A Common Law of Membership: Expulsion, Regulation, and Civil Society in the Early Republic

In 1813, William Stewart found himself estranged and expelled from the Philanthropic Society of the City and County of Philadelphia, one of countless mutual aid organizations that had formed in the young American republic to allow contributing members to draw upon the society's funds in time of need. Stewart informed the society of an illness and, in accordance with the institution's regulations, had presented a physician's bill for forty dollars, which he claimed to have paid. Stewart 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 attempt to defraud his fellow members, the society denied his request and promptly terminated his membership. The society's constitution permitted the expulsion of those "concerned in scandalous or improper proceedings which might injure the reputation of the society."[1]

Shamelessly, Stewart went to court. The Philanthropic Society had been formally incorporated by special charter, as had many similar organizations in Pennsylvania. Many other organizations were incorporated under one of the first general incorporation acts in history. Passed in 1791, the Pennsylvania law permitted the speedy incorporation of literary, charitable, and religious associations. Thus, Stewart could call for a writ of mandamus to compel the society, which was, in a formal sense, a creation of the state, to restore him to "the standing and rights of a member

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[1] *Commonwealth v. Philanthropic Society*, 5 Binn. (Pa.) 486 (1813); *Constitution of the Philanthropic Society, Established at Philadelphia, May 6th, 1793: Incorporated the Seventh Day of January, 1799* (Philadelphia, 1808).

of the Philanthropic Society." He asserted that the question of whether his conduct had, indeed, injured the society's reputation had not been formally noted in the minutes of his expulsion proceedings. Chief Justice William Tilghman would have none of it, noting that "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.[2]

The episode itself reveals a great deal about how Americans conceived of voluntary membership and the regulation of private associations in the decades following the Revolution. Stewart knew where to turn if he was unhappy with an organization's decisions 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, invoked specific constitutional articles and terms of agreement in justifying, to a panel of judges, its decision to expel Stewart. Even in these early years of the Republic, as some of the very first contests over the limits of the authority of voluntary groups over their members played out in the courts, the participants, including Tilghman, seemed to know their roles. But what is remarkable about the Stewart case 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 English and American law cases regarding expulsions and the contested rights of membership. He found in Stewart's case something "very rare in the authorities, an instance of expulsion that was sustained." In reported appellate cases, courts often compelled an organization to readmit a member they believed had been wronged, even when no property was at stake. To understand what voluntary membership meant in the early American republic, it is clear that we must know what happened when the relationship between society and member broke down.[3]

Historians have yet to explore in any detail the legal consequences of voluntary membership in the early years of the United States. As the

[2] *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.

[3] George W. Woodward, writing at nisi prius, Mar. 11, 1864, quoted in *Evans v. Philadelphia Club*, 50 Pa. 107 (1865). The distinction between actions at law, which were applicable in cases of expulsion only when property was at stake, and petitions for readmission by mandamus is well described in *Fuller v. Trustees of the Academic School in Plainfield*, 6 Conn. 532 (1827).

numbers and varieties of voluntary organizations, as well as the numbers of members, increased in the postrevolutionary decades, there was a perceived and often explicitly expressed need to define what, precisely, such membership entailed. Largely because so many associations had been formed in Philadelphia and the surrounding areas by the turn of the nineteenth century, Pennsylvanians played a leading role in shaping both popular perceptions and legal definitions of voluntary membership. According to Philadelphia economist Samuel Blodget, by creating formally organized, rule-bound, and wholly voluntary associations, Americans were forming "minor republics." Similar notions of associational activity have prompted historians of democratic civil society to question how Americans came to terms with the unanticipated prevalence of such entities *within* a republic, particularly one that the founding generation had hoped would never become so fragmented.[4] Scholars 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—one integral to the success of the whole republican experiment—between the state and its people.[5]

[4] [Samuel Blodget], *Economica: A Statistical Manual for the United States of America* (1806; repr., New York, 1964), 12, 19, 199–200; Johann N. Neem, *Creating a Nation of Joiners: Democracy and Civil Society in Early National Massachusetts* (Cambridge, MA, 2008); 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): 259–90; Pauline Maier, "The Revolutionary Origins of the American Corporation," *William and Mary Quarterly*, 3rd 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, MA, 1969).

[5] 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, MA, 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*, 3rd ser., 58 (2001): 615–36; Albrecht Koschnik, *"Let a Common Interest Bind Us Together": Associations, Partisanship, and Culture in Philadelphia, 1775–1840* (Charlottesville, VA, 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 *Launching the "Extended Republic": The Federalist Era*, ed. Ronald Hoffman and Peter J. Albert (Charlottesville, VA, 1996), 273–377; Joanna Brooks, "The Early American Public Sphere and the Emergence of a Black Print Counterpublic," *William and Mary Quarterly*, 3rd ser., 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 *Beyond the Founders: New Approaches to the Political History of the Early American Republic*, ed. Jeffrey L. Pasley, Andrew W. Robertson, and David Waldstreicher (Chapel Hill, NC, 2004), 207–50.

The act of joining virtually any formally organized group created rights and duties that had not existed before, ranging from the frivolous to the vitally important, but we know very little about what they were and, more importantly, what happened when they went unprotected or unfulfilled. Historians have begun to move beyond simple applications of Habermasian theory to their subject matter. Indeed, they are beginning to question the relevance of Habermas's work for understanding the political culture of the early United States. And, yet, the emphasis of Habermas and other critical theorists on communication, deliberation, and a civic associational life sheltered from the state has, thus far, led scholars to neglect many of the internal matters to which men and women of the postrevolutionary period devoted a great deal of attention. Setting those affairs into the relevant historical context can help us to see the ways that cultural, legal, and political conceptions of the nature of voluntary membership itself—what people thought it meant to become a member—shaped civil society, both macroscopically and in how it was experienced by the organizers and joiners themselves. Furthermore, conflicts over associational benefits and obligations can help better delineate Americans' changing notions of personal rights and duties in other contexts, including citizenship. In the formative decades of American associational life, disputes over the meanings and limits of voluntary membership reveal citizens, both in their individual experiences and in the discourses and institutions of law and politics, attempting to identify a conception of voluntary belonging suitable for a republic committed to ideals of both popular and personal sovereignty—two quite different meanings of the term *self-government*.

Just as the astonishing growth in the numbers and varieties of voluntary associations in the first several decades of the new nation has been treated as a historical event that requires explanation and interpretation, the forms those associations took, the allocation of authority within them, and the modes of interpersonal relationships created by formal concerted action need to be understood historically as well. A bitter conflict in 1807 between two Philadelphia printers provides an opportunity to explore those themes further. The controversy began when William Duane had 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, complaining of the tyrannies and injustices in each and every

instance. 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 people working to define the nature of voluntary membership. In the process, Americans laid a substructure for the development of a new civil society grounded in the common law and shaped by postrevolutionary conceptions of personal rights.[6]

The consequences of the jurisprudential efforts to define and delimit the power of voluntary associations over their members are striking. In this case, the Commonwealth of Pennsylvania acted decisively to place early American voluntary associations on an unquestionably liberal foundation. By emphasizing the legal origins of associational authority as opposed to a rival, affective vision of concerted action that saw the powers of voluntary associations as deriving from the mutual agreement and camaraderie of their members, the Pennsylvania Supreme Court proved willing to bring the St. Patrick's Benevolent Society within the embrace of a larger framework of civil rights.

That development, and the broader trend it reflects as to how Americans were beginning to conceive of authority and belonging in any social relationship, suggests a new possibility 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, postrevolutionary commitment to the principle that civil rights and fair procedure should be brought to bear in increasingly diverse areas of social activity. Even as scholars have become better aware of the active hand of governments in

[6] 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. See 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. The literature has become too vast in the last three decades 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): 511–57; Jason Mazzone, "Organizing the Republic: Civic Associations and American Constitutionalism, 1780–1830" (JSD diss., Yale Law School, 2004); Theda Skocpol, *Diminished Democracy: From Membership to Management in American Civic Life* (Norman, OK, 2003); John L. Brooke, "Cultures of Nationalism, Movements of Reform, and the Composite-Federal Polity: From Revolutionary Settlement to Antebellum Crisis," *Journal of the Early Republic* 29 (2009): 1–33, in addition to the work cited in the preceding two notes.

shaping early American civil society, our understanding of an emerging law of membership remains unclear. The government and organizations codified legal and political rights in charters and articulated a common law of membership. These rights ultimately defined the nature of American civil society, developed in practice more than in theory, and were tested in the organization of new societies and in moments of conflict between members and associations. An extraordinarily influential and revealing moment occurred when a friendship between William Duane and John Binns came to a sudden end.[7]

* * *

John Binns emigrated from Dublin to London to Northumberland, Pennsylvania, where he arrived in 1801 and renewed an acquaintance with William Duane, whom he 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 went to Philadelphia to set up a newspaper that was 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 scholarship has shown, his use of membership in these clubs as a gateway into local politics should come as no surprise.[8]

[7] One common feature in descriptions of a liberal political philosophy, namely 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, CA, 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): 752–72.

[8] Koschnik, *"Let a Common Interest Bind Us Together"*; Andrew Shankman, *Crucible of American Democracy: The Struggle to Fuse Egalitarianism and Capitalism in Jeffersonian Pennsylvania* (Lawrence, KS, 2004), 92–94, 173–74; Sanford W. Higginbotham, *The Keystone in the Democratic Arch: Pennsylvania Politics, 1800–1816* (Harrisburg, PA, 1952), 136–39; Kim Tousley

As a result of that year's elections and the always tenuous relationship between the urban radicals (whom Duane spoke for) and Simon Snyder's rural democrats (for whom Binns printed the party line), the two men very soon had a falling out. Duane had Binns expelled from the Tammany Society, a club that, according to a moderate Republican newspaper, Duane, his son, and Michael Leib ran with a tyranny "unexampled in the most despotic governments of the world." At about the same time, Binns was also expelled from another political organization called the Society of Friends of the People, from two private militia corps, and from the St. Patrick Benevolent Society.[9]

The conflict began in late August 1807, when Binns began running a series of letters signed "Veritas" in which he attacked Michael Leib's political practices. In an angry letter on September 2, "Veritas" discussed Leib's tactics as president of the Society of Friends of the People. He questioned, "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, he called Duane "a man of talents, who has rendered important services to the democratic cause," but who was simply far too attached to the conniving Leib.[10]

Phillips, "William Duane, Revolutionary Editor" (PhD diss., University of California, Berkeley, 1968), 228–34; Kim T. Phillips, "William Duane, Philadelphia's Democratic Republicans, and the Origins of Modern Politics," *Pennsylvania Magazine of History and Biography* 101 (1977): 365–87; Richard J. Twomey, *Jacobins and Jeffersonians: Anglo-American Radicalism in the United States, 1790–1820* (New York, 1989), 24–29, 54–56, 68–69, 108–11; Jeffrey L. Pasley, *"The Tyranny of Printers": Newspaper Politics in the Early American Republic* (Charlottesville, VA, 2001), 314–19; Worthington C. Ford, ed., "Letters of William Duane," *Proceedings of the Massachusetts Historical Society*, 2nd ser., 20 (1907): 257–394; *The Constitution of the St. Patrick Benevolent Society* (Philadelphia, 1804), 1; James Mease, *The Picture of Philadelphia* (1811; repr., New York, 1970), 287.

[9] *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.

[10] *Aurora*, Oct. 20, 1807, quoted in David A. Wilson, *United Irishmen, United States: Immigrant Radicals in the Early Republic* (Ithaca, NY, 1998), 73; *Democratic Press*, Aug. 26, Sept. 2, Sept. 4, Sept. 25, 1807.

That same edition of Binns's *Democratic Press* began telling the saga of his expulsion from those clubs he had joined upon arriving in Philadelphia. The night before, at a meeting of the Society of Friends of the People, Duane had denounced Binns. Binns described Duane's attack as "in substance the same as his denunciation of this paper, but particularly distinguished by vulgar epithets and indecent allusions." When Binns and others had left the room after their committee had reported, and "under the impression that no other business would then be submitted," Duane acted. "A motion was made that John Binns be expelled [from] 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.[11]

In early October, a month before the St. Patrick Benevolent Society would meet and vote to expel Binns, Duane's *Aurora* announced that Binns had been expelled from four organizations. Those dismissals were evidence that he "must be considered . . . a *public disturber*." Binns used his own newspaper to respond point by point. As far as the militia companies were concerned, Duane was factually wrong: Binns remained a member of one and never had been a member of the other. Regarding 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?" On October 9, just a few days before the state election, Binns printed a letter, signed "No Body," that 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 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. It is also

[11] *Democratic Press*, Sept. 25, 1807.

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 clubs, was to be exercised fairly, justly, and democratically.[12]

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 expelled), 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, the 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. Perhaps it even played some role in his humiliating loss in the state senate race and the narrow reelection of Leib in a safe district on October 13.[13]

Before that election, Binns cited 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 and into later years. In his famous 1809 "tyranny of printers" letter, Alexander Dallas wrote that the only issue left to be decided in Philadelphia was "the question whether Binns or Duane shall be the dictator."[14]

In the St. Patrick Benevolent Society, however, there was no question. When Duane sought Binns's expulsion, he got it, with seventy votes out

[12] *Aurora*, Oct. 3, 1807; *Democratic Press*, Oct. 5, Oct. 9, 1807.

[13] *Democratic Press*, Oct. 5, Oct. 8, 1807; Shankman, *Crucible of American Democracy*, 179–80.

[14] *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.

of seventy-one. The charges brought against him in November 1807 were that he had broken a bylaw that, according to Duane, made "villifying any of its members" a "crime against the society." 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 into evidence a pamphlet copy of the club's constitution with the relevant passages underlined.[15]

Binns seized upon the fact that the society held a state charter 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 on New Year's Eve 1807 ordered William Duane, as organization president, either to readmit Binns or show cause for his expulsion. Duane chose the latter course—no one expected him to do otherwise—and described 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." For insulting the reputation of a fellow member, the association charged Binns with "violating his obligation to the said Society." He could not be restored to membership.[16]

Binns's argument in court began with the fact that the St. Patrick Benevolent Society had been 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." This bylaw, however, 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

[15] 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.

[16] 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.

by the same principle regulate their behavior to the rest of the world." Last, the state's attorney cited *Rex v. Richardson*, for the first time in an American courtroom, which 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 points stand out in Binns's effort to regain his 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.[17]

Duane's attorney's first words were "This is the case of a private charitable institution." Thus, he contended, the society was not to be ruled by the sort of laws that governed incorporated municipalities. Rather, a club like this depended "for its existence upon the admission of new members, and upon the contribution of such as voluntarily continue to be members." He made 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 the General Assembly, the charter, and the common law. Duane's view, which emphasized the association's need for affection and mutuality as evidence that a bylaw against besmirching a fellow member's reputation was perfectly legitimate, fell flat. The Pennsylvania Supreme Court would invoke principles derived from the common law, not notions of affinity or sociability, 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," suggesting that it was

[17] An Act to Confer on Certain Associations of the Citizens of this Commonwealth the Power and Immunities of Corporations, or Bodies Politic in Law (Apr. 6, 1791), *The Statutes at Large of Pennsylvania from 1682 to 1801*, 18 vols. (Harrisburg, PA, 1896–1915), 14:50–53; *Commonwealth v. St. Patrick Benevolent Society*, 2 Binn. (Pa.) 441, 443–45 (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, PA, 1837–38), 1:339–496; J. Alton Burdine, "Governmental Regulation of Industry in Pennsylvania, 1776–1860" (PhD diss., Harvard University, 1939).

not simply common-law notions of corporators' rights that were at issue. Rather, those legalistic conceptions were being understood in a way very much influenced by the recent republican revolution.[18]

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. In 1809, he became a member of the Hibernian Society, an older and relatively conservative Philadelphia club for Irishmen, 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 candidate 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, for John Binns, all that was quite beside the point. He saw an injustice—and an opportunity to attack a political opponent, albeit one who held no office, for being a despot—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 society represented an attempt to separate Binns from Philadelphia's Irish community, a threat to his Irishness. Regardless of 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."[19]

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

[18] *Commonwealth v. St. Patrick Benevolent Society*, 2 Binn. (Pa.) 441, 445–47 (1810).

[19] Judith N. Shklar, *Ordinary Vices* (Cambridge, MA, 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, 1892), 177–78, 349–50; Higginbotham, *Keystone in the Democratic Arch*, 214–16; Margaret H. McAleer, "In Defense of Civil Society: Irish Radicals in Philadelphia during the 1790s," *Early American Studies* 1 (2003): 176–97.

of the English practice of voiding corporate bylaws "repugnant" to the laws of the land, which "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 is even greater. It created a means by which much associational activity, which foreign-born observers like Alexis de Tocqueville and Francis Lieber considered a defining feature of American society, could be superintended by legal and political institutions whose authority rested on popular sovereignty.[20]

But there is more at issue here than the concession theory of corporate existence, or the idea that any and all corporate 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 were expressed in the ways 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—and closely construing the corporation's statutory origins. Cases involving churches, business corporations, mutual insurance societies, and professional societies, to name a few, all provide similar stories of people attempting to understand precisely what voluntary membership was and what rights and duties accompanied it. Such jurisprudence reflects broader trends in American voluntary associations, even when there was no existing corporate charter (making it less likely that courts would involve themselves directly, though not entirely so).[21] It also played a formative role as

[20] Mary Sarah Bilder, "The Corporate Origins of Judicial Review," *Yale Law Journal* 116 (2006): 502–66, quotation on 504; Philip Hamburger, "Law and Judicial Duty," *George Washington Law Review* 72 (2003–4): 1–41; William J. Novak, "The American Law of Association: The Legal-Political Construction of Civil Society," *Studies in American Political Development* 15 (2001): 163–88; William J. Novak, "The Legal Transformation of Citizenship in Nineteenth-Century America," in *The Democratic Experiment: New Directions in American Political History*, ed. Meg Jacobs, William J. Novak, and Julian E. Zelizer (Princeton, NJ, 2003), 85–119; Theda Skocpol, "The Tocqueville Problem: Civic Engagement in American Democracy," *Social Science History* 21 (1997): 455–79; 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): 527–46.

[21] For examples, see Scott Gregory Lien, "Contested Solidarities: Philanthropy, Justice, and the Reconstitution of Public Authority in the United States, 1790–1860" (PhD diss., University of Chicago, 2006); Carol Weisbrod, *The Boundaries of Utopia* (New York,1980); *Babb v. Reed*, 5 Rawle

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 greatly influenced broader developments in American corporate law. Indeed, in the same year that Binns and Duane were battling in Philadelphia, an American court for the first time made clear that membership in a business corporation could rest only on voluntary consent. The Massachusetts Supreme Judicial Court ruled that William Marshall's refusal to agree expressly to membership in the Front Street Corporation in Boston freed him from liability for corporate assessments; he could not be compelled to join. And the same generation was beginning to better understand how and when a majority could bind a minority, in both incorporated and unincorporated societies. In an unchartered association, no change was permissible without unreserved and unanimous consent. Some special agreement could be made at the outset defining a mode of amendment as to how, exactly, a majority may bind the minority. "[B]ut 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 its funds to pursue a business outside the scope of its articles of agreement was well established in the early nineteenth century.[22]

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 objectives and the means to be employed in pursuit of them, nothing can "properly be changed in any essential particular, without unanimous consent." This makes such an association "from the nature of the case, essentially unalterable." James

(Pa.) 151 (1835); *Duke v. Fuller*, 9 N.H. 536 (1838). The most articulate case on the incorporated/unincorporated distinction is *Hess v. Werts*, 4 Serg. and Rawle (Pa.) 356 (1818).

[22] *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, GA, 1994), 134; Dale A. Oesterle, "The Formative Contributions to American Corporate Law by the Massachusetts Supreme Judicial Court from 1806 to 1810," in *The History of the Law in Massachusetts: The Supreme Judicial Court, 1692–1992*, ed. Russell K. Osgood (Boston, 1992), 137–39; Handlin and Handlin, *Commonwealth*, 21–22; *Livingston v. Lynch*, 4 Johns. (N.Y.) 573, 582 (1820).

Willard Hurst has also argued that the extension of such a principle to corporate law, namely the requirement of unanimous consent to amend the charter, would have hindered the sort of "flexible continuity" that was appealing in the increasingly unpredictable American marketplace of the early nineteenth century. And though legislators and jurists worked diligently to facilitate corporations' ability to change, they also worked to ensure that those powers to evolve remained within reasonable bounds. There was a 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 a venture to which he or she had never assented.[23]

Such ideas shaped how Americans understood and adjudicated cases regarding expulsion and the rights of membership in private associations. The oversight of private groups by democratically legitimated institutions 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 discussed 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."[24]

The court's reasoning merits examination, for in his opinion Chief Justice Tilghman directly addressed and, somewhat surprisingly, found a way to balance 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." This truth gave him "a mind strongly disposed to give a liberal construction" to the society's powers. Duane's attorney had emphasized the importance of

[23] Francis Wayland, *The Limitations of Human Responsibility* (Boston, 1838), 110; James Willard Hurst, *The Legitimacy of the Business Corporation in the Law of the United States, 1780–1970* (Charlottesville, VA, 1970), 25. Of course, any corporate charter or contract can be amended, 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*, 2nd American ed. (Philadelphia, 1830), app. 2, 576–95.

[24] Joseph K. Angell and Samuel Ames, *A Treatise on the Law of Private Corporations, Aggregate* (Boston, 1832), 239–43.

a union of sentiment in the society, claiming that "the instant that personal abuse and vilification of the members are permitted, that instant the society decays." It was an affective—as opposed to legalistic or contractual—understanding of the St. Patrick Benevolent Society, in which common feeling, not contracts or charters, held the association together. That perception of the whole affair was reaffirmed in the weeks leading up to the court's mandamus hearing. Duane's *Aurora* published the society's proceedings on May 17, 1810, which included the announcement that "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, in 1798, had betrayed a fellow Irish nationalist, who was then 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.[25]

Tilghman, however, took such assertions—that sentimental bonds were the basis for effective association—to help craft a liberal principle around which to organize civil society in the early United States; it became an influential legal precedent. "Taking cognizance of such offenses" like 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 postrevolutionary age that increasingly saw association as an effective means to improve the human condition, that was not to be allowed. And it was not an isolated position, relevant only to Binns and Duane. Rather, Tilghman noted, it was 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."[26] The Pennsylvania judiciary and jurists around the country seized on this principle, as evidenced by the number of times the case was cited in subsequent cases and treatises. As Justice John Bannister Gibson noted in 1822, the commonwealth's courts had come to stand as a "superintending power" over all the "inferior associa-

[25] *Aurora*, Mar. 20, 1810. On the betrayal of James O'Coigley, see Wilson, *United Irishmen, United States*, 73–74; E. P. Thompson, *The Making of the English Working Class* (New York, 1966), 169–74; [John Binns], *Trial of Edward Lyon, (of Northumberland) for Subornation of False Swearing . . .* (Philadelphia, 1816).

[26] *Commonwealth v. St. Patrick Benevolent Society*, 2 Binn. (Pa.) 441, 450 (1810).

tions" of American civic life.[27]

John Binns's court-ordered membership in the Irish benevolent society reflected both broader postrevolutionary notions of legitimate associational activity and jurists' willingness to bring common-law principles of members' rights and duties to bear in internal operations. This liberal conception influenced the jurisprudence regarding early national voluntary associations. According to political theorist Nancy Rosenblum, liberalism "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, the court declared that John Binns, a rude club member who received only one vote in his favor out of seventy-one votes cast, was a man improperly stripped by "the uncertain will of a majority of the members" of "the right of membership."[28]

The struggles within an Irishmen's society demonstrate some of the ways in which anxieties about partisanship and ethnic division were partially determinative of the shape of civil society. Though scholars have recently made us aware of the role formally organized associations—ranging from militias to banking companies—played as structures around which American partisanship could develop, the opposite was also true: as some groups embodied the excesses of factionalism (challenging notions of popular sovereignty) and of overly strong or corrupt private government (challenging newly forming liberal notions of personal sov-

[27] *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). On the direct and indirect influence of *Commonwealth v. St. Patrick Benevolent Society*, see Angell and Ames, *Treatise on the Law of Private Corporations*, 239–43; *Vivar v. Supreme Lodge of the Knights of Pythias*, 52 N.J.L. 455, 461 (1890); *Otto v. Journeyman Tailors' Protective and Benevolent Union*, Note, *American State Reports* 7 (1889): 160–70; *Baird v. Wells*, 44 Ch.D. 861 (1890); *McGuiness v. Court Elm City, No. 1*, Note, *American and English Annotated Cases* 3 (1906): 211–17; *Del Ponte v. Societa Italiana*, Note, *American State Reports* 114 (1907): 24–30; *Tarbell v. Gifford*, Note, *American and English Annotated Cases* 17 (1910): 1145–46; *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): 828–29; *Robinson v. Templar Lodge*, Note, 117 Cal. 377 (1897); Seymour D. Thompson, "Expulsion of Members of Corporations and Societies," *American Law Review* 24 (1890): 537–58.

[28] Nancy L. Rosenblum, *Another Liberalism: Romanticism and the Reconstruction of Liberal Thought* (Cambridge, MA, 1987), 162. The pioneering work on notions of private governing power is Grant McConnell's *Private Power and American Democracy* (New York, 1966); McConnell, "The Spirit of Private Government," *American Political Science Review* 52 (1958): 754–70; 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, Interests, and the Concept of 'Public,'" in *Public Values and Private Power in American Politics*, ed. J. David Greenstone (Chicago, 1982), ix–xiv, 3–33.

ereignty), Americans responded. Citizens called upon political and legal institutions in ways that helped give American civil society a recognizably liberal cast. This tendency was also apparent quite early in unchartered associations, in the form and content of their constitutions and rules, and in the ways many members doggedly adhered to them and to broader principles of justice and procedural fairness.[29]

In the early American republic, numerous associations faced accusations of private tyranny. In 1806, the Philadelphia judge in the first American labor case described a cordwainers' union as violating both the law and "the spirit of '76" when this "new legislature composed of journeymen shoemakers" told members what wages they could and could not earn. It thereby bound them to a rule other than "the [state] constitution, and laws adopted by it or enacted by the legislature in conformity to it." How such challenges were addressed in the republic's formative years offers new perspective on the theoretical division between civil society and government. Americans of this period were not only aware of concerns about private authority, but they were becoming increasingly confident that procedural formality, law, and representative government were the media through which such concerns should be channeled and resolved.[30]

All this does not mean that contemporary social theorists' insights about civil society are of no use to historians of the early republic. Habermas himself has been attentive to how the "repressive and exclusionary effects of unequally distributed social power" are more likely to arise in the comparatively anarchic public sphere than in political institutions. But he and other theorists who adhere to his analytical model tend to oppose legalistic constraints on associations as part of their instinctive resistance to the domination of that sphere by state power of any sort. Such scholars have emphasized the communicative autonomy of individ-

[29] 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*, 3rd ser., 65 (2008): 233–66; and the works by Brooke, Koschnik, and Neem cited above.

[30] *The Trial of the Boot and Shoemakers of Philadelphia . . .* (Philadelphia, 1806), 148; Christopher L. Tomlins, *Law, Labor, and Ideology in the Early American Republic* (New York, 1993); Robert J. Steinfeld, *The Invention of Free Labor: The Employment Relation in English and American Law and Culture, 1350–1870* (Chapel Hill, NC, 1991). Steinfeld extends the time line on the changes he charts further into the nineteenth century in "Changing Legal Conceptions of Free Labor," in *Terms of Labor: Slavery, Serfdom, and Free Labor*, ed. Stanley L. Engerman (Stanford, CA, 1999), 137–67.

uals who sought to unite in order to amplify their voices in the public sphere; the personal autonomy of those men and women has been of secondary interest, at best. Where scholars have paid attention to the issue of internal allocations of authority, it has tended to come from those writing from a non-Habermasian perspective. Many feminist scholars, in particular, have supported a legalism and independent court supervision of associational life in ways that other political theorists have abjured. According to Anne Phillips, private groups can be "much more coercive and less protective of individual equalities and freedoms than the much-despised institutions of the state."[31]

As helpful as Habermasian ideas have been for our understanding of the early republic, then, an emphasis on communicative autonomy has obscured something important about the postrevolutionary moment. The liberating effects of the American Revolution are evident *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 were to be protected. And such prescription led to, among other things, the proscription of unjustifiable expulsions. In unchartered associations, no less than in chartered ones, there was a tendency to evoke discourses of rights and fair procedure, arising both from within the societies and from without. In chartered groups, courts would act directly to secure those rights and duties that the members had voluntarily assumed. By the early nineteenth century, there was something definitively liberal about the manner in which members organized, entered and exited, and superintended voluntary associations.

In one sense, this focus on the meanings and rights attached to membership in private associations accords perfectly both with the "common-

[31] Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, trans. William Rehg (Cambridge, MA, 1996), 307–8; Michael Walzer, "The Civil Society Argument," in *Dimensions of Radical Democracy: Pluralism, Citizenship, Community*, ed. Chantal Mouffe (London and New York, 1992), 104; Anne Phillips, "Does Feminism Need a Conception of Civil Society?" in *Alternative Conceptions of Civil Society*, ed. Simone Chambers and Will Kymlicka (Princeton, NJ, 2002), 71–89, quotation on 81; Susan Moller Okin, *Justice, Gender, and the Family* (New York, 1989); Carol C. Gould, *Rethinking Democracy: Freedom and Social Cooperation in Politics, Economy, and Society* (New York, 1988), 293–94. The work of the liberal theorist Nancy Rosenblum has been extremely helpful in my understanding of feminist contributions to the civil society literature. See her "Feminist Perspectives on Civil Society and Government," in *Civil Society and Government*, ed. Nancy L. Rosenblum and Robert C. Post (Princeton, NJ, 2002), 151–78, and her contributions to Rosenblum, ed., *Obligations of Citizenship and Demands of Faith: Religious Accommodation in Pluralist Democracies* (Princeton, NJ, 2000).

wealth school" of historical work (Oscar and Mary Handlin, particularly, and their emphasis on the active hand of government in what formerly had been considered a private sphere of corporate activity) and with recent work on police and regulation in the early nineteenth-century United States. In both schools, there is an emphasis on the close relationship of state authority and so-called "private" institutions like corporations. But the Handlins and other "commonwealth" historians were far more attuned to the relationship of these associations to the broader body politic than they were to concerns about internal group relationships. And William Novak, who has addressed the issue directly, is certain that the jurisgenerative capacity of such societies (the power to pass laws, to act upon their members) operated largely unchecked. He argues that a person's "bundle of rights and duties" could be determined by "a very complicated and varied tally of the rules, regulations, and bylaws of the host of differentiated associations to which he belonged." Such a view is jurisdictional rather than jurisprudential, and Novak finds nothing to "trump or limit the power of these majoritarian organizations." But the Binns-Duane affair helps to uncover just how notions of personal self-government and of a society's political self-government, in practice, gave shape to American civil society in the immediate postrevolutionary era. These ideas determined not only how people perceived, but also how courts policed, the rights and duties of membership.[32]

This perspective on developing notions of voluntary association reveals a long-neglected aspect of one state's regulatory power over many of its private groups, but it is regulation of a distinct sort. The state was not so much pursuing its own agenda as it was being called upon by the people to enforce prevailing, prescriptive standards of membership and association. Concerns about the effects of factionalism (in this case, the ethnopolitical solidarity of an Irishmen's association) and of private governing power in a youthful republic amplified the trend toward a legalistic understanding of voluntary membership that favored individuals' rights. And such efforts to prevent internal injustices and to better define voluntary engagement produced new and consequential views on personal rights.

[32] Handlin and Handlin, *Commonwealth*; Louis Hartz, *Economic Policy and Democratic Thought: Pennsylvania, 1776–1860* (1948; repr., Chicago, 1968); Harry N. Scheiber, "Private Rights and Public Power: American Law, Capitalism, and the Republican Polity in Nineteenth-Century America," *Yale Law Journal* 107 (1997): 823–61; Novak, "American Law of Associations"; Novak, "Legal Transformation of Citizenship," 101–2.

Those ideas helped to shape, and set limits to, the assumptions of private authority. They also strengthened a growing certainty that express consent—precise, direct, and informed—was required to create the sorts of interpersonal bonds that made association, if not always affective, at least effective.[33]

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[33] Consent in the early national period has been the subject of two brilliant studies in recent years: François Furstenberg, *In the Name of the Father: Washington's Legacy, Slavery, and the Making of a Nation* (New York, 2006); and Holly Brewer, *By Birth or Consent: Children, Law, and the Anglo-American Revolution in Authority* (Chapel Hill, NC, 2005).