, by which the person who should refuse to come into the measures of the majority, or who subsequently to a turn out should, before an arrangement was had, labor at the same place for less than the wages demanded, was stigmatized by an appropriate name, and rendered too infamous to be allowed to labor in any shop where his conduct should be known." When the first jury could not reach a verdict in that case, a second was impaneled, which found the defendants guilty and fined them two dollars each. The decision was not well reported: its existence is known only by newspaper accounts. But it did suggest that the use of one of the most powerful tools at the disposal of working men—shame—might be deemed to be indictable as a criminal conspiratorial act.<sup>48</sup>

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<sup>48</sup> *People v. Trequier* (New York Hatters' Case), 1 Wheeler's Criminal Cases 142 (1923), in Nelles, "Commonwealth v. Hunt," appendix, 1167; Arthur James Selfridge, "American Law of Strikes and Boycotts as Crimes," *American Law Review*, 22 (1888): 236; Buffalo Tailors' Case, reported in the *Buffalo Emporium*, Dec. 25, 1824, in Commons et al., eds., *Documentary History of American Industrial Society*, 4:94-95. On shame as a tool for early American labor unions, see the comment by the secretary of the New York Typographical Society in 1809 on why they should exchange the names of members expelled for rule violations with other journeymen's societies: "There is nothing which acts more powerfully on the human mind than shame.... it is to be hoped it will ever deter a journeyman printer from conducting himself unworthily toward his brother when innate principle is wanting" (Barnett, "Printers," 287n.12).

In sum, courts in the 1820s were beginning to develop a fairly articulate notion of the role of associated action in the labor market, and it was one that rested quite heavily on the idea that journeymen's societies can and should claim the allegiance only of those who had made a free and uncoerced decision to join. Among themselves, they could agree not to work for certain employers or below certain wages. Any moment that they attempted to prevent others from working, however, a charge of criminal conspiracy might succeed in court. In an 1827 conspiracy case, the defendant journeymen were quite explicit in their testimony about what "the rules among journeymen tailors" were, in a clear effort to persuade the court that theirs was a mere voluntary association that claimed authority over no one who had not chosen to join their ranks. As Thomas Carr testified, "The rule, as far as I know, is such, that, in case any journeyman in Robb and Winebrener's, or other shops should *strike* for higher wages, I should feel bound not to work for Robb and Winebrener, but not to prevent others working." The case, *Commonwealth v. Moore*, more popularly known as the *Case of the Twenty-Four Journeymen Tailors*, wound up hinging on just that question, the question of whether coercion had been used to prevent nonmember journeymen from working. In fact, every charge against them that did not involve threats against nonmember journeymen tailors was dropped, owing to the instructions to the jury by Recorder Joseph Reed, in which he deliberately invoked the authority of Justice Gibson (who by that time had become chief justice of the Pennsylvania Supreme Court) in *Commonwealth v. Carlisle*: simply combining was not in itself necessarily a crime, but rather the jury had to determine whether the association claimed and exercised any coercive authority over people that were not members.

Reed noted, for instance, that “the rules of the society of journeymen tailors...are, in some respects, illegal and oppressive, operating not only on the members, but on others.” He explained why, in a way that actually sums up quite well early nineteenth century beliefs about the role of consent as the foundation of all associational authority: “These young men, have an undoubted right, by agreement among themselves, to regulate their own conduct, to ask as much as they please for their services, to continue, or to leave the service of any employer, as reason, inclination, or caprice should dictate;-- but the moment they interfere with the rights and privileges of others, equally valuable and sacred as those, which, in this prosecution, these defendants so jealously contend for, they are criminal.” It was in their actions, by forming picket lines and preventing men who wanted to work from reaching their shops, that they committed a crime. Reed was clear to the jury whose rights he was speaking of: “the defendants by combination attempted to injure and oppress others, more especially their fellow journeymen, (I say nothing here of the interests of [shop owners] Robb & Winebrener,).” It was on charges of threats against nonmember journeymen, and those grounds only, that the jury found the defendant tailors guilty.<sup>49</sup> Criminal conspiracy charges in the courts of Pennsylvania would, more and more often after Gibson’s influential 1821 opinion, include the matter of whether the defendants did anything to injure journeymen who would not join their association. When the journeymen shoemakers of Chambersburg, Pennsylvania, were indicted for conspiracy in 1829, for example, the charges were two, according to the lone

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<sup>49</sup> Marcus T. C. Gould, *Trial of Twenty-Four Journeymen Tailors, Charged with a Conspiracy: Before the Mayor’s Court of the City of Philadelphia, September Sessions, 1827* (Philadelphia: n.p., 1827), 28, 160, 162; Tomlins, *Law, Labor, and Ideology*, 145.



newspaper account: they were charged with “conspiracy to raise their wages, and prejudice such as were not members of their association.”<sup>50</sup>

The decade of the 1830s witnessed a great deal more labor organization, even on a national scale, and continued prosecutions against journeymen’s societies for criminal conspiracy. But the conviction rate plummeted, and public support for the workingmen’s combinations would grow. People of widely divergent opinions about whether associated action was a blessing or a curse in American society were nonetheless beginning to acknowledge that, even in the workshops and marketplaces, combination was here to stay. But battles in the streets and in the courtrooms about the rights of workers to combine, even if that combination put pressure on all workers of a given trade to join their cause, would continue through the decade.<sup>51</sup>

In 1831, in another case that is only known to us by scattered newspaper accounts, Pittsburgh carpenters were alleged to have combined with several hundred others in the streets of the city, massing in front of shops to discourage any carpenters from taking work until their dispute was ended. But, apparently, the jury took no time at all to deliver a verdict of not guilty.<sup>52</sup> In Connecticut in 1834, a civil suit was brought against William Taylor and other carpet weavers for \$15,000 based on the allegation that they did “wrongfully and injuriously by threats and falsehood induce a great number of Ingrain Carpet Weavers” to quit their work at the Thompsonville Carpet Manufacturing

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<sup>50</sup> *Philadelphia National Gazette*, Nov. 19, 1829, in Commons et al., eds., *Documentary History of American Industrial Society*, 4:273.

<sup>51</sup> See David Grimsted, “Ante-bellum Labor: Violence, Strike, and Communal Arbitration,” *Journal of Social History*, 19 (1985): 5-28.

<sup>52</sup> *Allegheny Democrat*, Aug. 9, 1831, quoted in William A. Sullivan, *The Industrial Worker in Pennsylvania, 1800-1840* (Harrisburg, Pa.: Pennsylvania Historical and Museum Commission, 1955), 132-133.

Company. Not only did Taylor win, but it was noted that “the result it is believed has met with public approbation,” and he countersued for damages owing to his temporary imprisonment (though he withdrew the suit three years later).<sup>53</sup> And of the eight conspiracy cases between 1836 and 1843, only three resulted in convictions, one of which was overturned. As Tomlins has observed, there had been nine convictions and five acquittals in all the previous recorded labor conspiracy trials. Workingmen in the decade of the 1830s united far more often than ever before, began their first efforts at transforming workplace organization into political activism, and even attempted to unite discrete trades into common organizations (hence the origins of the term “trades’ union”). And even as perceptions of the American labor union were slow to change, the first national organization of journeymen cordwainers could announce that “combinations and associations among the mechanics and the laboring poor” were a legitimate means of regaining their “lost rights” and have some evidence that more and more Americans agreed with them.<sup>54</sup>

A stumbling block in any individual labor dispute, however, was any evidence that uncooperative journeymen were being coerced into participation by their fellow workingmen. Those charges, as had been the case for more than a decade, were usually paired with allegations that the actions of labor combinations were also depriving the public of its rights to a free and unobstructed marketplace, but prosecutors and judges in

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<sup>53</sup> *Thompsonville Carpet Manufacturing Company v. Taylor and William Taylor v. Thompsonville Carpet Manufacturing Company*, in Commons et al., eds., *Documentary History of American Industrial Society*, 4(suppl.):17-23, 110-136.

<sup>54</sup> Tomlins, *Law, Labor, and Ideology*, 151-152; *Proceedings of the Convention of Cordwainers, Holden in the City of New-York, Commencing on the First Monday in March, 1836*, p. 17, quoted in *ibid.*, 159. See, too, the Philadelphia cordwainers continued calls for united action. “If we do not attempt to remedy our condition, ourselves, no one will do it for us. So long as continue separate and disunited we can accomplish nothing” but “IN UNION THERE IS STRENGTH.” *The Pennsylvanian*, Apr. 4, 1835, quoted in Sullivan, *Industrial Worker in Pennsylvania*, 106.

labor conspiracy trials who either sought or approved of a conviction almost invariably put a great deal of emphasis on the lone suffering journeyman who might be injured by the union's efforts to enforce a closed shop. In 1835, for example, in the case of *People v. Fisher*, a conspiracy trial against journeymen shoemakers in Geneva, New York, Chief Justice John Savage of the Supreme Court of Judicature put great emphasis on the public injury that resulted from their combined efforts to drive up their own wages. But he also decried the injustice of their insistence that the expelled journeyman, Thomas J. Pennock, work only for one dollar per pair. Savage wrote, "If the defendants cannot make coarse boots for less than \$ 1 per pair, let them refuse to do so; but let them not directly or indirectly undertake to say that others shall not do the work for a less price. It may be that Pennock, from greater industry or greater skill, made more profit by making boots at 75 cents per pair than the defendants at \$ 1. He had a right to work for what he pleased. His employer had a right to employ him for such price as they could agree upon. The interference of the defendants was unlawful; its tendency is not only to individual oppression, but to public inconvenience and embarrassment." Savage's perspective was partially based on a particular, political economic perspective—"Competition is the life of trade," he declared, and this union seeks to end it by insisting that Pennock work only at their level of efficiency—but his contention that what they had done was "wrong" rested not merely on political economy but on the right that Pennock had to remain free from union regulations.<sup>55</sup>

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<sup>55</sup> *People v. Fisher*, 14 Wend. (N.Y.) 9, 19 (1834). Savage's emphasis on public injuries alongside the private injuries suffered by Pennock and master shoemaker Daniel Lum were probably prompted by a statute passed the New York assembly. Owing to the controversies over the applicability of the common law of criminal conspiracy, the legislature of New York in 1828 attempted to formulate a statute for it that eliminated conspiracy for mere private injuries (Act of Dec. 10, 1828, *New York Revised Statutes, 1829*, 2:691). As Tomlins notes, however, "There is no evidence to suggest that a desire to modify the conspiracy doctrine's impact on journeymen's combinations had any particular bearing on the New York legislature's

The allegations of associational tyranny on the part of journeymen's associations became increasingly hyperbolic in the 1830s. More and more, for instance, their critics declared that unions in the United States were led by foreigners, painting for observers a picture of freeborn Americans under the thumb of unions that "are of foreign origin," as Judge Ogden Edwards said in a controversial conspiracy trial against twenty journeymen tailors in 1836. The *New York Commercial Advertiser*, for example, noted that the labor unions "are based on the same principles as the pernicious Trades Unions in England, and in almost every case, we are informed, they are managed and controlled by foreigners." And the master carpenters in Philadelphia announced that "combinations of this description are indebted for their origin to the discontented and disorganizers in a monarchical government; they are not of American birth." In the 1830s, as the labor movement grew increasingly strong and visible, mounting its first organized political efforts, arguments were trumpeted that unions took away the individual liberties of the workingman and made him "to march like some conscript militia through the streets, under the command of some foreigner."<sup>56</sup>

The workingmen of the labor unions of the 1830s and 1840s, however, held fast to their commitment to their rights of organization and collective self-rule. And yet, as scholars have come to emphasize, both Whigs and Democrats generally agreed that when journeymen made attempts to enforce their collective agreements on all the tradesmen of their industry they were acting tyrannically and were unfairly stripping their fellow

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action" (*Law, Labor, and Ideology*, 149). See also Wilentz, *Chants Democratic*, 286-290; Stephan Mayer, "People v. Fisher: The Shoemakers' Strike of 1833," *New-York Historical Society Quarterly*, 62 (1978): 7-21.

<sup>56</sup> *New York Commercial Advertiser* reprinted in *The Saturday Evening Post*, Mar. 12, 1836; *The Pennsylvanian*, Mar. 17, 1837; *Poulson's Daily American Advertiser*, Apr. 10, 1835, quoted in William A. Sullivan, *The Industrial Worker in Pennsylvania, 1800-1840* (Harrisburg, Pa.: Pennsylvania Historical and Museum Commission, 1955), 88-89; Nelles, "Commonwealth v. Hunt," appendix, 1168.

workingmen of the right to decide for themselves when, how, and for what wage they would work.<sup>57</sup> Thus, the Whig *New York Journal of Commerce* could write unequivocally that “Trades Unionists” acted in a way that was “tyrannical, unfair, and a combination against the rights of other men.” And the Democratic *Philadelphia Public Ledger*, in the midst of a lengthy editorial in support of the twenty tailors convicted of conspiracy in New York in the case of *People v. Faulkner* and fined the extraordinary sum of \$1,150 dollars, would still draw a line between acceptable and improper associations based on perceived coercion of those unwilling to join the cause: “But while we contend that all men have a perfect right, by agreement, to settle the prices of their labor or merchandise, we contend that they have no right to coerce others into such agreement. Such coercion is a violation of the very principle upon which they claim the right of making such agreements.”<sup>58</sup> By the dawn of the 1840s, there had been almost four decades of public debate and legal dispute regarding concerted action among laboring men on their own behalf, and much of it centered on questions of how much authority such groups could claim over their own members and whether they acted coercively toward those who hesitated to abide by their regulations or sought to chart their own course in the marketplace.

Thus, it should come as no surprise that the most famous labor conspiracy trial in history was not a battle between masters and journeymen, or between factory owners and employees. It was a dispute between the Boston Society of Journeymen Bootmakers and one disgruntled member, Jeremiah Horne. And like so many of the conspiracy cases

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<sup>57</sup> Laurie, *Artisans into Workers*, 54-56; Tomlins, *Law, Labor, and Ideology*, 168-171.

<sup>58</sup> “Societies vs. Individuals,” *New York Journal of Commerce*, May 25, 1839; *Philadelphia Public Ledger*, June 13, 1836, quoted in Tomlins, *Law, Labor, and Ideology*, 168.

before it, there were discussions of the rights of the people to a free market in goods and labor, and there were demands that the relevance of the common law of criminal conspiracy be rethought in a democratic republic such as the Commonwealth of Massachusetts. But the case of *Commonwealth v. Hunt*, which Hunt and the other union shoemakers lost in the Boston Municipal Court in 1840 and then won in a landmark decision by Lemuel Shaw in the Massachusetts Supreme Judicial Court in 1842, was at its core nothing more than a matter between Horne and the journeymen's society. The most thorough study of the documents surrounding the case, written by Walter Nelles in 1932, deserves to be quoted: "It seems clear, both from positive implications of the testimony and from the absence of any contrary suggestion in any of the reports, that there was no strike or threat or thought of a strike in 1840; no difference or friction whatever between masters and journeymen, or the Society; and that the prosecution was instigated single-handed by Jeremiah Horne." Horne's boss testified that he had never been injured by the society's actions, that "the wages fixed by the society were not unreasonably high," and that "society men were all good workmen." And other masters also told the court that they had actually benefited from the society's policies. This was in every way a legal dispute about the authority of a journeymen's society over one of their own.<sup>59</sup>

Horne had been a member of the bootmakers' society. He was fined for a violation of the society's rules, and his employer, Isaac Wait, actually paid the fine for him. When more fines piled up, and the cantankerous Horne refused to pay, his employer even advised him to settle up with them and try to remain on good terms. But Horne

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<sup>59</sup> Nelles, "Commonwealth v. Hunt," 1133; testimony of Isaac Wait in *Commonwealth v. John Hunt et al.*, Thacher's Criminal Cases 609, 614-615 (1840).

refused, and Wait dismissed him. Horne then met with the local district attorney about pressing charges, and he sent his brother Dennis Horne, a member of the bootmakers' society, to attempt a reconciliation. When the journeymen's society said they would not settle, Dennis informed them that Jeremiah "wanted nothing but his rights" and would take the matter to court. And the district attorney, Samuel Parker, took the case with zeal to the Municipal Court of Boston, presided over by Peter Oxenbridge Thacher, a longstanding opponent of organized labor.<sup>60</sup>

The defense attorneys for John Hunt and the six other men charged with criminal conspiracy declared that there was nothing at all criminal about the means or goals of the Boston Society of Journeymen Bootmakers. After arguing halfheartedly that the common law of conspiracy was not in force in Massachusetts, John Kimball for the defense contended that no evidence had been shown that Wait had been compelled to dismiss Horne, or that any employers had been impoverished by the actions of the society (and that, indeed, they had benefited), and that "similar societies have existed among the members of the legal and medical professions, and in almost every kind of business in which large numbers are engaged; and that it has been the custom of the people of this country to combine for any and every purpose not criminal or forbidden by law." Kimball even called members of the Suffolk Bar Association and the Boston Medical Association to make the point that they operated in a manner virtually indistinguishable from the bootmakers' union.<sup>61</sup>

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<sup>60</sup> *Ibid.*, 1132-1133; Leonard W. Levy, *The Law of the Commonwealth and Chief Justice Shaw* (Cambridge, Mass.: Harvard University Press, 1957), 185-190. For Thacher's views, see Peter Oxenbridge Thacher, *A Charge to the Grand Jury of the County of Suffolk, for the Commonwealth of Massachusetts, at the Opening of the Municipal Court of the City of Boston, on the First Monday of December, A.D. 1832* (Boston: Stimpson and Clapp, 1832), 13.

<sup>61</sup> *Commonwealth v. Hunt*, Thacher's Criminal Cases, 609, 619, 621-622 (1840).

It was Parker's two-hour closing speech for the prosecution that drove home the nature of the case. He insisted that he had proven to the jury that, although this journeymen's "society may have some good objects, and do some good," it was "a coercive, rigid, persecuting society, to all who refuse to be members," such as the expelled Horne. He told the jury that they could have the rules of the bar association and the constitution of the journeymen's association before them to "compare them," and they will find that "they are wholly unlike." And, surely knowing that he had a good friend in Judge Thacher, the prosecutor closed his case by reminding the jury that the presiding judge was "a *constitutional witness*, who is to testify what is the law.... He is sworn to tell you truly and conscientiously, and you are to believe his testimony, as you would that of a witness upon the stand." And Thacher did not disappoint Parker. His charge to the jury was conclusive as to the questions of law: "The illegality of the agreement [among the journeymen] consists in the design and tendency, by a concentrated action, to injure and control others. If the defendants intended and expected, by means of this confederacy, to benefit themselves, at the expense of the rights of others, and by an unlawful invasion of those rights, it was an offence." He left to the jury only the question of fact: did John Hunt and the other members of the Boston Society of Journeymen Shoemakers intend to benefit themselves by their concerted actions? Or, more specifically, he asked the jury whether they believed that the defendants had a rule that they would not work for an employer "who should employ any workman or journeyman... who was not a member of their said club, after notice given to him to discharge such workman from his employ," for if they did, "It is an unlawful means to effect an unjust and injurious purpose."<sup>62</sup>

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<sup>62</sup> Ibid., 635-636, 643. Thacher's charge to the jury also found a large audience by its publication in Peleg



Thacher also spent a great deal of time discussing the constitution, which he called “the soul of the club,” and the apparent cohesiveness of the journeymen’s society: “You may have perceived in this case, as in other secret associations,” observed Thacher, “the strength of the spirit of the society.” He told the jury that the members of the society had been “careful to conceal” their own roles and “were most unwilling to reveal any fact which might tend to impeach their associates.” Thacher went to great lengths to describe the society, then, as a band of brothers, a tightly knit fraternity that “avow their intention to regulate their wages by a concentration of feeling and action with their brother craftsmen.” And that emphasis was intended to give the jury a somewhat darker view of the society’s treatment of men such as Horne, a “marked journeyman” or “*scab*, as he is called in this new vocabulary.” In Thacher’s telling, the members of the bootmakers’ society had leagued together, and they claimed authority to fine Horne, to expel him when he refused to pay, and to cease working alongside him and thereby keep him from finding work in the city of Boston. Such authority, he said conclusively, “was a new power in the state, unknown to its constitution and laws, and subversive of their equal spirit.” The jury agreed, and John Hunt and the others were convicted of criminal conspiracy. The case was appealed.<sup>63</sup>

Robert Rantoul was the lead defense attorney who argued the case before Thacher and before Shaw at the Supreme Judicial Court, and his arguments at both the trial and the appellate court were nearly identical. He centered his defense on the inapplicability of the common law in every case and on the particular injustice of applying it in this case, to

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W. Chandler’s *Law Reporter*, 3 (1841): 290-304.

<sup>63</sup> *Commonwealth v. Hunt*, Thacher’s Criminal Cases, 609, 647, 650, 653 (1840). On the details of the appeal, see *Law Reporter*, 3 (1841): 304.

charge a society that did no more than was done every day by bar associations and medical societies with a crime, merely because it was made up of workingmen. Thus, the exception that he argued most closely for Shaw's court was that Thacher had not properly instructed the jury "that the indictment did not set forth any agreement to do a criminal act, or to do any lawful act by any specified criminal means, and that the agreements therein set forth did not constitute a conspiracy indictable by any law of this Commonwealth." Shaw agreed. He "stripped" the indictment of "introductory recitals," "alleged injurious consequences," and "qualifying epithets," and he restated it this way: "the defendants and others formed themselves into a society, and agreed not to work for any person, who should employ any journeyman or other person, not a member of such society, after notice given him to discharge such workman." Was that unlawful, in either its aims or in the means it proposed to accomplish that purpose?<sup>64</sup>

How Shaw answered those questions can best be seen as a culmination of a slow drift among American jurists toward the idea that combination itself was not a crime. Rather, as Gibson had been the first to suggest in Pennsylvania two decades earlier, to determine the lawfulness of any voluntary association, the actual deeds and goals of the group must be evaluated. And when Shaw did this, he could not help but to do so in a way that reflected the growing experience with associational membership that so many Americans now had, including Shaw himself. That is, reading Shaw's opinion in *Hunt* shows the astonishing degree to which the law and experience of voluntary membership in all manner of associations had now developed to the point that people such as Shaw

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<sup>64</sup> *Commonwealth v. Hunt*, 45 Mass. 111, 127 (1842).

had a well-developed vocabulary regarding voluntary affiliation that effectively framed their conceptions of organized labor.

Shaw stated first, “The manifest intent of the association is, to induce all those engaged in the same occupation to become members of it.” Similar attempts to “induce” people to join a cause, by signing a constitution and paying dues, had become commonplace in American society by that time. And with the very next sentence he began to reshape American labor law in a way that brought it into line with all other kinds of associated action: “Such purpose is not unlawful.” Nor, he said, was there any evidence that the association attempted to achieve its goal “by criminal means.” And he did this by comparing the Boston Journeymen Bootmakers’ Society with a temperance association. “Suppose a class of workmen, impressed with the manifold evils of intemperance, should agree with each other not to work in a shop in which ardent spirit was furnished, or not to work in a shop with anyone who used it, or not to work for any employer, who should, after notice, employ a journeyman who habitually used it.” The drinking workingman might suffer unemployment owing to their agreement, and an employer “might, at times, experience inconvenience in his work, in losing the services of a skilful but intemperate workman.” (More on the temperance analogy, below.) But Shaw was certain that a simple agreement among themselves not to work with or for a certain kind of person, in this case, someone who was not a member of their association, was nothing more than “an agreement, as to the manner in which they would exercise an acknowledged right to contract with others for their labor.” There was no reason to think

that the simple existence of that agreement was a criminal act in the Commonwealth of Massachusetts.<sup>65</sup>

Though it would appear that Shaw had covered all of the charges made against Hunt and the other journeymen, there were two other matters that he addressed at length that focused more than anything on what sorts of pressures a voluntary association ought to be permitted to bring to bear on nonmembers. First, he addressed the question of their demands on Wait to dismiss the disgruntled Horne. In the trial and at the appellate level, the constitution of the bootmakers was cited as evidence of their purposes and their means, and it included article 14, which stated the duty of members to quit the employ of a man who hired nonunion workers. And so Shaw stated directly that the accusation that they had attempted to “compel” Wait was “rendered harmless by the precise statement of the means, by which such compulsion was to be effected. It was the agreement not to work for him, by which they compelled Wait to decline employing Horne any longer.” Clearly possessing the individual right to work for whomever they pleased, they were not culpable for having joined together to more effectually exercise that right, just as they would not have been guilty of a crime if they had chosen to quit en masse from an employer who served alcohol.<sup>66</sup>

Second, Shaw wanted to address directly the accusation that the society had “a wicked and unlawful intent to impoverish one Jeremiah Horne, and hinder him from following his trade as a boot-maker.” He proceeded by way of analogy to show that collective efforts to lessen someone else’s profits, even to impoverish someone, were ordinary, lawful, and even “laudable.” He described a scene in which a baker was asked

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<sup>65</sup> Ibid., 129-130, 132.

<sup>66</sup> Ibid., 132-133; Nelles, “Commonwealth v. Hunt,” 1134n.21.

by a group of townspeople to lower his prices or they would join together to “introduce another baker.” As Shaw noted, “it might be said and proved, that the purpose of the associates was to diminish his profits and thus impoverish him,” but “the same thing may be said of all competition in every branch of trade and industry.” In short, “associations may be entered into, the object of which is to adopt measures that may have a tendency to impoverish another, that is, to diminish his gains and profits, and yet so far from being criminal or unlawful, the object may be highly meritorious and public spirited.”<sup>67</sup>

Shaw’s decision has been interpreted a number of different ways over the years. For Walter Nelles, the decision was a way of weakening a radical workers’ movement in politics, particularly their support for protective tariffs. For Mark DeWolfe Howe, it was a way of undercutting the legal codification movement by showing the flexibility of the common legal tradition. For legal scholars such as Wythe Holt and Raymond Hogler, the decision by Shaw was still decidedly procapitalist and founded on “deep economic interests,” especially the way he “encouraged courts to persist in identifying the good of the community with *laissez-faire* ideology, or with the interests of entrepreneurs.” For Alfred Konefsky, both *Hunt* (which specifically excluded the case of men who were under contract with their employers) and the fellow-servant ruling a week earlier in *Farwell v. Boston and Worcester Railroad*, a decision that seemed as anti-labor as *Hunt* seemed to be pro-labor, were really about the freedom of contract, the freedom for employees to choose. For Leonard Levy, Shaw was a realist who weighed competing rights and social consequences, a man more akin to Oliver Wendell Holmes, Jr., than to his conservative forebears on the Massachusetts bench. To Levy, *Hunt* signaled an

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<sup>67</sup> *Commonwealth v. Hunt*, 45 Mass. 111, 133-134 (1842).

acceptance by Shaw that the competition among organized forces in American society will benefit the public more than it will injure it. Tomlins, in a manner somewhat akin to both Konefsky and Levy, argues that Shaw was among the first judges to see a market-driven world, with “society as the sum of a congeries of diverse material interests that individuals pursued, self-consciously, by entering into voluntary transactions that bound them according to the terms they were able to negotiate with each other.” Thus, Shaw could support the combined efforts of laboring men as being only one more component of, as Shaw stated, a “thousand other instances, where each strives to gain custom to himself, by ingenious improvements, by increased industry, and by all the means by which he may lessen the price of commodities, and thereby diminish the profits of others.” There are myriad interpretations of what led Shaw to decide that collective action by laboring men was not per se a criminal act, but none has yet to situate his decision in the emerging law and practice of membership and association. And the examples that Shaw used make that perspective an essential one.<sup>68</sup>

For even once Shaw had determined that the purpose of the journeymen’s society was not unlawful, he had a tough argument to make regarding their means, and he opted to make that argument by appealing to Americans’ growing comfort with voluntary association. The long history of labor conspiracy trials covered here has shown just how sticky the question of associational authority could be, even in cases in which it appeared that the association’s purposes were not illicit and abusive to the public at large. Did it

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<sup>68</sup> Nelles, “Commonwealth v. Hunt,” 1151-1162; Mark DeWolfe Howe, *Readings in American Legal History* (Cambridge, Mass.: Harvard University Press, 1949), chap. 5; Holt, “Labour Conspiracy Cases in the United States,” 644, 645n.267; Raymond Hogler, “Law, Ideology, and Industrial Discipline: The Conspiracy Doctrine and the Rise of the Factory System,” *Dickinson Law Review*, 91 (1987): 697-745; Alfred S. Konefsky, “‘As Best to Subserve Their Own Interests’: Lemuel Shaw, Labor Conspiracy, and Fellow Servants,” *Law and History Review*, 7 (1989): 219-239; Levy, *Law of the Commonwealth*, 203-206; Tomlins, *Law, Labor, and Ideology*, 215.

violate the rights of Horne, the man who began the prosecution, or of his employer, Isaac Wait, when Hunt and the other journeymen refused to work alongside Horne simply because he was not a member of their association, did not pay their fees and fines, and would not work only at their approved wage rate?

In a move that no one could have foreseen, Shaw answered that question by invoking the example of the temperance society. When he stated that “we cannot perceive, that it is criminal for men to agree together to exercise their own acknowledged rights, in such a manner as best to subserve their own interests,” he immediately proposed “one way to test this.” Imagine, he said, that they had joined together as a temperance society. A decade earlier, Shaw had been a member of a committee of the Massachusetts Society for the Suppression of Intemperance that actually appealed in an open letter to “the Master and the Journeyman Mechanic” to form just that kind of society, a society in which the “principle” of temperance served as “the bond of union.”<sup>69</sup> He had been asked multiple times by the defense to draw a parallel between the bootmakers and the bar associations or the medical societies of the day, but he never did. Instead, Shaw deliberately compared the association of journeymen to a society that asked no dues of its members, was entered and exited with the complete freedom of the participants, and asked nothing of its members but that they adhere to a shared belief and practice regarding the use of alcohol.<sup>70</sup>

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<sup>69</sup> *A Letter to the Mechanics of Boston, Respecting the Formation of a City Temperance Society: From a Committee of the Massachusetts Society for the Suppression of Intemperance* (Boston: Massachusetts Society for the Suppression of Intemperance, 1831), quotation on 4.

<sup>70</sup> Temperance associations of the 1830s and 1840s were entered and exited freely, almost always based on nothing but professed belief. One especially clear example is found in the *Constitution of the Providence Association for the Promotion of Temperance, Adopted March 29, 1830—Amended May 30, 1831*, in Papers of the Providence Association of Mechanics and Manufacturers, Rhode Island Historical Society, Providence, R.I.:

Defense attorney Robert Rantoul had given the example of a temperance lecturer, “who induces men to forbear buying rum, to the impoverishing of sellers of rum,” to contest the idea that every action seeking to impoverish another person was a crime or even morally objectionable. But Shaw adapted this to become a discussion of a temperance association, something he had long supported and thus could hardly be expected to condemn. In doing so he utterly ignored an important component of the prosecution—that the bootmakers’ society demanded dues and thereby claimed a power to tax upon penalty of unemployment. During the trial, Thacher had very clearly informed the jury that “the only authority which may rightfully impose a tax, in the shape of a fine or penalty, or in any other way, must be imparted by the legislature.” But Shaw disregarded the contention, paying it no attention at all in his opinion. Even though it appeared that Shaw was attempting to deflect that question by his use of the temperance analogy, it was true that many groups did everything they could to “induce” people to become members and yet also required the payment of dues, for example, most every moral reform society. He apparently saw nothing objectionable in that. In his opinion, Shaw made a deliberate choice to situate the Boston Society of Journeymen Bootmakers within an associational world to which both he and so many of his contemporaries had become accustomed. Shaw was not only a member of a Massachusetts temperance society, but a member of such associations as the Massachusetts Historical Society, the

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Article 4: Any citizen, resolved to carry into practice the principle of total abstinence recognized in the second and third articles, may become a member of this Association by signing the Constitution.

Article 5: Any member may withdraw from the Association, by signifying his wish to that effect, to either of the Secretaries.

Article 6: No member shall be subject to any tax or assessment for the expenses of the Association, and its necessary funds shall depend upon voluntary contributions, in and out of the Association.



Society for Propagating the Gospel among the Indians, Phi Beta Kappa, the Friday Evening Club, and the Law Club. He even served as secretary and wrote out the constitution for the Washington Benevolent Society he joined in 1812 (on these political fraternities, see chapter 2). He was, not merely aware of, but an active participant in the growing array of associational opportunities in the early nineteenth century. He was willing, like few jurists before him, to contend that labor unions ought to be understood as part of that world. Thus, the laws and practices of voluntary membership that were being worked out in the culture at large, in groups such as temperance societies, can be understood as being the framework within which labor unions, too, operated. Seen that way, they were not criminal. They were common.<sup>71</sup>

As political theorists have long recognized, the associational world of civil society can have a positive and healthy relationship with a democratic political system. But individuals must be free to choose their affiliations, free to enter those groups that fit their beliefs and exit those that no longer do.<sup>72</sup> Labor unions presented the most significant or, at least, most visible challenge to that idea in the early decades of the nineteenth century,

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<sup>71</sup> Rantoul quoted in Tomlins, *Law, Labor, and Ideology*, 207, and see 212n.92. On the bar and medical societies, see Nelles, “Commonwealth v. Hunt,” 1134n.21, 1138 (When the district attorney read and commented upon the cordwainers’ constitution, clause by clause, he too kept asking the jury to compare the Boot-Makers’ Society to his own bar association. After reading their rule that disputes between members ought to be adjudicated by the club, he declared: “Despotic, tyrannical, illegal, etc.” and asked them, “Is there any such bar rule?”); Holt, “Labour Conspiracy Cases in the United States,” 638n.216; *Law Reporter*, 3 (1841): 303. On Shaw’s associational memberships, see Frederic Hathaway Chase, *Lemuel Shaw: Chief Justice of the Supreme Judicial Court of Massachusetts, 1830-1860* (Boston: Houghton Mifflin, 1918), 250-255. On the power to “tax,” see *Commonwealth v. Hunt*, Thacher’s Criminal Cases, 609, 613-614 (1840); Anthony Woodiwiss, *Rights v. Conspiracy: A Sociological Essay on the History of Labour Law in the United States* (Munich: Berg Publishers, 1990), 55-56.

<sup>72</sup> Geert Munichs, “Rational Politics? An Exploration of the Fruitfulness of the Discursive Concept of Democracy,” in René von Schomberg and Kenneth Baynes, eds., *Discourse and Democracy: Essays on Habermas’s Between Facts and Norms* (Albany: State University of New York Press, 2002), 186-187. And, as Michael Walzer has noted, “A state that is “liberal and pluralist more than republican” (in the sense of civic virtue and a shared conception of the good) is “necessary if associations are to flourish.” (Walzer, “The Civil Society Argument,” in Chantal Mouffe, ed., *Dimensions of Radical Democracy: Pluralism, Citizenship, Community* [London and New York: Verso, 1992], 98).

for it was clear to the labor organizers that some level of coercion was necessary for them to have any chance at all of succeeding in improving or at least preserving the position of those who worked for wages. And yet in the early nineteenth century, the journeymen's societies had come to act in ways virtually indistinguishable from the other sorts of associations that Americans were beginning to join in great numbers, except for the fact that they placed collective pressures on nonjoiners that were unsettling for many observers. But labor unions also drew up constitutions, distributed them to members, abided by rules and made decisions by direct democratic action or by the constitutionally circumscribed authority of elected officers.<sup>73</sup>

For years, advocates for organized labor had been attempting to state their case by insisting that the rich organized, too. Men such as Frederick Robinson could exclaim: "Who are they who complain of Trades Unions? Are they not those whose combinations cover the land, and who have even contrived to invest some of their combinations with the sanctity of law? Are they not those, who are the owners of all kinds of monopolies, who pass their lives in perpetual caucuses, on 'change, in halls connected with banks, composing insurance companies, manufacturing companies, turnpike, bridge, canal, railroad, and all other legalized combinations?" He could declaim the conspiracy of the "Trades Union of lawyers," and announce that Judge Thacher was "a member of a combination of lawyers, better organized, and more strict and tyrannical in the enforcement of their rules, than even masonry itself." But only Shaw, more calmly, drew

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<sup>73</sup> On constitutionalism and associational practices, see the discussion in this chapter as well as "Librarians Report," Aug. 6, 1831, New York Typographical Society papers, Manuscripts and Archives Division, New York Public Library (charged members 12½ cents to purchase copies of the society constitution); Society of Mechanics and Workingmen, minutes, 1830-1831, New-York Historical Society (operated by ballot and parliamentary procedure, and distributed printed copies of the rules to members); Rock, *Artisans of the New Republic*, 290n.17 ("Four constitutions of New York journeymen societies are extant").

a parallel between the labor union and the temperance society, in which people joined together in support of a shared principle and did everything they could to appeal to the better nature of their neighbors to join in. Only then did the labor union find its place in the American associational landscape.<sup>74</sup>

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<sup>74</sup> Frederick Robinson, *An Oration Delivered before the Trades Union of Boston and Vicinity, on Fort Hill, Boston, on the Fifty-Eighth Anniversary of American Independence* (Boston: Charles Douglas, 1834), 14-15.

## Conclusion

Alexis de Tocqueville's characterization of antebellum America as a nation in which "Americans of all ages, all stations in life, and all types of disposition are forever forming associations" has largely set the terms by which we describe the period, especially since the famous designation by Arthur M. Schlesinger, Sr., that the United States has long been "a nation of joiners." The French traveler was dazzled by the ubiquity and the variety of the phenomenon. "There are not only commercial and industrial associations in which all take part," he wrote, "but others of a thousand different types—religious, moral, serious, futile, very general and very limited, immensely large and very minute."<sup>1</sup>

But voluntary associations captured the imaginations and the anxieties of Americans living in the first decades of the nineteenth century in ways that Tocqueville did not quite capture. William Ellery Channing, for example, a Unitarian minister in New England and participant in no small number of associations himself, took an opportunity in reviewing publications by such admirable groups as the American Unitarian Association, the American Society for the Promotion of Temperance, and the General Union for Promoting the Observance of the Christian Sabbath to observe in 1829 that all such large associations "are perilous instruments" and "ought to be suspected." Both nation and individual might suffer if Americans were not vigilant: "As soon as we find them resolved or disposed to bear down a respectable man or set of men, or to force on the community measures about which wise and good men differ, let us feel that a

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<sup>1</sup> Alexis de Tocqueville, *Democracy in America*, trans. George Lawrence (New York: Harper and Row, 1966), 513; Arthur M. Schlesinger, "Biography of a Nation of Joiners," *American Historical Review*, 50 (1944): 1-25.

dangerous engine is at work among us, and oppose to it our steady and stern disapprobation.” Formal, concerted action created great possibilities, and American observers saw that those possibilities could include dangerous abuses of private power. Baptist minister Baron Stow was more concerned in 1837 with “the natural, the actual tendency of Voluntary Associations” to “reduce the authority or debilitate the energy of the individual conscience.” These “instruments of Power,” he told his congregation, have both uses and abuses. The Reverend Dura Pratt, a few years later, made much the same point to his congregation, noting that the “power accumulated” in the voluntary group life of antebellum America “is in danger of becoming arbitrary and oppressive.”<sup>2</sup>

Such concerns are but one signal to historians that the first generations of Americans who joined together did so while fully aware that the exercise of associational authority ought to be circumscribed and delimited within the bounds of fairness and justice. Where other scholars have traced the rational concerns and irrational fears that early national voluntary associations might fragment an ideally cohesive society and usurp the voice of the people, this dissertation has explored a wholly different but no less significant assemblage of fears. In the post-Revolutionary era, there were anxieties too that, unless the member-to-group relationship was well defined and properly superintended, American voluntary associations might destroy the very autonomy of the individual American citizen that they were intended to enhance. Thus, within the associations that they formed, men and women of the post-Revolutionary period came to embrace a constitutional, procedurally circumscribed way of acting collectively. And,

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<sup>2</sup> [Channing], Article V in *Christian Examiner and General Review*, 7 (1829): 123; Baron Stow, *Voluntary Associations—Their Use and Abuse: Discourse Delivered in the Meeting House of the Second Baptist Society, in Baldwin Place, Thanksgiving-Day, November 30, 1837* (Boston: Gould, Kendall, and Lincoln, 1837), 7, 15; Dura D. Pratt, *Voluntary Associations: A Discourse delivered Oct. 10, 1841, in the First Baptist Meeting House, Nashua, N.H.* (Nashua, N.H.: C. P. Danforth, 1841), 12.

what is more, in moments of dispute, some of these people in this nation of joiners would call on an outside authority—be it legislative, judicial, or popular opinion—to correct apparent injustices in these private associations.

This dissertation has shown the experiential means by which Americans came to hold certain ideas about the meanings and consequences of voluntary affiliation. Because of the ways that the first generations of Americans came to define the nature of the member-to-group relationship across a wide array of voluntary associations, American civil society came to take on a distinctively liberal cast, in its reliance upon adversarial legalism and procedural formalities to reconcile conflict, even in what were ostensibly private, wholly voluntary groups. The experience of voluntary affiliation was shaped by conflict and unforeseen debates regarding the rights and duties of membership. And in societies ranging from religious groups to mutual insurance companies to labor unions there were articulate discussions of what constituted consent, of how people ought to enter and exit, and what the relationship among members ought to look like. Unsteadily, the day-to-day experiences of association prompted jurists, joiners, and organizers to spell out with greater clarity and precision the rights, duties, and expectations of membership. Procedural fairness came to be seen as key, both among members themselves and on the part of courts that, through the 1830s, continued to play a key role in shaping American civil society by enforcing the idea that people carried rights into these relationships, rights that merited legal superintendence.

The causes of these changes were diverse and complex. Debates of the late eighteenth and early nineteenth centuries about the nature and the role of voluntary societies in the political, religious, and economic realms of the new American republic

helped to set the stage for a development unique to the first third of the nineteenth century: direct judicial involvement in the interior world of voluntary associations. That latter development reinforced trends that had already begun within early fraternal societies, in which members increasingly emphasized a legalistic understanding of membership as opposed to an older conception focused on affection and friendship. Organizers and joiners no less than the legal institutions that sometimes adjudicated internal disputes came to see that, rather than bonds of affection, associations were held together by individual, fully voluntary decisions to bind oneself on known and definite terms and by adherence to rules and fair procedure. And courts in the first third of the nineteenth century—not before and, more surprisingly, not after—were quite willing to involve themselves in the internal affairs of these groups, articulating a common law of membership. Certain powers were seen as vital to any group’s good government, but those powers were always to be in check. And those checks were not merely charter-derived constraints against ultra vires action by incorporated bodies: broader principles of justice were imposed upon associations in a way as yet unexplored by historians. And Americans came, by experience and contest, to hold ideas about associations and the bonds of membership that were not at all in mind just after the Revolution.

The state played an important role here, if only for a few, distinctly post-Revolutionary decades. In the second third of the century, certain conceptions of voluntary membership had become so generally accepted that the judicial superintendence of private associations could become less direct, resting on the broadest schema of procedural expectations. The jurisprudence of associations could move toward one in which courts would take a more hands-off approach to matters of internal

governance, in which “the sentence of the society, acting in a judicial capacity and with undoubted jurisdiction of the subject-matter, is not to be questioned,” as Pennsylvania chief justice John Bannister Gibson would decide in 1837. Without doubt, obvious injustices would find their way into courts long after this turn, often as breaches of contract, and incorporated and unincorporated associations and their officers would continue to find themselves called to account for actions affecting an aggrieved member, albeit in new legal, equitable, and administrative venues and under different pretences. In the early national period, though, American jurists adapted principles derived from many sources, including traditional, common laws of municipal corporations and the latest political theory regarding just government, to apply to this panoply of private bodies that were filling the American landscape. And organizers and joiners, too, were drawing from earlier associational forms and were looking forward, seeking to create more perfect modes of organization.<sup>3</sup>

The definitions and redefinitions of the concept of voluntary affiliation in the early United States that are explored in this dissertation were the unplanned offspring of attempts to make collective action and cooperative endeavor a reality in an age of social flux and political revolution. The challenges of minority rights and majority rule were not only being worked out in the broader political sphere. They were being experienced in settings far more intimate and, in many cases, in ways much more directly felt.

The intricacies of procedural formalities within the group life of the early United States—and, more importantly, the manner in which many Americans came to demand a strict adherence to process—was the key to the formation of an associational

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<sup>3</sup> *Black and White Smiths’ Society v. Vandyke*, 2 Whart. (Pa.) 309, 312 (1837).



world that fit the laws, mores, and perceived needs of a post-Revolutionary society. Civil society rested on assurances that individual autonomy would not be allowed to fall victim to private authority in the legal regimes and in the political culture of the United States. This dissertation has described the contested, unsteady formation of a new way of thinking about voluntary association: it became increasingly formal, legalistic, and attenuated; individual autonomy was not to be constrained beyond certain limits (such as limiting their ability to act as an independent political actor); and the early national state played a role in creating a more liberal society by extending civil rights into associational life and setting parameters around when and how someone could be rejected from an association. By the second decade of the nineteenth century, the rights and duties of membership were bounded by a recognizably modern and liberal framework of procedural fairness.

In a manner unique to post-Revolutionary American political culture, they saw these constitutionally organized bodies that they were forming among themselves as being effectively encompassed and superintended by the legal and political institutions of their governments. The everyday experience of constitutional self-government gave American men and women opportunities to confront directly the tensions between individual autonomy and collective action. And in this post-Revolutionary moment, they found legalistic, well-defined modes of organization as well as external, legal superintendence of claims of private governing authority to be the best means to ensure that authority was circumscribed; that their organizations did not stray from their intended purposes; and that individuals had institutional means of righting injustices.

They came to form for themselves an idea of what constitutional self-government meant in the new United States.