A Dissertation
submitted to the Faculty of the
Graduate School of Arts and Sciences
of Georgetown University
in partial fulfillment of the requirements for the
degree of
Doctor of Philosophy
in Government

By

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Washington, D.C.
April 22, 2020
THREE ESSAYS ON CIVIL ASSOCIATIONS IN AMERICA

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ABSTRACT

My dissertation includes three articles united by a focus on the normative value of civil associations. In the first article, I offer a novel interpretation of Ralph Waldo Emerson’s political theory. Emerson sometimes proclaims radical individualism and a deep antagonism to associational living. Other times—especially in the context of abolitionism and reformism—he urges solidarity and even personally embraces membership in associations. Juxtaposing Emerson’s political theory with that of Alexis de Tocqueville, I argue that we can understand Emerson as a unified, democratic political theorist through an appreciation of his consistent embrace of what I describe as extra-associational moral authority. Through both his apolitical and his political writings, Emerson consistently appeals to a source of moral authority beyond society.

The second article focuses on two values underlying the Supreme Court’s Freedom of Association jurisprudence: associational freedom and equal access. While associational freedom justifies a right of associations to exclude unwanted people (such as the Boy Scouts’ right to exclude gay scoutmasters), equal access demands greater inclusion in associations (for example, by requiring that the Jaycees admit women). I defend a novel approach to maximizing the twin ideals of associational freedom and equal access: what I call ‘heckling analysis.’ I argue that courts should consider whether a person seeking admission into an association threatens to disrupt the association—in other words, whether the person seeking admission is a heckler.
Finally, the third article focuses on a specific association: the American petit jury. There are two Sixth Amendment jury rights: the *individual* right of the criminal defendant, and the *collective* right of the community to adjudicate allegedly criminal behavior. After exploring the history of the two jury rights, and describing some of the corollaries of each right, I consider some of the possible implications of this analysis for different constitutional philosophies: Dworkinian moral reading of the law, constitutional pluralism, and originalism. Given the occasional tension between the two rights, the analysis in this article will enable legal practitioners to meaningfully debate issues and proposals that implicate one or both of the jury rights.
ACKNOWLEDGEMENTS

I am grateful to Richard Boyd, Joshua Cherniss, and Lawrence Solum, for their time and service on my dissertation committee. Their willingness to discuss the subjects in this dissertation, feedback on early drafts, and support throughout the writing process are reflected in the final product. Many of the ideas in this dissertation were also borne out of my conversations with other professors: Randy Barnett, Nolan Bennett, Bruce Douglass, Tara Helfman, Marc Howard, David Luban, Susan McMahon, Naomi Mezey, John Mikhail, Joshua Mitchell, Louis Michael Seidman, and William Treanor. Those conversations immeasurably impacted the nature of, and arguments in, this dissertation. Professors Mikhail, Seidman, and Treanor reviewed various parts of this dissertation and their feedback was critical to the development of the parts they reviewed.

I am thankful to The Georgetown Law Journal and the members of the Volume 108 Articles Committee. My service on that Committee made me a more thoughtful writer, and I am lucky to consider the members of that Committee my friends. I also could not have completed this project without the support and resources provided by Department of Government at Georgetown University.

Finally, I owe much to my family and friends. My father and mother, Ron and Phyllis Rattey; my grandfather, Morris Range; my brothers, Connor and Isaac; my girlfriend of many years, Alexandra Rosen; and, all the friends from before and during this academic endeavor provided emotional and spiritual support without which I would not be where I am. I dedicate this project to all of them.
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I. Introduction

In one of Ralph Waldo Emerson’s most famous essays, “Self-Reliance,” he proclaimed that “[t]o be great is to be misunderstood.”1 If Emerson was right, he ranks among the greatest. Within just a few decades of Emerson’s death, he was both praised as “The Philosopher of Democracy” by John Dewey and scorned as a “Nihilist” by Charles Gray Shaw.2 In “Self-Reliance,” Emerson celebrated solitary individuality, claiming that “[i]t is only as a man puts off all foreign support and stands alone that I see him to be strong and to prevail.”3 But just a decade later, in his “Address to the Citizens of Concord’ on the Fugitive Slave Law,” Emerson expressed solidarity with the political cause of abolition, saying, “I am a Unionist as we all are.”4 Conflicts such as this one between Emerson’s apolitical and political positions permeate his scholarship.

In recent decades, political theorists and historians have sought to reconcile the disparate threads of Emerson’s writing. George Kateb, for example, understands Emerson as a maturing and evolving scholar. Kateb suggests that Emerson became more pragmatic with age, accepting the necessity of political solidarity and associational membership to accomplish Emerson’s larger political aim of enabling greater individuality by more people.5 Robinson Woodward-Burns offers a slightly different perspective, arguing that Emerson’s intellectual development

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4 Ralph Waldo Emerson, “Address to the Citizens of Concord’ on the Fugitive Slave Law,” in Emerson’s Antislavery Writings, ed. Len Gougeon and Joel Myerson (New Haven: Yale University Press, 1995), 68.
reflects his endorsement of a particular mode of living: the individual must be alone before she is capable of political engagement. Rather than a pragmatic concession to the realities of political change, Woodward-Burn’s Emerson requires apolitical solitude in order to become political. For Woodward-Burns, solitude must precede society.

This essay builds on recent attempts to understand Emerson holistically. In an effort to locate a unified, Emersonian political theory, I draw attention to an underexplored dimension of Emersonian individuality. I focus on the necessity of deriving moral authority from beyond associational life. In contrast to Woodward-Burns, I argue that this moralizing function of “solitude” is perennial—not temporal—and does not require actually being alone; in this sense, “solitude” is a misnomer. Even when the individual has integrated into society, she must continue to draw moral inspiration from outside of society. In the essay “Self-Reliance,” Emerson says that, “the great man is he who in the midst of the crowd keeps with perfect sweetness the independence of solitude.” Emerson’s moral theory of the individual—his praise for solitude-inspired morality—illuminates his political theory of society.

The challenge in this essay is putting into words a moral concept that Emerson fails to systematically describe. In one place, Emerson says of morality that its source is a “fair mystery, [and its] foundations are hidden in eternity.” Solving that “fair mystery” and uncovering the

7 Recent Emerson scholars, including Alex Zakaras, distinguish individualism from individuality. For Zakaras, individualism corresponds to the private egoism that Tocqueville feared and “retains a pejorative connotation.” Alex Zakaras, Individuality and Mass Democracy (Oxford: Oxford University Press, 2009), 24. Individuality, in contrast, “describes the full development of the individual’s faculties, the achievement of originality through self-creation and expression.” Zakaras, 25. I am grateful to Professor Joshua Cherniss for pointing me to John Stuart Mill’s On Liberty as a possible source of this distinction, as well as to George Morgan Jr.’s “Individualism Versus Individuality.” George Morgan, Jr., “Individualism Versus Individuality,” Ethics 52, no. 4 (Jul., 1942): 434–46.
9 Emerson, “Address to the Citizens of Concord,” 58.
foundations of Emerson’s morality is key to understanding his political theory. I describe Emerson’s “fair mystery” as extra-associational moral authority. Uniting the many threads of Emerson’s writings is a consistent embrace of moral authority that comes from beyond society.\textsuperscript{10} The problems Emerson identifies with society—compromise, conformity, and complicity—are particularly pronounced in associations. Focusing on the extra-associational dimension of Emerson’s moral theory allows us to reconcile his apolitical with his political writings. In both, he remains wedded to a conception of morality that is found and cultivated—receives its authority—beyond society. For Emerson, that which lies beyond society can be understood either as the moral superstructure he labels the “Over-Soul,”\textsuperscript{11} or as a critical and skeptical disposition towards the corrupting influences of society.\textsuperscript{12} Those two understandings—the Over-Soul and the critical disposition—have often been understood as distinct in Emerson’s philosophy; in fact, as I will show, they are two different manifestations of the same underlying conception of moral authority. Both embody Emerson’s conception of moral authority beyond society.

More conventional Emersonian concepts such as self-reliance and solitude are prone to both overbreadth and inaccuracy. For example, though Emerson is better known for his concept of self-reliance,\textsuperscript{13} that term is unhelpful as a device for identifying what I label “extra-
associational moral authority.” Similarly, both self-reliance and solitude lend to semantic inaccuracy. “Self-reliance” refers to the state of being of Emerson’s ideal individual; and “solitude” conveys a misleading degree of loneliness or isolation. Emerson admits that isolated solitude “is impracticable.”14 This essay, by contrast, aims to shed light on a different dimension of Emerson’s scholarship: the need to derive morality from outside of association with others, even while engaging in political activity.

Understanding the extra-associational dimension of moral authority will not completely elucidate Emerson’s political theory. There is much in his writings that is still undeveloped. It is not clear, for instance, whether morality is disclosed, discovered, intuited, or reclaimed beyond society. There is evidence to support any of these relationships to morality. I use the term “authority” to draw attention to the fact that, whatever it is that happens beyond society (whether disclosure, discovery, or something else), it must happen beyond—in that sense, extra-associational morality is authoritative rather than recommendatory.

To aid in describing Emerson’s extra-associational conception of moral authority, I juxtapose Emerson’s position with that of one of his contemporaries, Alexis de Tocqueville. After visiting America in 1831, Tocqueville published Democracy in America (DIA) in which he attempted to describe the same social and political15 landscape that confronted Emerson. Among

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15 Throughout this essay, I use “social” to refer to the range of interpersonal, nonpolitical interactions between friends, family members, and citizens generally; I use “political” generally to refer to those relationships that are mediated primarily through conventional political mechanisms such as voting, political parties, hierarchy (in the case of aristocratic societies), and laws.
other things, Tocqueville identified the features of democracy—especially, the freedom from social and political obligations—that made possible Emerson’s solitude. But Tocqueville thought that moral authority was derived, at least in part, from association with others—from resisting the allure of solitude. While Emerson looked beyond society, Tocqueville credited the “reciprocal action of men one upon another”—perhaps the loosest definition of association—with instilling and preserving morality.16 Both because Tocqueville systematically described the social and political landscape confronting Emerson, and because Tocqueville clearly articulated the antithesis of Emerson’s position, a better understanding of Tocqueville’s political theory will aid in clarifying Emerson’s “fine mystery.”

This essay begins with a description of Tocqueville’s moral associations.17 In Part II, I describe Tocqueville’s conception of associations and the ways in which, for him, associations are conducive to democratic morality. Tocqueville suggests that associations are necessary (even if not sufficient) to promoting and preserving morality in the democratic world.

Part III presents the Emersonian alternative: it is the absence of associations that is necessary for democratic morality. To appreciate the significance of this difference, I trace historical developments in Emersonian scholarship from the treatment of Emerson as an apolitical “nihilist” to the revival of the democratic spirit of his writings. My central claim is that we can better understand Emerson as a unified, democratic political thinker if we appreciate his consistent embrace of an extra-associational source of moral authority. I provide several

examples of how extra-associational moral authority manifests in Emerson’s writings. On the one hand, Emerson may be understood as requiring a positive embrace of what he calls the Over-Soul—a sort of moral superstructure. On the other hand, we may understand him as requiring merely a negative resistance against the vices of associational life. On both accounts, Emerson demands that individuals constantly appeal to something beyond society for moral authority.

Finally, in Part IV, I consider the implications of extra-associational moral authority for understanding Emerson as a democratic political theorist. Dewey identified the democratic spirit of Emerson’s philosophy,\textsuperscript{18} and Harold Bloom credited to Emerson the founding of the “actual American religion.”\textsuperscript{19} Recent scholars similarly treat Emerson as an exemplar democratic political theorist.\textsuperscript{20} I argue that the concept of extra-associational moral authority aids in understanding Emerson’s conception of, and his proposals for the preservation of, democracy.

As a preliminary note, this essay is not about the content of Emerson’s moral theory. It does not focus on how Emerson thought individuals should behave in groups (ethics), or what he thought makes the right actions right (meta-ethics). Instead, the focus of this essay is political. To understand Emerson’s unified theory of politics, my claim is that we must understand his extra-associational concept of morality. Only then can we fully understand how it is that the great man can maintain the “perfect sweetness … of solitude” in the political and social world.

II. Tocqueville’s Moral Associations

Among laws controlling human societies there is one more precise and clearer, it seems to me, than all the others. If men are to remain civilized or to become civilized, the art of association must develop and improve among them at the same speed as equality of conditions spreads.\textsuperscript{21}

Alexis de Tocqueville considers associations \textit{necessary} to the preservation of democratic morality, even if they are not sufficient.\textsuperscript{22} As we will see below, the opposite was the case with Emerson, for whom it is the \textit{absence} of associations—what I describe as extra-associational moral authority—that is necessary to the cultivation of democratic morality. While Emerson’s political theory accommodates social living, even in society, democratic men and women must draw moral authority from beyond society. Both because Tocqueville’s arguments are so prevalent today, and because Tocqueville so clearly described the moral landscape of Emerson’s America, it is helpful to begin with a recitation of Tocqueville’s position.

A. Democracy, Despotism, and the Decline of Political and Social Ties

For Tocqueville, the central democratic value—equality—makes possible its chief danger: despotism. Towards the end of the second volume of \textit{DIA}, Tocqueville says of this danger that “[i]t does not break men’s will, but softens, bends, and guides it… [I]n the end each nation is no more than a flock of timid and hardworking animals with the government as its shepherd.”\textsuperscript{23} This soft despotism, or “peaceful slavery,”\textsuperscript{24} is made possible by democratic man’s

\begin{footnotesize}
\begin{enumerate}
\item Tocqueville, \textit{Democracy in America}, 517.
\item Tocqueville, \textit{Democracy in America}, 692.
\item Tocqueville, 692.
\end{enumerate}
\end{footnotesize}
preoccupation with equality. Though Emerson did not use the same terminology, he was concerned with the same problem—Tocqueville’s “flock” is Emerson’s “herd.”

To understand both of their fears, we must understand the political and social differences between aristocratic and democratic societies. While aristocracy is characterized by hierarchy and a rigid political/social structure, democracy is characterized by equality and independence from social and political stratifications. Tocqueville says, “[a]ristocracy links everybody, from peasant to king, in one long chain. Democracy breaks the chain and frees each link.”

Proverbially, aristocratic hierarchy kept the pauper in service to his master, the master in service to the lord, and the lord in service to the baron or king. The rigidities of life in the aristocratic world prevented the self-interested individualism that Tocqueville observed in American democracy. The demands of aristocratic social life disallowed retreat from society; those demands disallowed Emerson’s “solitude.” In breaking down the “chains” of political and social hierarchy, democracy liberates citizens to pursue their individual, private interests. Democracy thus provides the conditions for retreat from society—in other words, for solitude.

As aristocracy gives way to democracy, political ties thus give way. At the same time, social ties—the nonpolitical relationships between people—begin to erode. Tocqueville laments that “not only does democracy make men forget their ancestors, but also clouds their view of their descendants and isolates them from their contemporaries. Each man is forever thrown back on himself alone, and there is danger that he may be shut up in the solitude of his own heart.”

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25 As Harvey Mansfield describes it, “the political evil toward which democracy naturally tends, the culmination of [Tocqueville’s] fear, repeatedly expressed, [is] that democratic equality will overwhelm democratic freedom.” Harvey Claflin Mansfield, *Tocqueville: A Very Short Introduction* (Oxford: Oxford University Press, 2010), 77.
27 Tocqueville, *Democracy in America*, 508.
28 Tocqueville, 508.
For support, Tocqueville could point us to Emerson who, in “Self-Reliance,” shuns “father and mother and wife and brother when [his] genius calls.”29 Left without the social (in addition to the political) linkages of aristocracy, democratic men and women become independent. But independence is not, in this case, to be revered; it is what Cheryl Welch describes as “the moral and spiritual ravages of individualism.”30 The democratic independence that worried Tocqueville is better characterized by what it lacks: political ties, social bonds, friendships, and even familial relations.

The newfound freedom from political and social constraints, which appeared at first sublime, thus presents a new set of problems. Most significantly, democratic citizens become indistinguishable and, as a result, docile.31 “As conditions become more equal among people,” Tocqueville says, “every citizen having grown like the rest, is lost in the crowd.”32 Welch characterizes this as a socio-psychological claim.33 Tocqueville suggests that the experience of equality—seeing oneself as “little different from [one’s] neighbors”—influences men and women’s “mental attitudes” and leads to homogeneity within society.34 To view oneself as above the crowd would be anathema to this democratic sensibility. Though Tocqueville praises the “intractability” of democratic man’s “inclination towards political freedom,” he is

30 Welch, De Tocqueville, 92.
31 Related to the problem of docility is the loss of traditional codes of propriety according to which individuals conduct themselves. When political ties give way, traditional rules of conduct—what Tocqueville calls “good manners”—also give way. Tocqueville, Democracy in America, 511–12. Without some new source of proper conduct, norms governing behavior and interpersonal communications risk disappearing. As Dennis Bathory notes, “[d]emocratic citizens had to be taught directly about the ‘moral standards of the nation,’ the polity’s most general ideas and principles… Americans, he thought, had been well taught. They shared conceptions of duty and goodness and were afforded the opportunity to experiment in their application.” Dennis Bathory, “Moral Ties and Political Freedom in Tocqueville’s New Science of Politics,” in Tocqueville’s Defense of Human Liberty: Current Essays, ed. Peter Augustine Lawler and Joseph Alulis (New York: Garland Pub., 1993), 341.
32 Tocqueville, Democracy in America, 669.
33 Welch, De Tocqueville, 81.
34 Tocqueville, Democracy in America, 668–69.
nonetheless anxious about the effects of this psychological disposition.\textsuperscript{35} In the democratic
crowd, Tocqueville worries that individualism will give way to “general uniformity”\textsuperscript{36}—
precisely the foundation for the soft despotism he fears.

Once uniform, the citizenry may be directed by the masses.\textsuperscript{37} To become crowdlike
requires what Alex Zakaras describes as an “abdication[ ] of judgment.”\textsuperscript{38} Men and women, by
virtue of coming to think democratically, cease to think differently and to exercise independent
judgment. As a result, those men and women are prone to influence by the opinions of others.
In this way, uniform individuals may become enslaved to popular opinion\textsuperscript{39}—the “tyranny of the
majority.”\textsuperscript{40} Such slavery is a direct consequence of the initial tendency of democracies towards
equality: equality allows for democratic independence; independence enables docility; and,
docility paves the way for herd-like obedience to public opinion. Democracy thus made possible
this danger: an enslaved, complacent citizenry prone to the whims of public opinion and mob
mentality.

Such a degraded democratic condition is averse to democratic morality. Both docility
and enslavement to public opinion are characteristic of an amoral (if not also immoral) situation
in which citizens fail to recognize each other’s moral interconnectedness. In one sense, this

\textsuperscript{35} Tocqueville, 667–68.
\textsuperscript{36} Tocqueville, 673.
\textsuperscript{37} Welch nicely summarizes the two versions of despotism in Democracy in America. The version of despotism in
Volume I is that of “new majorities that smother individual independence and may eventually yield to a Caesaristic
tyrranny”; the version in Volume II is “a flat Orwellian landscape of servile sameness in which an equal but
diminished humanity, ruled by a deceptively benevolent central state, pursues material desires in a spiritual
vacuum.” Welch, De Tocqueville, 72. Both descriptions are compatible with the cursory sketch of despotism
described here.
\textsuperscript{38} Zakaras, Individuality and Mass Democracy, 16.
\textsuperscript{39} This is a different sort of slavery from the chattel slavery of the American south, of which Tocqueville was also
critical. According to Welch, Tocqueville thought “the institution of black chattel slavery had not only inequitably
appropriated their labour but had almost obliterated their humanity.” Welch, De Tocqueville, 174.
\textsuperscript{40} Tocqueville, Democracy in America, 262.
follows naturally from enslavement to public opinion: by ceasing to exercise agency over their opinions, individuals cease to exercise moral agency. This is Zakaras’ “abdication[] of judgment” or what Kateb refers to as people’s “unreluctant[] accept[ance of] being used.” In another sense, this follows from democratic individuals’ tendencies towards isolation. The extreme form of democratic individualism that Tocqueville decried is characteristic of individuals who no longer recognize their moral (or social/political) relationships to their neighbors and friends.

Tocqueville was not alone in his concern with democratic docility. Though Emerson does not systematically describe the phenomenon, it is clear that he was anxious about the increasing power of public opinion and the decreasing energy of individuals to oppose it. In Emerson’s critique of political parties, for example, he laments that members of parties can “give no account of their position, but stand for the defence [sic] of those interests in which they find themselves.” Similarly, just as Tocqueville worried that democratic individuals would be “lost in the crowd,” Emerson wondered how best to preserve the “independence of solitude” in “the midst of the crowd.” Scholars including Zakaras have previously recognized the overlap between Tocqueville and Emerson in their concerns about docility. Zakaras describes docility

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43 Emerson, “Politics,” 383. Tocqueville similarly worried about the “despotism of parties.” Tocqueville, *Democracy in America*, 192. Emerson compares the problems posed by political parties to the similar problems posed by “parties” of religion, “free-trade,” “universal suffrage,” and others. Emerson, “Politics,” 383. In other words, for Emerson, the problem of parties is common to associations generally.
as a “democratic sickness” characterized by both “a state of mind” and “a habit of inaction.”

According to Zakaras, a preoccupation with docility undergirds Emerson’s endorsement of individuality in the form of self-reliance.

Importantly, for Tocqueville, the problem of docility is merely a possible consequence of the transition from aristocracy to democracy; it is not necessary. Democratic citizens may avoid that peril through, among other things, the creation and protection of a robust civil society. If democracy breaks the chains of aristocracy, citizens may re-embed themselves into reciprocal moral relations with others by forming social groups and associations. Those groups cultivate feelings of compassion and motivate men and women to pursue the community-oriented “self-interest properly understood” rather than mere “private self-interest.”

B. Associations and Moral Ties

Recent years have seen renewed attention to Tocqueville as a moral thinker. Alan Kahan, for example, has done much to demonstrate that “Tocqueville’s discoveries in America were as much moral as political.” In contrast to older readings of Tocqueville as a political or social scientist, Kahan and others focus on Tocqueville’s concerns with moral improvement and what Kahan calls “human perfection.” In line with the new attention to the deliberately moral

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47 Tocqueville was among the first theorists to advise “the defense or even creation of voluntary associations as a means of checking a political trend inherent in the egalitarian movement.” Jack Lively, *The Social and Political Thought of Alexis de Tocqueville* (Oxford: Clarendon Press, 1965), 127. The “intellectual and moral results of association … helped to create in society a variety and diversity, a dialectic of opinion and viewpoint, which mitigated the uniformity of outlook natural to it.” Lively, *The Social and Political Thought of Alexis de Tocqueville*, 130.
48 Tocqueville, *Democracy in America*, 515.
49 It is the latter that breeds “law-abiding, sober, moderate, careful and self-controlled citizens” and “raise[s] the race as a whole.” Tocqueville, 528.
51 Kahan, 11.
content of Tocqueville’s writings, this section explores the moral significance of associations in Tocqueville’s political theory.

Associations are, at their core, groups of people.\textsuperscript{52} What generally unites Tocqueville’s many types of associations—such as those formed to build churches and roads;\textsuperscript{53} temperance societies;\textsuperscript{54} political associations;\textsuperscript{55} and townships\textsuperscript{56}—is the precise ways in which those associations bring private individuals together. By bringing people together, associations promote the development of new moral ties that can replace the lost political ties. Tocqueville claims that “[f]eelings and ideas are renewed, the heart enlarged, and the understanding developed only by the reciprocal action of men one upon another.”\textsuperscript{57} This is his wager: democratic citizens must find their moral sense through the “reciprocal influence” of association with others, or risk succumbing to the danger of soft despotism described above.

Tocqueville does not systematically describe the moral content derived through association with others,\textsuperscript{58} but morality encompasses more than just customs, traditions, or habits. It covers “mental habits” and “ideas,” as well as “the whole moral and intellectual state of a people.”\textsuperscript{59} Throughout both volumes of DIA, the concept of morality covers the set of

\begin{footnotes}
\item[52] In his discussion of political associations, Tocqueville says, “[a]n association simply consists in the public and formal support of specific doctrines by a certain number of individuals who have undertaken to cooperate in a stated way in order to make these doctrines prevail.” Tocqueville, Democracy in America, 190.
\item[53] Tocqueville, 511, 513.
\item[54] Tocqueville, 516.
\item[55] Tocqueville, 190.
\item[56] Tocqueville, 62.
\item[57] Tocqueville, 515 (emphasis added).
\item[58] Welch observes that Tocqueville “devotes so little attention to the ethical grounding of this thought that some subsequent commentators, attracted to his comparative method or to his political conclusions, have assumed that these conclusions are not linked in any important way to specific moral or religious beliefs.” Welch, De Tocqueville, 32.
\end{footnotes}
conventions and rules of conduct that Tocqueville suggests *must* (again, associations are necessary even if not sufficient) replace the lost political ties.

By artificially replicating some of the stratification of aristocracy, associations also mitigate the dangers of democratic docility. Associations check, or at least temper, the socio-psychological disposition in democracy towards homogeneity. In so doing, by breaking the causal chain between democracy and the herd-like obedience to public opinion, Tocqueville argues that associations enable democracies to survive, if not also flourish.

There is an important qualification to be made at this point. Associations are part of a much larger project for Tocqueville. Kahan characterizes associations as one of the important “checks and balances” on the dangerous tendencies of democracy.60 Other checks include religion,61 decentralized administration,62 family,63 and even the legal profession.64 Moreover, Tocqueville’s praise of associations was not categorical. Despite the praise of associations generally, Tocqueville occasionally expresses ambivalence about the normative role of associations in democratic society.65 He worries, for example, that associations engender “secret

64 Tocqueville, *Democracy in America*, 263–70.
65 Richard Boyd, for example, points to some of the passages in which Tocqueville appears critical of “uncivil society.” Richard Boyd, *Uncivil Society: The Perils of Pluralism and the Making of Modern Liberalism* (Lanham, Md.: Lexington Books, 2004), 228–31. In Tocqueville’s discussion of political associations in Volume I of *DIA*, for example, Tocqueville reminds his readers not to “shut one’s eyes to the fact that unlimited freedom of association for political ends is … the last that a nation can sustain” and may lead a nation to the “verge” of anarchy. Boyd points us to the importance of “civic associations of the right sort” in Tocqueville’s philosophy. Boyd, 210. At the
feelings of fear and jealousy” because “the free use which each association makes of its natural powers is almost regarded as a dangerous privilege.”

To the extent that associations recreate the sorts of aristocratic privilege from which democratic citizens escaped, they may generate backlash. But notwithstanding such qualifications, Tocqueville articulated a general defense of associations as necessary to the cultivation and preservation of democratic morality.

III. Emerson’s Extra-Associational Moral Authority

In contrast to his French contemporary, Emerson conceives of morality in the democratic age in terms of the proper escape from—not to—associations. The comparison of Emerson to Tocqueville illuminates this underappreciated dimension of Emerson’s political thought and exposes the potential importance of Emerson’s democratic political theory. While Tocqueville saw associations as necessary to democratic morality, Emerson sees the movement beyond associations as necessary to the cultivation and preservation of democratic morality. Even while engaged in political or social activity, Emerson stresses the importance of maintaining a connection to extra-associational moral authority. For Emerson, associations are where the dangers of society are most pronounced. The difference between associations and society is thus a matter of degrees, not a difference in kind. Moral authority lies beyond both.

The challenge is that Emerson nowhere systematically describes why the movement away from society is necessary, nor what beyond society generates moral authority. In one essay, Emerson is ambivalent about how best to characterize the source of morality: “be it called

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heart of Boyd’s argument is that “civil society, rightly speaking, would consist only of those associations that contribute to the virtues of civility.” Boyd, 41.

morals, religion, or godhead, or what you will.” I use the term “extra-associational moral authority” to cover several different features of Emerson’s philosophy that are united by the requirement of moving beyond society. Extra-associational moral authority encompasses both Emerson’s positive embrace of what he calls the Over-Soul, as well as the negative, critical dimension of self-reliance. Uniting these different conceptions, and uniting Emerson’s political theory generally, is the requirement that individuals locate the source of moral inspiration beyond associational life. To better understand this unifying theme, I begin by outlining Emerson’s ambiguous attitude towards associations and associational living.

A. Emerson’s Critique of Associations

In 1914, Charles Gray Shaw published “Emerson the Nihilist,” in which he argued that Emerson was a proponent of absolute individualism and political anarchy. Shaw painted Emerson’s work as “the beginning of downright egoism in the world” and characterized Emerson as “anarchistic,” “immoralistic,” and “irreligious.” A few decades later, Arthur Schlesinger Jr. claimed that Emerson had “failed himself, and ignored the responsibilities of his own moral position.” Emerson was aware of political injustices around him but, according to Schlesinger, “[f]undamentally … did not care” and was content with his solitary lifestyle in Concord. Embedded in Shaw’s and Schlesinger’s writings are two related lines of attack. First, Emerson was accused of nihilism/amoralism for apparently lacking empathy with those around him. As we will see below, more recent scholarship has shed light on Emerson’s

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67 Emerson, “Address to the Citizens of Concord,” 58.
68 Shaw, “Emerson the Nihilist,” 70.
69 Shaw, 68.
71 Schlesinger, 385.
ethics, directly rebuking the amoralistic charge. Second, and more significantly for this article, Emerson was accused of lacking a political philosophy—in other words, for articulating an extreme form of individualism. For Shaw, that which undergirded Emerson’s nihilism was a “cold current of the anti-social.”72 Neither Shaw nor Schlesinger cite Tocqueville, but both would see in Emerson the dangerous—apolitical—individualism that Tocqueville feared.

The critiques of Emerson as an apolitical thinker prevailed for much of the twentieth century. Levine and Malachuk offer as evidence of the apolitical reading of Emerson the lack of serious treatment by “political theorists and philosophers.”73 There is plenty in Emerson’s writings to support that reading. In “Self-Reliance,” Emerson says that “man [is] better than a town”; and in the “American Scholar,” Emerson laments that his contemporaries have failed to live up to that ideal, instead coming to resemble “the mass” or “the herd.”74 Essays written around this time (from roughly 1836–1844) make up what is now described as the “small canon” of Emerson’s scholarship; such essays exemplify his most apolitical and individualistic positions.75

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72 Shaw, “Emerson the Nihilist,” 68.
73 Levine and Malachuk, A Political Companion to Ralph Waldo Emerson, 1. The apolitical understanding of Emerson persists outside of academia. Allen Mendenhall, for example, considers Emerson’s self-reliance “so radical that it border[s] on self-deification.” Allen Mendenhall, “Emersonian Individualism,” Mises Daily Articles, December 16, 2011, https://mises.org/library/emersonian-individualism (accessed March 1, 2020). Mendenhall considers Emerson’s political theory to embody Tocqueville’s “individualism,” and Mendenhall explores the overlap between Emerson’s political theory and those of more conventional libertarian theorists, Ayn Rand and Ludwig von Mises. Ibid. Others read into Emerson a hyperbolic self-obsession—what Dan Zak calls “Selfie”-Reliance.” Dan Zak, “‘Selfie’-Reliance: The Word of the Year is the Story of our Individualism,” Washington Post, November 20, 2013. Zak asserts that “Self-Reliance” was Emerson’s “marquee essay” and claims, apparently without evidence, that Emerson “would have been a habitual selfie-taker.” Ibid.
75 Levine and Malachuk, A Political Companion to Ralph Waldo Emerson, 8. Sacvan Bercovitch argues that at least some of Emerson’s writings around this time were reactions against the nascent socialist movements in New England, including the founding in 1840 of the Brook Farm utopian community. Bercovitch, “Emerson, Individualism, and Liberal Dissent,” 308. The socialism to which Emerson was opposed was not the twentieth century statist socialism. Instead, the communal living arrangements exemplified by Brook Farm were association-like efforts, at least implicitly, at mitigating the dangers of individualism that worried Tocqueville.
Throughout Emerson’s writings, there are several dangers that he attributes to associations. First, associations force citizens to *compromise* on those citizens’ authentic values and selves. In the essay “New England Reformer,” for example, Emerson says of the organizations and unions emerging in the 1830s and 1840s that, “[t]hese new associations are composed of men and women of superior talents and sentiments; yet it may easily be questioned whether such a community will draw, except in its beginnings, the able and the good… and whether the members will not necessarily be *fractions of men* because each finds that he cannot enter it without some compromise.”

Because men and women may be forced to compromise on their opinions and values to conform to the views of the group into which they hope to gain membership, Emerson finds associations incompatible with authentic individuality. Emerson’s elevation of individual authenticity—the inverse of this compromise—is at the heart of his writings, especially those in the apolitical small canon. In the opening paragraphs of “Self-Reliance,” he says, “[t]rust thyself, every heart vibrates to that iron string.”

Second, and relatedly, Emerson critiques associations because they promote *conformity.* While compromise takes the individual away from himself, conformity brings him closer to those with whom he associates. In “Politics,” for example, Emerson directs his vitriol at political

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77 It is possible that some degree of compromise is necessary for democratic society. In the passage from “New England Reformers,” quoted above, Emerson continues, “[f]riendship and association are very fine things … but remember that no society can ever be so large as one man.” Emerson, 408–09. He suggests that the compromise of association is always inversely related to the authenticity of the individual. At the same time, however, to the extent that compromise inhibits the individual’s relationship to his or her authentic moral self (as will be discussed below), compromise may inhibit democracy. Zakaras says of compromise—he uses the term “partiality”—that it “amounts to a kind of willful narrowness or obsessiveness that obscures, for these political men, a more inclusive view of their society and its ills and allows them to overlook their own shortcomings.” Zakaras, *Individuality and Mass Democracy,* 59. In short, the relationship between compromise and democracy is complex, and there is no necessary relationship between them in Emerson’s account.

78 Emerson, “Self-Reliance,” 133.
parties because they flatten citizens into “masses” who can “give no account of their positions, but stand for the defense of those interests in which they find themselves.” And, as has already been quoted, in “The American Scholar,” Emerson expressed concerns that American individuality was giving way to what he called “the mass” or “the herd.” Zakaras identifies conformity as one of the few subjects about which Emerson’s optimism gives way to despair, and Kateb describes it as “the main antithesis to [Emerson’s] self-reliance.”

As hinted at above, Emerson’s concerns about conformism accord with those of Tocqueville. Tocqueville saw as dangerous the tendency in democracies like America to blindly conform to the views of the majority. He says, “I know of no country in which … there is less independence of mind and true freedom of discussion than in America. … [T]he majority has enclosed thought within a formidable fence.” Despite agreeing about the nature of the problem, Emerson and Tocqueville disagreed about the solution. Tocqueville saw associations as key to protecting against conformity; for him, associations protect—in fact, they may be the only possible protection—against the reduction of the citizenry to “a flock of timid and hardworking animals.” Emerson held the opposite view, that a conformist and docile citizenry

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79 Emerson, “Politics,” 383.
81 Zakaras, Individuality and Mass Democracy, 42.
82 Kateb, Emerson and Self-Reliance, 152.
83 Zakaras notes that, “[l]ike Tocqueville… Emerson was concerned about the oppressive force of public opinion in America. Like Tocqueville, he found something absurd in the spectacle of so many individuals, each equally impressionable, each imitating others, each eventually pressuring others to adhere to some ‘popular cry’ or consumer preference.” Zakaras, Individuality and Mass Democracy, 44.
84 For Tocqueville, the danger stemmed from the urge towards equality, which accorded to each person the same moral respect in decision-making.
85 Tocqueville, Democracy in America, 255.
86 Tocqueville says that “it is only through association that the citizens can raise any resistance to the central power.” Tocqueville, 686.
87 Tocqueville, 692.
would be borne in associational living. Emerson thus demanded resistance to, and occasionally escape from, associations.

A focus exclusively on these aspects of Emerson’s philosophy—his critiques of the compromise and conformity promoted in associational living—supports Shaw’s claim that Emerson promotes “downright egoism in the world.” Both compromise and conformity impinge on the natural individuality that Emerson praises; and Emerson’s critiques of both lend to Shaw’s anarchistic and hyper-individualistic reading of Emerson. In short, Emerson thus far represents Shaw’s egoism and Tocqueville’s dangerous individualism. But with the introduction of a third critique of associations, we begin to see the emergence of Emerson’s political philosophy.

The third critique of associations is directed at the complicity that associational membership enables. Here we begin to see what Shaw may have overlooked. To be a part of an association, for Emerson, was to be complicit in all wrongs perpetrated by that association and its members. Perhaps most prominently, the complicity engendered by the Fugitive Slave Act, which required citizens of northern states to return runaway slaves to their southern owners, formed the basis for Emerson’s critique of that law. For Emerson, that law and surrounding political developments “forced us all into politics.” The obligations the Fugitive Slave Act imposed on northern abolitionists to support southern slaveholders was unacceptable. Other large-scale injustices, including the Mexican-American war, and the slave trade generally.

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88 Shaw, “Emerson the Nihilist,” 68.
89 Emerson, “Address to the Citizens of Concord,” 53. Emerson expresses similar concerns for complicity in “Lecture on Slavery” and “Man the Reformer.” Turner, Awakening to Race, 37.
90 Ralph Waldo Emerson, “Antislavery Speech at Dedham,” in Emerson’s Antislavery Writings, ed. Len Gougeon and Joel Myerson (New Haven: Yale University Press, 1995), 44.
generated similar lamentations about complicity. Even participation in the marketplace—*any* participation, whether as a producer or just a casual consumer—involved an intolerable form of complicity in the injustices of modern capitalism about which Emerson was deeply critical.92 Jack Turner draws attention to Emerson’s concern about complicity, arguing that Emerson’s “self-reliance requires that individuals not benefit from exploitation.”93 Turner juxtaposes Emerson’s “democratic individualist” with Tocqueville’s “atomistic individualist” as a way to magnify the opposition to complicity at the heart of Emerson’s self-reliant, democratic individualism. Complicity, according to Turner, “undermine[s] the principles of moral equality and reciprocity underwriting self-reliance.”94 Tocqueville’s atomistic individual expresses no concern for the type of complicity that Emerson decried.95

As the foregoing demonstrates, Emerson was concerned with associational living because of the compromise, conformity, and complicity that associational living enables. His concerns were not unique to any particular sector of American society. Though Emerson was particularly critical of political associations (especially political parties96), he expresses these concerns about other types of associations as well, including even the family.97 Running through each of the above concerns is the consistent position that associations inhibit morality. Compromise and conformity, insofar as they take the individual from his authentic self, detract from his moral

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92 Emerson says that “the trail of the serpent reaches into all the lucrative professions and practices,” suggesting that mere abstention from direct benefit in the slave trade was not enough. Emerson, 104.
96 Emerson, “Address to the Citizens of Concord,” 56; Emerson, “Politics,” 383.
character—his “self-reliance.” Complicity and docility are symptoms of that lost moral character.

B. Emerson’s Embrace of Associations

The purely anti-associational Emerson is incomplete. Dewey’s defense of the political, and relatedly democratic, Emerson has gained new appeal in recent decades with the emergence of what has been dubbed the “New History” of Emerson. New History scholars move beyond Emerson’s “small canon” (his essays written between 1836 and 1844) to consider texts from both earlier in Emerson’s career and, more importantly, later in his career when Emerson became politically active in abolitionist and reformist movements. Many of the essays and speeches, written and delivered in the years shortly before the Civil War, inform the new wave of literature connecting Emerson to democracy, democratic morality, and an embrace of associations. New History scholars have not omitted the small canon from consideration but have sought to properly contextualize it in Emerson’s career.

Recent decades have also seen greater attention to Emerson’s ethics. Robert Richardson’s 1995 biography of Emerson demonstrates the extent to which the ideas Emerson

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98 Kateb, Emerson and Self-Reliance, xliii.
100 Len Gougeon and Joel Myerson’s publication of Emerson’s antislavery writings in 1995 helped propel this shift. Ralph Waldo Emerson, Emerson’s Antislavery Writings, ed. Len Gougeon and Joel Myerson (New Haven: Yale University Press, 1995). Several years prior, in 1990 Gougeon published Virtue’s Hero, in which he sought to draw attention to Emerson’s then-virtually unknown “intense antislavery career.” Len Gougeon, Virtue’s Hero: Emerson, Antislavery, and Reform (Athens, Ga.: University of Georgia Press, 2010), ix. Michael Strysick, for example, says that “Gougeon’s groundbreaking study [Virtue’s Hero] challenged the prevailing opinion that Emerson was a disinterested scholar who appealed to broader philosophical questions at the exclusion of particular social issues.” Michael Strysick, “Emerson, Slavery, and the Evolution of the Principle of Self-Reliance,” in The Emerson Dilemma: Essays on Emerson and Social Reform, ed. T. Gregory Garvey (Athens, Ga.: University of Georgia Press, 2001), 139.
articulates in his writings map on to Emerson’s personal life and reflect his continuous quest after the good life.\(^{101}\) And, Gustaaf Van Cromphout’s *Emerson’s Ethics* similarly explores Emerson’s consistent preoccupation with the question, “How shall I live?”\(^{102}\) Other essays and books echo that interest in understanding the moral—as distinct from the political—dimension of Emerson’s thought.\(^{103}\) Importantly, though these scholars have parsed them out, the moral and political categories are not fully separable in Emerson’s philosophy. We cannot understand Emerson’s politics without first understanding the moral concept of self-reliance. The relationship Kateb identifies between what Kateb calls mental self-reliance and active self-reliance (discussed in greater detail below) is key to understanding the relationship between morality and politics in Emerson’s writings.\(^{104}\) This renewed attention to ethics refutes Shaw’s and Schlesinger’s critiques of Emerson as nihilistic and amoralistic.

As New History scholarship has brought to light, Emerson was not wholly dismissive of associations. Indeed, “[t]he old myth that Emerson’s project is exhibit one of the phenomenon Tocqueville most famously labeled ‘individualism’” has been debunked.\(^{105}\) Even in his essay, “Politics,” in which Emerson is critical of most political and social institutions, Emerson suggests that a State based on authentic human affection (Emerson says the “power of love”) might promote and support democratic individuality.\(^{106}\) He elsewhere expresses “respect” for

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\(^{104}\) The relationship between politics and morality is discussed in greater detail below in Part III.D.


\(^{106}\) Emerson, “Politics,” 388.
abolitionist associations such as the Anti-Slavery Society. And, in May 1851, Emerson identified himself with an association: “I am a Unionist as we all are... and I strongly share the hope of mankind in the power, and, therefore, in the duties of the Union.” That association was not merely a political abstraction for Emerson; he calls it a “real and not a statute Union” and an “alliance of men of one stock.”

In addition to embracing associations, Emerson was also sometimes critical of the solitary lifestyle. Unlike Henry David Thoreau, who experimented with living outside of society at Walden Pond, Emerson resisted the temptations of isolation. For Emerson, to live hermetically is to miss the point. He says:

> We wish to escape from subjection, and a sense of inferiority, — and we make self-denying ordinances, we drink water, we eat grass, we refuse the laws, we go to jail: it is all in vain; only by obedience to his genius; only by the freest activity in the way constitutional to him, does an angel seem to arise before a man, and lead him by the hand out of all the wards of the prison.

Elsewhere, Emerson describes isolated solitude as “impracticable” and urges his readers to adhere to the “revelations” of solitude even while “in the street and in palaces.” What is important for Emerson is not abandonment of one’s social commitments through isolation but rather “obedience to … genius”—what is described here as extra-associational moral authority.

Emerson’s acceptance of associations can also be found in his personal life, as evidenced by those associations with which he chose to align himself. Richardson notes that, in the years

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108 Emerson, “Address to the Citizens of Concord,” 68.
109 Emerson, 67.
111 Emerson, “Society and Solitude,” 669.
after the passage of the Fugitive Slave Law, Emerson became an “activist,” and even campaigned for John G. Palfrey, who ran for Congress as a Free-Soil candidate. Emerson’s participation with political campaigns, abolitionist groups, and the underground railroad, seems odd given the concerns about associations articulated above. Membership is hard to square with Emerson’s self-reliant individuality; it seems to risk corrupting the authentic moral content Emerson derived from individual genius.

C. Reconciling the Tension in Emerson’s Philosophy

How are we to make sense of praise for associations—and even membership in those associations—by the anti-associational Emerson? Kateb offers one solution: it is possible that “Emerson accepts the sacrifices of every sort—including abandonment of aspirations of free persons to self-reliance—which are needed to give all Americans, not just some, the chance for self-reliance.” Kateb suggests that Emerson became more pragmatic with age, accepting the necessity of solidarity and membership to accomplish his larger political aim of enabling greater self-reliance by more people.

Woodward-Burns offers a slightly different take, arguing that the apolitical and political strands of Emerson’s thought are “temporally separated.” Emerson’s intellectual

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113 Richardson, *Emerson: The Mind on Fire*, 496, 498. Gougeon similarly draws attention to Emerson’s willingness to engage with political campaigns when Emerson thought such engagement appropriate. Gougeon, *Virtue’s Hero*, 338.


117 Woodward-Burns, “Solitude Before Society,” 29. This is a slight oversimplification of Woodward-Burns’ claim. In the end, Woodward-Burns agrees that it is not possible to fully separate solitude from society, calling such an exercise “foolish” and “deceptive.” Woodward-Burns, 54. In the final iteration of his project, Woodward-Burns
development, according to Woodward-Burns, reflects the “individual’s path from solitary contemplation to discursive political action.” For Kateb, the temporal distinction was biographical: changes in Emerson’s outlook on the world, as well as changing social and political circumstances, caused him to amend his theory of self-reliance. For Woodward-Burns, the temporal distinction is part of a principled argument that solitude must precede political activity. For example, it was “Emerson’s private contemplation [that] revealed the antislavery moral law, inspiring his abolitionism, a self-reliant but political activity.”

This essay adds to the accounts of both Kateb and Woodward-Burns by focusing on Emerson’s consistent embrace of extra-associational moral authority. My claim is that, across the spectrum of views Emerson expresses about associations and politics, Emerson consistently relies on a source of moral authority beyond associational life. Through a better appreciation of the several ways in which extra-associational moral authority manifests in Emerson’s writings, we can understand the coherence of his political thought as well as the nature of his contribution to democratic political theory. As will be seen in the examples below, it is not entirely clear whether morality is revealed, found, intuited, or something else; Emerson is sufficiently imprecise about how morality is accessed that any of those modes might be supported with his writings. The key is that, for Emerson, morality beyond associational life is authoritative.

There are at least two ways to understand Emerson’s extra-associational moral authority: as a positive embrace of what Emerson abstractly describes as the “Over-Soul,” and as a negative, critical disposition towards the corrupting influences of associational life. First, the

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seems to characterize the Emersonian project as circular—moving from society to solitude and back again in a never-ending cycle.

118 Woodward-Burns, 32.
119 Woodward-Burns, 40.
positive conception of moral authority is found in what Emerson calls in some places the “Over-
Soul,” which he describes most succinctly as:

That Unity … within which every man’s particular being is contained and made one with
all other; that common heart of which all sincere conversation is worship, to which all
right action is submission; that overpowering reality which confutes our tricks and
talents, and constrains every one to pass for what he is, and to speak from his character
and not from his tongue, and which evermore tends to pass into our thought and hand and
become wisdom and virtue and power and beauty.121

The Over-Soul does not require in-person interactions—such as neighbors coming
together to build bridges or schools—as was required by Tocqueville.122 In contrast to
Tocqueville, for whom morality was a function of “the reciprocal action of men one upon
another,” for Emerson, “within man [individually] is the soul of the whole.”123 Gougeon
describes the Over-Soul as “the basis for both individual self-reliance and a collective social
identity.”124 The “spiritual” understanding of moral authority binds people together as tightly as
did Tocqueville’s concrete associations without people ever actually coming together.
Importantly, the Over-Soul is accessible only through authentic individuality or what
Woodward-Burns describes as Emerson’s “solitude before society.”125 The Over-Soul is thus
incompatible with the conformity and compromise of associational living.

120 This is a positive account of moral authority insofar as Emerson demands the active embrace of the Over-Soul.
121 Emerson, “The Over-Soul,” 237.
122 Importantly, this positive conception is also not merely a virtual replacement for the type of association described
by Tocqueville: “virtual” associations would likely cover Tocquevillian associations in the technological era of the
twenty-first century, in which people may participate online or remotely without getting together in a single
location. Such virtual associations pose the same threats of conformity and compromise, perhaps even to a greater
extent because of the increased insularity of online associations. The spiritual association that Emerson embraces as
the ultimate source of moral authority is individually accessible, but not accessed merely because one is alone. To
drive home the overlap between individuality and moral authority, Emerson uses the same term to describe both
self-reliance and the Over-Soul: “genius.”
123 Tocqueville, Democracy in America, 515.
124 Emerson, “The Over-Soul,” 237.
126 Woodward-Burns, “Solitude Before Society.”
There are several aspects of Emerson’s Over-Soul that make it difficult to understand or apply today. First, the religious language Emerson uses in describing the Over-Soul is hard to reconcile with secular, liberal principles. Even though the essay “Over-Soul” was written after Emerson had moved away from organized religion, it is still loaded with theological references to God, the eternal soul, and the power of revelation. Beyond alienating secular democratic theorists, it may prove difficult to extract from Emerson’s religious vocabulary a rigorous, philosophical message. Second, the Over-Soul may rest on metaphysical assumptions that contemporary theorists no longer accept. With the rise of post-foundationalism in the twentieth century, it may be difficult to accept the metaphysics underlying Emerson’s Over-Soul. In Eric Keenaghan’s words, “today we are likely to be suspicious of Emerson’s apparently metaphysical rhetoric of humanistic universalism.” In sum, though it is important to recognize Emerson’s positive account of extra-associational moral authority, there are reasons why that conception may prove unhelpful to contemporary political theorists.

128 Though Emerson had been a Christian preacher, he had serious objections to organized religion as it was being practiced in New England. He delivered his last sermon in 1839, still early in his literary and oratory career. Thus, while Christianity was still central to his thinking, organized religion was not. Lloyd Earl Rohler, Ralph Waldo Emerson: Preacher and Lecturer (Westport, CT: Greenwood Press, 1995).
129 Emerson, “The Over-Soul,” 236–43.
131 Eric Keenaghan, “Reading Emerson in Other Times,” 168.
The second conception of Emerson’s moral authority is negative in the sense that it demands only a critical (negative) disposition towards the associational world. He suggests that moral authority may be found through reasoned self-reflection. Rather than searching in society for moral truths, he claims, “in yourself is the law of all nature… in yourself slumbers the whole of Reason.”

It is through critical self-reflection and questioning of the social and political institutions, according to Emerson, that men will come to understand moral truths such as the immorality of slavery. In his defense of social reform, Emerson says that people’s “noble aim[s]” are to be found “within themselves.” He derides associations because they make self-reflection (reasoning) difficult through the compromise and conformity they promote.

Many scholars have observed the critical/negative element of Emerson’s moral philosophy. Michael Lopez, for example, compares Emerson’s “resistance and overcoming” to the similar disposition endorsed by Friedrich Nietzsche. Likewise, Kateb describes a “bellicose engagement with the world;” Stanley Cavell, “aversive thinking;” and Sacvan Bercovitch draws our attention to the concept of “dissent” in Emerson’s thought, which Bercovitch characterizes as “negation” and “resistance.” Finally, Zakaras focuses specifically

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133 Emerson, “Man the Reformer,” 104.
135 Kateb, Emerson and Self-Reliance, 139.
136 Cavell is not entirely clear what he means by “aversive thinking,” but suggests “[i]t is when Emerson thinks of thinking, or conversation, as oppositional, or critical.” Stanley Cavell, “Aversive Thinking: Emersonian Representations in Heidegger and Nietzsche,” in Conditions Handsome and Unhandsome: The Constitution of Emersonian Perfectionism (La Salle, IL: University of Chicago Press, 1990), 36. Though Cavell situates Emerson alongside the more nihilist Friedrich Nietzsche and Martin Heidegger, he compares this “aversion” to “Kant’s speaking of Reason,” and describes it as a sort of “violence” that enables man’s moral development. Cavell, 36.
137 Bercovitch, “Emerson, Individualism, and Liberal Dissent,” 346. Bercovitch says, “Emersonian dissent reminds us that ideology in America works not by repressing radical energies but by redirecting them into a constant conflict
on the negation of associational influences, claiming that, “once freed from the shackles of conformity and petty self-interest, [the mind] will yield to the unadulterated force of the moral law.”\textsuperscript{138} Each of these scholars recognizes a necessarily critical and solitary dimension to morality in Emerson’s writings. To overcome the conformity and compromise of associational life, and to resist the temptation of complicity in an amoral (or even immoral) political world, the individual must constantly resist and question the directions offered by society. This is the essence of what Emerson means when he encourages man to “[t]rust thyself.”\textsuperscript{139}

The apparent contradictoriness of Emerson’s essays exemplifies the negative conception of extra-associational moral authority. In one place, Emerson concedes, “I am always insincere, as always knowing there are different moods.”\textsuperscript{140} Lopez, Zakaras, and Barbara Packer suggest that the bipolarity of Emerson’s writings—in this article, reflected in his vacillating views about associations—manifests his method of critique.\textsuperscript{141} Defending different, even contradictory, positions about associations allows Emerson to critically evaluate each position; and such an approach ensures that he avoids the temptations of relaxing into any singular viewpoint. To relax into a singular viewpoint would signal the docility about which Emerson is so critical. Emerson implicitly suggests that the critical nature of “insincer[ity],” like the Over-Soul, will better connect men and women to the universality of what I call extra-associational moral

\textsuperscript{139} Emerson, “Self-Reliance,” 133.
authority. The individual is united with the political through a critical, and at times contradictory, style.

Writing from different perspectives is not the only way the negative conception of extra-associational moral authority manifests in Emerson’s political theory. He also endorses a unique disposition towards the wisdom of others. Emerson, on the one hand, lauds those who challenge conventional wisdom by thinking for themselves. He praises Moses, Plato, and Milton because those great men “spoke not what men, but what they thought.” He urges his readers to question political and social authority. At the same time, while challenging authorities, Emerson suggests it is possible to respect them. Skhlar describes Emerson’s Representative Men (a compilation of essays about great thinkers, including Plato, Montaigne, Shakespeare, and others) as a “zig-zag” because of Emerson’s vacillations between praising and critiquing the subjects of his studies. Emerson shows that it is possible to simultaneously praise and critique. As with adopting different perspectives, Emerson suggests that such an approach will yield higher truths including the universal moral law.

Both the adoption of a bipolar writing style and a zig-zagging posture towards authorities manifest the critical/negative conception of extra-associational moral authority. Both practices exemplify Emerson’s efforts at articulating a complex and apparently (though not actually) contradictory posture towards the social and political world. Both ensure that the individual does not succumb to the dangers of associational living—conformity, compromise, and complicity. Not only do the bipolar writing style and zig-zagging posture embody an active mind that is

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142 Emerson, “Self-Reliance,” 132.
143 Turner, Awakening to Race, 28.
averse to the docility that worried Emerson, but those practices also specifically counter the type of thinking that Emerson locates in associations. The bipolar writing style disallows the writer from conforming to any specific viewpoint for too long. The zig-zagging posture towards authority allows the practitioner to maintain a healthy, but critical, relationship with the outside world—thus mitigating the risks of compromise.

D. Extra-Associational Moral Authority

What unites both the positive and negative accounts articulated above is the consistent embrace of a source of morality beyond society and associations—extra-associational moral authority. *Extra-associational* conveys the individualistic and solitary nature of moral authority. I have chosen “extra-associational” rather than “asocial” or “extra-social” to more obviously juxtapose Emerson’s position with Tocqueville’s; but those other terms might work as well.145 What is significant is the individual—rather than social—character of morality. *Moral* further conveys the normative and individualistic element; it is neither political nor social, both of which would conflict with the extra-associational element. Finally, *authority*, as has already been said, conveys that extra-associational morality is authoritative rather than recommendatory.

The embrace of extra-associational moral authority can be found throughout Emerson’s writings. Consider an extreme example: in his 1844 essay, “Manners,” Emerson endorses social norms and praises fashion and manners insofar as they conduce social living. In that essay,

145 In addition to better reflecting the contrast between Emerson’s and Tocqueville’s positions, “extra-associational” is also better because associations are where the dangers described by Emerson—conformity, compromise, and complicity—are most pronounced. Those dangers may be found in society generally, but some of Emerson’s most pointed critiques focus attention on associations rather than society. Perhaps the chief advantage of using the label “extra-associational” is that it better accommodates the claim that Emerson’s individual can—perhaps should—continue to be in society; enabling the individual to maintain the “perfect sweetness … of solitude” “in the midst of the crowd.” Emerson, “Self-Reliance,” 136. In short, as a label, “extra-associational” allows us to critique the facets of society that are most pronounced in associations and encourage the proper mode of living in society.
Emerson even reveres the “heroic character” of the gentleman as “a man of truth” and “the lord of his own actions.”\textsuperscript{146} Kateb describes that essay as “aberrant” within Emerson’s writings because of Emerson’s encouragement of “conformity to codes or styles for the sake of cooperating.”\textsuperscript{147} But Kateb may have overlooked parts of that essay where Emerson hints that something exists beyond fashion and manners. In one place, Emerson uses spatial metaphors to suggest that “[g]reat men are not commonly in . . . the halls” of fashion; instead, “they are absent in the field.”\textsuperscript{148} And, throughout the essay, Emerson suggests that fashion and manners are derivative of something still greater.\textsuperscript{149} Thus, though Emerson endorses an extreme form of associational living in “Manners,” even in that essay he suggests that there is something morally significant and authoritative beyond associations.

The same concept of extra-associational moral authority can be found in Emerson’s later political writings as well. In his “Address to the Citizens of Concord,” the first charge Emerson raises against the Fugitive Slave Law is that it is an “immoral law.”\textsuperscript{150} Emerson grounds his critique of the law in universal principles, informing his listeners and readers that such principles are accessible at birth—before any imposition by society. Those principles can be rediscovered “every time a man goes back to his own thoughts.”\textsuperscript{151} And the moral law is manifested by the “genius” to which Emerson earlier appealed in “Self-Reliance,” in which he wrote, “henceforward I obey no law less than the eternal law.”\textsuperscript{152} As in “Manners,” Emerson embraces

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\textsuperscript{146} Ralph Waldo Emerson, “Manners,” in \textit{The Essential Writings of Ralph Waldo Emerson}, ed. Brooks Atkinson (New York: Modern Library, 2000), 343.  \\
\textsuperscript{147} Kateb, \textit{Emerson and Self-Reliance}, 174.  \\
\textsuperscript{148} Emerson, “Manners,” 345.  \\
\textsuperscript{149} Emerson suggests that fashion “grows up” out of the labor of “great men,” and he refers to it as a child of greatness. Emerson, 345.  \\
\textsuperscript{150} Emerson, “Address to the Citizens of Concord,” 57.  \\
\textsuperscript{151} Emerson, 58.  \\
\textsuperscript{152} Emerson, “Self-Reliance,” 145.
\end{flushright}
a source of morality linked to the individual in his or her own capacity, separate from associational life.

As has already been noted, morality and politics are logically distinguishable but are non-severable for Emerson. Morality refers to a state of being of the individual, covering common Emersonian concepts such as self-reliance, solitude, and individuality. Politics, by contrast, refers to the individual’s engagement with others. Emerson’s political views cover, among other things, his conception of democratic citizenship; his attitudes towards political parties and movements; and his proposals for reform. Morality and politics are not severable for Emerson because the proper moral disposition—what I describe here as the proper appeal to extra-associational moral authority—is a necessary condition for the achievement of political ideals. At the same time, the achievement of political ends—such as withdrawal from unjust institutions, or the pursuit of reformist agendas—reflects the realization of the proper moral disposition. We cannot understand Emerson’s morality without referencing his politics, and we cannot understand his politics without reference to his moral framework.

Several scholars have drawn attention to the interplay between politics and morality in Emerson’s writings. Stephen Esquith, for example, describes Emerson’s moral concept of “poise” as the defining virtue of the “democratic citizen.” Esquith characterizes poise as “an orientation towards power … that enables citizens to express their desire for power creatively and cooperatively without losing sight of the subtle ways in which this peculiar desire also

\[153\] Emerson does not clearly distinguish society from politics. Thus, the term politics may accurately cover what we today conceive of as “politics” (political institutions or parties) as well as what we today conceive of as the less-formal, private sphere of society.

\[154\] The relationship between politics and morality manifests in many of Emerson’s early essays. Levine and Malachuk trace the “core relationship between [Emerson’s] ethics and his politics” back to Emerson’s essays written between 1826 and 1835. Levine and Malachuk, A Political Companion to Ralph Waldo Emerson, 4.

\[155\] Esquith, “Power, Poise, and Place: Toward and Emersonian Conception of Democratic Citizenship,” 234.
clouds their vision and makes them deaf to the dynamics of power in a democratic society.”\(^{156}\) Kateb similarly describes the union of morality and politics in his concept of “active self-reliance.” Kateb distinguishes *active* self-reliance from *mental* self-reliance, the latter of which is the “intellectual independence” described above.\(^ {157}\) Active self-reliance is the realization of mental independence in the world, through activities and engagements with others. According to Kateb, Emerson understood that “[t]hings must be done, tasks performed, relations and associations entered”;\(^ {158}\) the political Emerson emerges from that understanding. Both Kateb and Esquith focus on the necessary realization of moral self-reliance through political action.\(^ {159}\) In short, though the idea of extra-associational moral authority appears to be primarily relevant to understanding Emerson’s *moral* philosophy, it is also vital to properly understanding Emerson’s democratic *political* theory.

Emerson’s theory of moral authority may also aid in addressing other aspects of his political theory. Consider the scholarly treatment of Emerson’s reaction to the Fugitive Slave Act. Kateb and Woodward-Burns both treat the passage of that law as a turning point for Emerson.\(^ {160}\) They are right: Emerson spoke of the law as prompting a “new experience” and “painful sensation.”\(^ {161}\) And in response to the rhetorical question, “What shall we do?,” Emerson publicly endorsed the Union.\(^ {162}\) Kateb frames the transition as concessionary: after the

\(^{156}\) Esquith, 242.  
^{158}\) Kateb, 134.  
^{159}\) Kateb, 135.  
^{160}\) Kateb, *Emerson and Self-Reliance*, 177–78; Woodward-Burns, “Solitude Before Society,” 30. In Richardson’s biography, he says of Emerson that “[h]e had been a staunch abolitionist for some time; he now became an activist.” Richardson, *Emerson: The Mind on Fire*, 496.  
^{161}\) Emerson, “Address to the Citizens of Concord,” 53.  
passage of the Fugitive Slave law, the apolitical Emerson conceded to political membership to enable others to achieve self-reliance.163 Woodward-Burns, meanwhile, provides a temporally reconciliatory framing of Emerson. For Woodward-Burns, the solitary Emerson finally embraces social reform after the passage of the Fugitive Slave Act.164

On my account, Emerson’s reactions to the Fugitive Slave Law did not alter his commitment to extra-associational moral authority. He was consistent in his embrace of that concept both before and after passage of the Law. The idea that moral authority must be drawn beyond associational life thus helps us to better construct a unified vision of Emerson’s political theory. Kateb’s concessionary framing of Emerson, by contrast, leaves two separate philosophers—the apolitical Emerson before the Fugitive Slave Act, and the political Emerson after the passage of that law. Woodward-Burns’ reconciliatory framing of Emerson, meanwhile, overstates the temporal dimension of self-reliance; that temporal framing is hard to square with Emerson’s claim that true greatness requires embracing the “perfect sweetness … of solitude” while in society.165 What is important is not that solitude precedes society. Apolitical self-reliance is compatible with political engagement provided the individual derives moral authority beyond society.

The concept of extra-associational moral authority is not an interpretive panacea. That concept does not illuminate all aspects of Emerson’s philosophy. Emerson’s lack of systematicity and his poetic writing style interfere with the ability to answer many other important questions. As this brief presentation of the positive and negative/critical accounts of

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extra-associational moral authority demonstrates, there is much that we may still not be able to understand about what Emerson called at one point a “fair mystery.”¹⁶⁶ But even if not every detail can be neatly understood, the analysis in this Part shows how it is possible to understand Emerson as a coherent political thinker. The importance of that coherent vision will be described next.

IV. Emerson’s Democratic Political Theory

Recognition of Emerson’s conception of extra-associational moral authority enables us to reconcile disparate threads of Emerson’s scholarship. We can effectively move beyond the categories of “apolitical” and “political” in his writings. His consistent embrace of a moral authority beyond society not only dispels the fear by Shaw and others that Emerson’s writings were the “the beginning of downright egoism” and nihilism;¹⁶⁷ that embrace also exemplifies the democratic potential of Emerson’s political theory. Emerson offers a conception of democracy that requires none of Tocqueville’s moral associations, and Emerson provides an understanding of democratic morality that is compatible with the most extreme forms of freedom and social independence. For those interested in a democratic theory divorced from the demands of social institutions—religious groups; political parties; trade or labor associations; even the family—Emerson promises a framework within which democratic morality can be sustained and promoted. The democratic spirit of Emerson’s political theory can be understood in three ways.

First, democracy shaped Emerson’s worldview and we cannot understand Emerson’s political theory without appreciating the democratic environment in which he was writing. This

¹⁶⁶ Emerson, “Address to the Citizens of Concord,” 58.
¹⁶⁷ Shaw, “Emerson the Nihilist,” 68.
is what Skhlar means when she says that “democratic political experiences … gave [Emerson’s] essays their intellectual purpose and direction.” Zakaras makes a slightly different point, noting that Emerson’s notion of self-reliance is democratic because “the invitation to seek individuality is given in part by democratic culture and institutions themselves.” For both Skhlar and Zakaras, Emerson’s political theory was a reflection of the socio-political world in which he lived. In this sense, the concept of extra-associational moral authority is a product or reflection of Emerson’s democratic commitments. The democratic spirit of nineteenth century New England shaped Emerson’s Over-Soul—the “common heart” within each man. Even in “Self-Reliance,” as he lauds individualism, Emerson says of “genius” that it is “to believe that what is true for you in your private heart is true for all men.”

The same cannot be said of Tocqueville, whose aristocratic commitments are evident in his attitudes towards associations. Tocqueville worried about the isolation and solitude of democracy. He turned to associations in an effort to replace lost social and political ties. For Tocqueville, associations both neutralize the dangerous effects of narrow self-interest and cultivate democratic peoples’ moral characters. Associations also resemble the aristocratic institutions with which Tocqueville was more familiar. Welch describes Tocqueville’s associations as the “functional equivalent” of “nobility”, and Kateb correctly reports that Tocqueville wanted to find “a democratic equivalent for the old orders—the secondary powers—

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169 Zakaras, Individuality and Mass Democracy, 76.
170 Emerson, “The Over-Soul,” 237.
172 Cheryl Welch describes Tocqueville’s upbringing in the “political wake” of the French Revolution. Welch, De Tocqueville, 8. France was, throughout Tocqueville’s life, still wedded to many of its earlier institutions, and Welch reports that Tocqueville “was born into a tight cocoon of aristocratic reaction” against the loss of the Old Regime. Welch, 9.
173 Welch, 91.
of aristocratic society.”\textsuperscript{174} In short, while Tocqueville was wedded to an aristocratic institution in a democratic world, Emerson embraced the radical democratic individuality that Tocqueville resisted.

Second, within Emerson’s political theory, the concept of extra-associational moral authority marries the egalitarian aspirations of democracy to the promise of democratic freedom. Whether in the form of the abstract Over-Soul or through a negative/critical disposition, Emerson’s concept of extra-associational moral authority unites both freedom and equality. He suggests that, as we become free, we will also understand our “radical unity”—that each of us is “equal to every other man.”\textsuperscript{175} In “The American Scholar,” Emerson associates intellectual independence with the achievements of democratic equality. In the closing lines of that essay, he hopes that “[w]e will walk on our own feet; we will work with our own hands; we will speak our own minds,” and he promises that, if we can achieve such independence, a “nation of men will for the first time exist.”\textsuperscript{176} In his rebuke of the Fugitive Slave Act, Emerson roots the immorality of slavery in both the inalienable “right to liberty” and the natural equality of men.\textsuperscript{177}

The marriage of equality with freedom is at the heart of Emerson’s political theory. Wilson Carey McWilliams finds in Emerson’s writings “[t]he All and the One.”\textsuperscript{178} Extra-associational moral authority is the mechanism through which the equality of “all” is squared with the freedom of “one.” Others—Kateb, Zakaras, and Woodward-Burns—similarly understand the mechanism but fail to explicitly describe it. Putting the concept of extra-associational moral authority in the broader context of Emerson’s political thought will help to clarify its meaning.

\textsuperscript{175} Emerson, “New England Reformers,” 416.  
\textsuperscript{176} Emerson, “The American Scholar,” 59.  
\textsuperscript{177} Emerson, “Address to the Citizens of Concord,” 57–58.  
\textsuperscript{178} Wilson Carey McWilliams, “Emerson: The All and the One,” in \textit{A Political Companion to Ralph Waldo Emerson} (Lexington, Ky.: University Press of Kentucky, 2011), 43.
associational moral authority into words, as I have done here, allows us to more fully explore its manifestations in Emerson’s writings—especially the positive (Over-Soul) and negative (critical). This article at least begins to solve Emerson’s “fair mystery”\(^{179}\) and, in so doing, enables a fuller appreciation of the democratic potential of his writings.

Finally, the concept of extra-associational moral authority allows us to understand and evaluate the viability of Emerson’s democratic political prescriptions. Emerson, like Tocqueville, was aware of the dangers of conformity in the democratic world; Emerson adds to this his concerns over compromise and, specifically in the context of social and political engagement, complicity. Extra-associational moral authority is one way to coherently understand how Emerson proposes we overcome those dangers. Even if the positive conception may not work in contemporary democracy—the Over-Soul is too otherworldly and laden with religious baggage—the negative conception may still be a workable tool for democratic political theorists. As described above, the negative conception may be realized through a bipolar writing style (defending contradictory positions on certain issues) or practicing what Skhlar describes as the “zig-zag”—simultaneously praising and critiquing sources of authority.

Others offer different strategies for realizing Emerson’s vision. Turner describes the “intellectual wakefulness required by self-reliance” as an important step to achieving social and political justice.\(^{180}\) On Turner’s account, self-reliance demands that we continually question existing social and political arrangements with an eye towards building a more just world. Zakaras likewise encourages the realization of self-reliance through “trying hard to understand

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\(^{179}\) Emerson, “Address to the Citizens of Concord,” 58.

\(^{180}\) Turner, *Awakening to Race*, 27.
how a person could be moved by such unfamiliar moral concerns.” As with Turner, Zakaras’ “trying hard” requires a serious effort at understanding different points of view; it is especially anathema to the conformity of groupthink. By encouraging free thought, Emerson aspires to promote and preserve democratic morality and thus democracy. He would endorse Kateb’s “bellicose engagement with the world” and Cavell’s “aversive thinking.” Emersonian self-reliance can only be cultivated through practiced skepticism of received opinion—from institutions, associations, or the “mob.”

As these various strategies for realizing the negative conception of extra-associational moral authority demonstrate, that conception is “less utopian”: it does not require any fundamental reshaping of the world but instead just that individuals remain “unsettled and available to transformative experience, forming independent judgments, and then, in the face of injustice, translating these judgments into action.” Emerson hoped that such a critical disposition would, over time, yield a better social and political world. Intellectual bellicosity does not lead to an aggressive, Hobbesian, relationship to others in society. Quite the opposite. Emerson’s political theory is conducive to democratic social life, in part because his moral theory is so deeply attentive to politics and society—evidenced by his abolitionism, reformism, and concern over complicity in wrongdoing against others. Critical thinking and a proper

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182 Zakaras, 79.
preservation of one’s authentic self within the crowd encapsulate the socially-aware and democratically-inspired individuality that Emerson promotes.

The concept of extra-associational moral authority elucidates the democratic potential of Emerson’s political theory. By enabling readers to better understand how seemingly disparate parts of Emerson’s political theory fit together, extra-associational moral authority allows us to evaluate specific aspects of his political theory in light of a more holistic Emersonian project.

V. Conclusion

Emerson was long misunderstood to be endorsing the solitary individualism that Tocqueville feared would sound the death knell for democracy. Emerson’s embrace of self-reliance and solitude, and his praise of the individual’s superiority over the collective, enabled that misinterpretation. In this article, I added to the efforts in recent decades to revive the political and democratic spirit of Emerson’s writings. He was, as Stanley Cavell observes, “a figure of democratic inspiration and aspiration.”186 My argument is that we may understand Emerson as a unified political theorist by focusing on his consistent embrace of extra-associational moral authority. A democratic spirit pervades all of Emerson’s essays and speeches. Notwithstanding some variance over the form that morality takes, and the nature of the individual’s relationship with morality, he consistently demands that individuals find moral authority beyond society.

This article does not address every question. As has already been noted, there is much left to uncover about Emerson’s “fair mystery.” But by elucidating Emerson’s conception of extra-associational moral authority, this article ultimately enables a richer understanding of

Emerson as a democratic political theorist. Using extra-associational moral authority as an interpretive tool allows readers to appreciate the nuanced and complex relationship between solitude and society; independence and the crowd; self-reliance and politics. And finally, if Bloom is right that “[t]he mind of Emerson is the mind of America,”\textsuperscript{187} the concept of extra-associational moral authority equips us to better understand ourselves.

\textsuperscript{187} Bloom, “Emerson: The American Religion,” 95.
ASSOCIATIONS AND HECKLERS

I. Introduction

In *Boy Scouts of America v. Dale* (2000), the Supreme Court struck down a New Jersey public accommodations law as it was applied to the Boy Scouts of America; the group had recently revoked the membership of James Dale (a scoutmaster) after learning that he was gay.188 The Majority in *Dale* ruled that the New Jersey law violated the Boy Scouts’ freedom of “expressive association” protected by the First Amendment. In effect, the Court protected the Boy Scouts’ right to exclude Dale.189 That right to exclude stems from a more general constitutional protection of associational freedom.190 As Alexis de Tocqueville observed in 1835, “the right of association seems . . . by nature almost as inalienable as individual liberty.”191 And, though associational freedom is mentioned nowhere in the First Amendment, the Supreme Court has treated associational freedom as vital to the protection of other First Amendment activities—speech, religion, assembly, and petition.192

But associational freedom—and the corollary right to exclude—is in tension with the normative principle underlying the Court’s ruling in another important case. In *Roberts v. Jaycees* (1984), the Court rejected an association’s—the Jaycees’—right to exclude women,

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189 Nan D. Hunter, “Accommodating the Public Sphere: Beyond the Market Model,” *Minnesota Law Review* 85 (2000): 1591 (describing the issue in *Dale* as “one of the classic conflicts in constitutional law: the tension between equality and freedom, between the right to belong and the right to exclude”).
citing the state’s “compelling interest in eradicating discrimination against its female citizens.”193

While Dale protects exclusion, Jaycees promotes inclusion. Our constitutional tradition should aspire to accommodate both associational freedom and equal access to associational membership.

The Court’s current method of balancing associational freedom and equal access is flawed. Today, in cases such as Dale, the Court first considers whether the association at issue is engaged in “expressive association”;194 then, if engaged in expressive association, the Court considers whether any “compelling state interests” override the association’s expressive interests.195 The Court’s expressive association analysis does not adequately promote the twin ideals of associational freedom and equal access. By focusing primarily on the expressivity of the association, the Court is too deferential to associations. And, by demanding a “compelling” state interest to overcome the association’s protected interests, the Court sets a high bar for those promoting inclusion. In short, the Court’s analysis is biased towards associational freedom; and, the equal access thread of the Court’s jurisprudence—exemplified in Jaycees—is given short shrift.

In this article, I offer a novel tool for maximizing both associational freedom and equal access: heckling. Rather than focusing on whether an association is engaged in “expressive” conduct, courts should consider whether those seeking admission into associations are hecklers.

193 Roberts v. U.S. Jaycees, 468 U.S. 609, 623 (1984). As discussed below, the principle underlying the Jaycees holding can be found more generally in the Declaration of Independence’s promise that “all . . . are created equal,” The Declaration of Independence, para. 2 (U.S. 1776), and the Fourteenth Amendment’s guarantee that “No state shall . . . deny to any person within its jurisdiction the equal protection of the laws.” U.S. Const. amend. XIV, § 1; see Part I.A.2 below.
194 In Dale, the Court emphasized that “a group must engage in some form of expression, whether it be public or private” to garner First Amendment protection (Dale, 530 U.S. at 648).
195 Id. at 640, 640–41 (emphasizing that “freedom of expressive association is not absolute; it can be overridden by regulations adopted to serve compelling state interests”).
Though heckling—especially, the “heckler’s veto”\textsuperscript{196}—has been considered in other areas of First Amendment jurisprudence, it has yet to be extended to the Freedom of Association.

Heckling is classically when a secondary speaker disrupts the ability of the primary speaker to convey a message to the primary speaker’s audience. The heckler is disruptive. Like primary speakers, associations such as the Boy Scouts deserve protection from disruption.\textsuperscript{197} If a person seeking admission into an association is a heckler, the principle of associational freedom justifies excluding that person. At the same time, if a person seeking admission into an association is not a heckler (because he does not pose any threat of disruption to the association), his claim to inclusion in the association is strongest.

In its application to the associational context, “heckling” is a metaphor. Like the metaphor of the “marketplace of ideas,”\textsuperscript{198} which exposes important values underlying traditional protections of free speech, the metaphor of heckling illuminates what is at stake in debates over Freedom of Association. Even though they may not resolve all real-world problems, metaphors illuminate critical components of debates. The application of heckling to associations is helpful for shedding light on the values underlying the Court’s Freedom of Association jurisprudence: associational freedom (in Dale), and equal access (in Jaycees).


\textsuperscript{197} See Part II.A below.

\textsuperscript{198} Though he did not use that precise phrase, Justice Holmes said in his dissent in Abrams v. United States that, “when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out.” Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). The idea underlying Holmes’s statement is generally traced back to John Stuart Mill’s On Liberty but, in the law, is traced to Holmes’s dissent. David Schultz and David L. Hudson, “Marketplace of Ideas,” The First Amendment Encyclopedia, June 2017, https://www.mtsu.edu/first-amendment/article/999/marketplace-of-ideas. For a more recent example of someone arguing for an “international marketplace of ideas,” see Rodney A. Smolla, Free Speech in an Open Society (New York: Alfred A. Knopf, Inc., 1992), 343–67.
There is an important caveat at this point. Any judicial response to “hecklers” in the associational context will be filtered through various state and federal public accommodations laws. Such laws are complicated. The New Jersey law addressed in *Dale*, for example, non-exhaustively listed fifty types of establishments covered by the law—from taverns and trailer camps to bathhouses and billiard halls. I set those complex and multifaceted public accommodations laws to the side for the purposes of this article and assume the existence of relevant laws. A prolonged discussion of public accommodations laws is not necessary to this article’s focus on the competing constitutional and normative claims of associations and those seeking admission.

In Part II, I describe the normative values underlying protection of associations. Associations serve moral, civic, pluralistic, and personal functions. A right of associations to exclude unwanted people promotes each of those functions. I also introduce the other thread of American constitutional thought—equal access—found in cases like *Jaycees*.

In Part III, I describe the concept of heckling, especially the “heckler’s veto.” Though the Supreme Court has never expressly endorsed governmental restriction of hecklers, scholars including Owen Fiss, Cass Sunstein, and (now-Justice) Elena Kagan, shed light on possible legal foundations for such public protection of primary speakers against hecklers.

Finally, in Part IV, I apply the heckling analogy to the associational context. Specifically, I describe a set of dimensions within which we may evaluate the merits and

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199 At the most general level, public accommodations laws require non-discrimination by establishments defined as “public accommodations.” Such establishments classically included inns and restaurants. Many recent public accommodations laws expand that category to include swimming pools, movie theaters, and more. For a greater discussion of public accommodations laws, see the text accompanying notes 317–321.

legitimacy of particular practices of exclusion: the (1) size and resource constraints of the association, (2) the association’s degree of publicity, (3) the centrality of the association’s mission (or the relevant part of its mission to the exclusion), and (4) the association’s justification for exclusion. These dimensions will not generate categorical rules about exclusion; instead, they are factors that may inform reasonable debates about the legitimacy of specific practices of exclusion. To illustrate the mechanics of the analysis, I offer examples of easy and hard cases. Though the heckling analysis may not answer the hard cases, it nonetheless brings to light the most important issues at stake in those hard cases. I also describe the analytical advantages of this proposed heckling analysis over the traditional expressive association analysis.

The core legal question this article addresses—whether, and when, associations may exclude—appears narrow. But the heckling analysis proposed here may actually have broader value to political and legal theorists concerned with questions of political membership. Considering the actual threat of disruption may prove normatively significant in locating the outer limits of political communities’ rights to govern their borders. Though I defer those more general theoretical questions to later articles, those considerations undergird the legal analysis in this piece.

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The landscape of American constitutional theory is quite complex. Larry Solum, for example, identifies no fewer than ten different forms of living constitutionalism and four

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different versions of originalism. Rather than fitting the below analysis into an existing constitutional framework, this article brackets out issues of constitutional theory and focuses on the core argument in support of heckling analysis. The basic thrust of my argument is that courts and scholars should adopt the heckling analysis proposed in Part IV; not that it is a descriptively accurate account of existing Freedom of Association doctrine.

Insofar as the argument in this article is normative, it is at least consistent with the types of arguments made by Dworkinians and constitutional pluralists. First, Ronald Dworkin’s approach to the law—described in *Law’s Empire*—treats the law as a continuing story, the chapters of which are continuously being written by contemporary legal actors, especially judges. For Dworkinian scholars, subsequent developments in the law must both fit within the current legal paradigm and be justified by the normative aspirations of the law. A judge for example, when deciding between multiple possible interpretations of a law, should choose the interpretation that is most normatively-desirable—what Dworkin describes as putting “the text in a better light.” My basic position in this article is that heckling analysis can aid judges in locating that “better light.”

Second, constitutional pluralists such as Philip Bobbit and Richard Fallon also rely on normative values to defend constitutional interpretations. Constitutional pluralists recognize multiple sources as significant for the interpretation of constitutional text: among others, history, Popu

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202 Solum, 1253 (describing the family of originalist constitutional theories to include, at least: Public Meaning Originalism, Original Intentions Originalism, Original Methods Originalism, and Original Law Originalism).
204 Dworkin, 239.
205 Dworkin, 231.
caselaw/doctrine, constitutional text, and normative values. Like Dworkinians, constitutional pluralists thus retain an important role for normative principles in guiding constitutional interpretation.

My argument is consistent with the aspirations of Dworkinians and constitutional pluralists. Through a review of constitutional text, caselaw, and political theory, I locate two normative values underlying the constitutional Freedom of Association doctrine: associational freedom and equal access. And I defend the proposed heckling analysis as the best means of achieving both values. At most, adoption of heckling analysis by courts will maximize those twin ideals in our constitutional order. And, even if the Supreme Court and lower courts are resistant to categorically embracing it, the heckling analysis should at least aid lower courts in addressing conflicts that implicate both Jaycees and Dale. Most legal disputes between associations and those seeking admission cannot be perfectly resolved by reference to either case alone; so, to the extent that judges are bound by both Jaycees and Dale and must apply the holdings from both cases to future legal disputes, the heckling analysis proposed here may be helpful to judges confronting such disputes.

II. Associational Freedom and Equal Access

The associations on which this article is focused are private, civil, and non-corporate. The category is intended to cover small groups of informal, friendly interactions and large, multinational associations. But that category is meant to exclude at least three types of

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associations. First, this analysis does not (at least, not immediately) apply to public associations, such as townships. The heckling metaphor will make the most sense in the private context where both the primary speaker (association) and the heckler (person seeking admission) are private parties. Second, this analysis is also limited to civil associations—those that are, in Richard Boyd’s words, “conducive to the virtue of civility.” Just as the analogy to heckling is not intuitive with public associations, that analogy does not clearly apply to uncivil groups such as gangs or criminal syndicates. Finally, the heckling analysis proposed in this article is not intended to apply to the corporate context, where membership takes the form of employment. There are sufficient legal and normative differences between persons seeking membership in civil associations and persons seeking employment that the two should be treated separately. Future articles may adapt the heckling analysis to public, uncivil, and employment contexts.

In this Part, I describe the normative and legal status of this category of associations. As I will show, undergirding the protection of associations is the right of those associations to exclude unwanted people from membership. I then describe the egalitarian principle of equal access found in cases like Jaycees. Finally, I argue that the tension between the associational freedom and equal access—between exclusive associations, and the egalitarian promotion of inclusion—is desirable.

207 Richard Boyd, Uncivil Society: The Perils of Pluralism and the Making of Modern Liberalism (Lanham, MD: Lexington Books, 2004), 7. As legal and political history demonstrates, many associations are not. Boyd, 7 (exploring the darker side of associations, painting them as “‘inveterate,’ ‘factional,’ ‘parties,’ or ‘sects,’ susceptible to a spirit of ‘divisiveness’ and ‘persecution’”).
A. Associational Freedom and the Right to Exclude

1. The Value of Associations

Normative arguments for the value of associations take many forms in American political and legal thought. The classical defense of associations comes from Alexis de Tocqueville. Following his tour of America in 1831, Tocqueville reported that, “Americans of all ages, all stations in life, and all types of dispositions are forever forming associations.” He went on to argue that associations are critical to the preservation of democracy in the young nation, claiming that, “[i]f men are to remain civilized or to become civilized, the art of association must develop and improve among them at the same speed as equality of conditions spreads.” Tocqueville is today revered as the patron saint of associations, but the impact of associations on American democracy preceded him. In his “Biography of a Nation of Joiners,” Arthur Schlesinger describes some of the early-American civic associations. Benjamin Franklin, for example, personally organized and contributed to the formation of many such associations: the Junto (“a secret club of artisans and tradesmen”), a subscription library, and the American Philosophical Society, to name a few. Masonic lodges and other secretive societies flourished around the time of the Revolution—perhaps most famously, the Sons of Liberty, who orchestrated the Boston Tea Party.

208 Tocqueville, Democracy in America, 513.
209 Tocqueville, 517.
211 Schlesinger, 3.
Associations have not been uniformly praised. James Madison famously worried about the role of factions in American democracy. For Madison, factions were a specific but common type of association “united and actuated by some common impulse of passion, or of interest, adversed to the rights of other citizens, or to the permanent and aggregate interests of the community.”

More recent skeptics of associations include public choice theorists, who focus on the ways in which associations (especially interest groups) undermine democratic institutions by promoting the interests of their members over and against those of the general public. And, of course, associations are clearly dangerous when they devolve into, or exhibit features of, gangs, criminal enterprises, or terroristic organizations. Outside of the American context, Sheri Berman argues that high levels of associational membership contributed to the

213 James Madison, “The Federalist No. 10,” New York Packet, November 23, 1787, https://www.congress.gov/resources/display/content/The+Federalist+Papers#TheFederalistPapers-10. At the end of the day, even Madison recognized the naturalness of factions, saying “[l]iberty is to faction as air is to fire.” Madison, “Federalist No. 10.” Madison adds that, “it could not be less folly to abolish liberty, which is essential to political life, because it nourishes faction, than it would be to wish the annihilation of air, which is essential to animal life, because it imparts to fire its destructive agency.” Madison, “Federalist No. 10.” Thus, given the choice between controlling the causes of factions—the natural tendency to associate—and their effects, Madison elected to control the latter through the federalist structure of the Constitution. For a more general consideration of the complex status of associations in political theory, see Richard Boyd, “The Madisonian Paradox of Freedom of Association,” Social Philosophy and Policy 25, no. 2 (2008): 235.


fragmentation of society in Weimar Germany. Although factions, gangs, and criminal enterprises are not the same as civic associations (factions for example, are primarily political rather than civil), and although Berman’s argument may not hold true for contemporary American civil society, the same dangers animate skepticism of civic associations. When civic associations engage politically or exercise coercive power over non-members, those associations come closer to the pernicious types of associations not considered in this article.

Notwithstanding any dangerous potential, civic associations are praiseworthy for several reasons. First, associations serve a moral function. Tocqueville, for example, claimed that associations foster moral development “by the reciprocal action of men one upon another.” He suggests that something about association with others engenders moral sympathies and perhaps even generates moral conduct. Today, Nancy Rosenblum recognizes the same phenomenon, arguing that, in associations, “individuals learn the social roles and rules impressed on them by the approval and disapproval of other members and by the group’s authority,” and “[t]ies of friendly feeling and trust are generated.”

Associations also serve various civic functions. In his influential Bowling Alone, Robert Putnam describes some of the many civic benefits flowing from associational membership, including the promotion of children’s welfare, safe and productive neighborhoods, economic prosperity, health, and happiness. David Cole, meanwhile, describes the role of civic

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217 Tocqueville, Democracy in America, 515.
associations—primarily advocacy groups such as the ACLU, the NRA, and the NAACP—in the political and legal movements for marriage equality, gun rights, and the war on terror. Though each movement culminated in judicial action, Cole argues that the critical change was at the level of public opinion, which was invariably shaped by civic associations. He argues that, “behind any significant judicial development of constitutional law[,] you will nearly always find sustained advocacy by multiple groups of citizens.”

Like Putnam, Cole identifies a key civic function played by associations; for Cole, “the right of association is so critical to preserving all our constitutional freedoms” precisely because of this civic function.

Thirdly, associations serve pluralistic functions. The existence of diverse and (sometimes radically) different groups is essential to liberal democracy. In *On Liberty*, John Stuart Mill defends men’s “freedom to unite for any purpose not involving harm to others” in part because the spontaneous and natural diversity of ideas and lifestyles yields the highest social utility.

Rosenblum similarly lauds what she called the “experience of pluralism,” which generates a host of individual and collective benefits. Associations protect and promote the diversity that Mill and Rosenblum praised.

Finally, associations may generate a host of personal benefits. While the moral, civic, and pluralistic benefits of associations warrant praise, those benefits may not adequately capture

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221 Cole, 14.
224 I am grateful to Professors Richard Boyd and Joshua Cherniss for pointing me to this important and separate benefit of associational membership.
why individuals actually join groups. People join groups to find happiness and fulfillment; to express themselves with others; to learn new skills or expand professional networks; to accomplish tasks that can only be accomplished collectively; to be recognized; and more.²²⁵ Rosenblum, for example, describes the “personal psychological, moral, and political goods” derived from social membership.²²⁶ The list of personal reasons to join groups is endless and, by its nature, personal and subjective. If the other three benefits often justify association, the personal benefits help explain association.

These benefits—the moral, civic, pluralistic, and personal—are only some of the most popular grounds given for defending associations in American life; there are undeniably many more. Regardless of whether these benefits are cited explicitly, contemporary constitutional and legal thought is permeated by arguments for the protection of associational life grounded in these types of valuations. Much—though not all—of the scholarship and caselaw cites directly to Tocqueville.²²⁷ Other scholars, such as John Inazu, decline to ground their arguments in Tocqueville, but nonetheless come down clearly in support of associations.²²⁸

²²⁵ Erwin Chemerinsky, and Catherine Fisk, “The Expressive Interest of Associations,” William & Mary Bill of Rights Journal 9, no. 3 (2001): 611–12 (arguing that “freedom of association is protected because of the benefit individual members gain from groups”). Chemerinsky and Fisk argue that “associations provide benefits to their members, ranging from training, to business contacts, to the opportunity for school children to have fun and learn life skills.” Chemerinsky and Fisk, 615 (citing Rotary Int’l v. Rotary Club of Duarte, 481 U.S. 537, 546-47 (1987)).


As shown in the next section, the preservation of associations will at least sometimes rest on associations’ power to control membership—their rights to exclude. Even the Jaycees Court recognized that “[t]here can be no clearer example of an intrusion into the internal structure or affairs of an association than a regulation that forces the group to accept members it does not desire.” And among scholars, Andrew Koppelman and Tobias Barrington Wolff, although urging equal access, nonetheless emphasize the necessity of some right to exclude.

2. The Constitutional Status of Associations

The constitutional Freedom of Association is often found implicitly in the First Amendment protection of “freedom of speech,” as in Whitney v. California (1927). In that case, the Supreme Court upheld California’s Criminal Syndicalism Act, which criminalized joining in any “organization, society, group and assemblage of persons organized and assembled to advocate, teach, aid and abet criminal syndicalism.” Whitney is important because, though upholding the law, the Court recognized the centrality of association to free speech interests.
protected by the First Amendment.\textsuperscript{233} As with other areas of constitutional law, Whitney also serves as a reminder that constitutional rights may be trumped by sufficiently strong state interests.

Today, the heartland case for Freedom of Association is NAACP v. Alabama (1958), in which Justice Harlan, writing for the Court, recognized that the “[i]nvioability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs.”\textsuperscript{234} Alabama had tried to force the NAACP to disclose its membership lists, which the Court thought would have “adversely affected” the association’s civil rights work in the Jim Crow south.\textsuperscript{235} The Court thus rebuffed Alabama’s effort to get the NAACP’s membership lists by recognizing the NAACP’s freedom of association. Though the Court did not specifically address the NAACP’s right to exclude unwanted people from membership, Harlan’s emphasis on the “inviolability” of the association’s “privacy” implicates the group’s right to exclude. The Court’s holding would have meant nothing if the NAACP was unable to exclude from membership the Alabama officials that sought the NAACP’s membership lists.

\textsuperscript{233} Id. at 372 (“We cannot hold that, as here applied, the Act is an unreasonable or arbitrary exercise of the police power of the State, unwarrantably infringing any right of free speech, assembly or association, or that those persons are protected from punishment by the due process clause who abuse such rights by joining and furthering an organization thus menacing the peace and welfare of the State.” (emphasis added)).


\textsuperscript{235} NAACP, 357 U.S. at 459–60, 463 (recognizing that disclosure “may induce members to withdraw from the Association and dissuade others from joining it because of fear of exposure of their beliefs shown through their associations and of the consequences of this exposure”).
Forty years later, the Court squarely addressed the associational right to exclude in *Boy Scouts v. Dale* (2000). While the *NAACP* Court had emphasized the “inviolability of [the NAACP’s] privacy,” the Court in *Dale* focused on the expressive nature of the Boy Scouts. The Court grounded its protection of the Boy Scouts in the fact that the association engaged in “expressive” speech. Justice Rehnquist, who wrote for the Majority, was critical of the New Jersey public accommodations law which would have compelled the Boy Scouts to accept an “unwanted person”—James Dale—in violation of the Boy Scouts’ mission to “[i]nstill values in young people.”236 Those values included the proscription of homosexuality. *Dale* thus explicitly recognized associations’ rights to exclude unwanted people.

Beyond *NAACP* and *Dale*, the Court has addressed the rights of associations in a number of important decisions. Among these was *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston* (1995), in which an association of gay, lesbian, and bisexual Boston residents (GLIB) sought to be included in the St. Patrick’s Day parade organized by the South Boston Allied War Veteran Council. The Court rebuffed GLIB’s claim, affirming the right of the War Veteran Council to exclude GLIB from the parade.237 Though the parade was a public event attended by many non-members, Justice Souter compared the Council organizing the parade to a “private club [which] could exclude an applicant whose manifest views were at odds with a position taken by the club’s existing members.”238 The Court’s recognition of the Council’s right to exclude—which the Court traced to the freedom of *speech*, focusing on the expressive

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236 Boy Scouts of Am. v. Dale, 530 U.S. 640, 648–49 (2000). Part of the Scout Oath emphasizes that a boy scout must be “morally straight,” which the Boy Scouts interpreted as being inconsistent with homosexual conduct (*Id.* at 650).


238 *Id.*
nature of the St. Patrick’s Day parade—was critical to the Majority’s position in *Dale* five years later.  

The Court has also addressed the associational rights of specific types of associations such as private schools, unions, and religious organizations. At this point, the Court has been wrestling with the contours of freedom of association for nearly a century since *Whitney* in 1927. But the nebulous and undefined reach of freedom of association make it, in Larry Alexander’s words, a “quite capacious liberty.” And, as evidenced by the apparent tension between *Dale* and *Jaycees*, the Court’s jurisprudence has not yet yielded a coherent doctrine.

B. The Egalitarian Promotion of Equal Access

The Court’s apparently incoherent treatment of associations can be seen in the *Dale* Court’s failure to address another thread that runs through American constitutional history: equal access. At the most general level, equal access can be found symbolically in the Declaration of Independence’s claim that “all men are created equal” and later in the Fourteenth

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239 *Id.* at 569–70.
245 The Declaration of Independence, para. 2 (U.S. 1776).
Amendment’s promise that “[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws.” The egalitarian impulse for inclusion has animated many of the most important social and political developments in American history, including the abolitionist, civil rights, and the women’s rights movements. Each of those movements are driven by the demands for greater accessibility to American democratic institutions. The political theorist Judith Skhlar describes what she calls the “liberal highway” to an egalitarian society and some of the speedbumps along the way: “slavery, racism, nativism, and sexism.”

Similarly, Lauren Rosenblum (L. Rosenblum) explains the rise of public accommodations laws by appealing to the “principle of equal opportunity.” L. Rosenblum shows how that principle has been steadily applied to challenge various forms of discrimination in American history. She argues that the rise of public accommodations laws are a recent effort by states to enable access by “traditionally disadvantaged groups” to a broadening array of social and political goods and services. Like Skhlar, L. Rosenblum identifies the egalitarian impulse that I argue is critical to the American constitutional tradition.

In the specific context of voluntary, civic associations, the egalitarian impulse urges greater—equal—accessibility and inclusion in associational life. This impulse is labeled as “equal access” because it is characterized by the demand by some (the excluded people) for the same access to associations as is afforded to those associations’ members. As has already been said, the prototypical equal access case is Roberts v. Jaycees (1984), in which the Court rejected

246 U.S. Const. amend. XIV, § 1.
249 Rosenblum, 1250–52.
the Jaycees’ claimed right to exclude women from full membership. Women, appealing to Minnesota’s public accommodations law, demanded “equal access to the goods, privileges, and advantages” that had been classically reserved only for male members.250 In siding with those women, the Court validated the state’s “compelling interest in eradicating discrimination against [the state’s] female citizens.”251 The Jaycees Court was not, however, blinded to the associational freedom underlying the protection of exclusion. The Court conditioned state authority over associations on factors such as “size, purpose, policies, selectivity, [and] congeniality”252 of the associations. (Justice O’Connor, in her concurrence, also focused on the commercial nature of the Jaycees and recognized the state’s interest in promoting “nondiscriminatory access to commercial opportunities in our society.”)253 In so doing, the Jaycees Court came much closer to balancing the associational freedom of the Jaycees with the equal access demands of the female litigants.

The Court applied the Jaycees framework a few years later in Rotary International v. Rotary Club of Duarte (1987) to uphold a California law requiring Rotary Clubs to admit women.254 Writing for the unanimous Court, Justice Powell reaffirmed that states have a “compelling interest in assuring equal access to women extends to the acquisition of leadership skills and business contacts as well as tangible goods and services.”255 And the following year, in N.Y. State Club Ass’n v. City of New York (1988), the Court again affirmed the Jaycees Court’s analysis. In the challenge to a New York law imposing anti-discrimination requirements

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251 Id. at 623.
252 Id. at 620.
253 Id. at 632 (O’Connor, J., concurring) (emphasis added); Linder, “Freedom of Association,” 1889 (discussing Justice O’Connor’s opinion in Jaycees).
255 Id. (citing Jaycees, 468 U.S. at 626).
on private groups with more than 400 members, the Court upheld the law largely based on the

*Jaycees* Court’s reasoning. In a particularly illuminating passage, the Court affirmed that,

> It may well be that a considerable amount of private or intimate association occurs in such a setting, as is also true in many restaurants and other places of public accommodation, but that fact alone does not afford the entity as a whole any constitutional immunity to practice discrimination when the government has barred it from doing so. Although there may be clubs that would be entitled to constitutional protection despite the presence of these characteristics, surely it cannot be said that [the New York law] is invalid on its face because it infringes the private associational rights of each and every club covered by it.\(^{256}\)

As seen in cases like *Jaycees*, *Rotary International*, and *N.Y. State Club Ass’n*, exclusion from groups impedes equality.\(^{257}\) Though equality may sometimes take the form of mere membership in the groups—the deprivation of which is a direct function of exclusion—equality may also relate to other political ideals such as freedom or citizenship. For Sklhar, exclusion from the right to vote was a source of unequal citizenship. For Justice Brennan, exclusion of women from the *Jaycees* deprived them of “equal access” to “the various commercial programs and benefits offered to members.”\(^{258}\) To the extent that American democracy is premised on the promise that all “are created equal,” exclusion impedes equality. And in this regard, the *Dale* Court’s protection of the Boy Scouts’ associational freedom conflicted with the *Jaycees* Court’s promotion of equal access. It is on this battleground, between associational freedom and equal access, that the heckling analogy will prove most helpful.

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\(^{256}\) *N.Y. State Club Ass’n*, Inc. v. City of New York, 487 U.S. 1, 12 (1988) (internal citations omitted).

\(^{257}\) There are exceptional situations in which this is not the case. For example, where a group’s mission is egalitarian in nature, exclusion of persons with egalitarian views better promotes those egalitarian ideals.

C. Balancing Associational Freedom and Equal Access

In cases like *Dale* and *Jaycees*, the tension between associational freedom and equal access is clear. And, to the extent that those two values are individually praiseworthy, some balance between them must be struck. The idea of “balance” does not require that associational freedom and equal access exist in equal parts. Instead, the idea is that associational freedom and equal access should exist in tandem—neither should be embraced or rejected absolutely. On the one hand, too much associational freedom may lead to a rise in pernicious and invidious exclusion. As Justice Stevens argued in his dissent in *Dale*, exclusion may be deployed “to insulate nonexpressive private discrimination . . . .” The dangers of racism, sexism, and xenophobia lurk in the shadows of American civil society, and those dangers might be liberated through a Court too eager to defend associations’ rights to exclude. On the other hand, pushing the *Jaycees* doctrine too far generates its own set of risks. To the extent that a robust civil society is desirable for the moral, civic, pluralistic, and personal reasons described above, associations must be afforded some discretion to define their missions and memberships. If it is the right of any person, or group of persons, to join an association, that association may be unable to fully pursue its mission.

To promote the balance between associational freedom and equal access, this article proposes applying the concept of heckling: courts should consider whether a person seeking

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259 That tension is endemic to our constitutional tradition. Tocqueville, for example, identified the symbiotic relationship between associations and equality in 1840. In fact, it is equality—the chief feature of democracy—that necessitates associations. He tells us that, “[i]f men are to remain civilized or to become civilized, the art of association must develop and improve among them at the same speed as equality of conditions spreads.” Tocqueville, *Democracy in America*, 517 (emphasis added). More recently, Lauren Rosenblum describes “the tension between two compelling and competing values: the right of the State to prevent discrimination and the right of the speaker to select his audience and shape his event.” Rosenblum, “Equal Access or Free Speech,” 1246.

admission into an association threatens to disrupt that association, in other words whether they are a heckler. Just as the metaphor of the “marketplace of ideas” aids in wrestling with some of the values underlying free speech, the heckling metaphor helps balance associational freedom and equal access.

I am not the first to identify the need for balance. Douglas Linder, for example, locates the same conflict in a much broader constitutional universe. Linder traces the tension to pre-Jaycees “cases involving challenges to the application of anti-discrimination legislation in the areas of housing, employment, education, and access to commercial establishments, [in which] the Court . . . consistently rejected claims of an associational freedom to discriminate.” Linder appreciated the value of both “associational freedom” and the “egalitarianism” underpinning those anti-discrimination efforts. In an effort to reconcile those interests, Linder ultimately endorsed a Jaycees-like balancing act. He focused on the fact that the Jaycees was akin to a public association, the fact that admission of women would not likely “diminish [the Jaycees’] cultural richness and pluralism,” and the fact that the Jaycees was “not a type of association central to the communitarian ethic.”

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263 Carpenter, 1517.

264 Carpenter, 1902–03; Rosenblum, “Equal Access or Free Speech,” 1270 (arguing for an approach that mirrors “the tests developed by the Supreme Court for content-neutral restrictions on freedom of speech and expressive association”).
George Kateb also addresses the need for balance between associational freedom and equal access. Kateb argues that “[s]ome regulation [of associations] is surely necessary to prevent or remedy serious harm to the vital claims of those outside any given association . . . . [D]ifferent kinds of association will require different kinds and degrees of regulation (or limitation).”265 Overall, Kateb seems to side more with associational freedom, emphasizing that “regulation should proceed with a sense of gravity, with reluctance.”266 While Linder offered a multi-factor balancing test, Kateb focuses on whether the threat posed by potential admission to an association is real rather than “just some vague or speculative imperfection.”267 The argument in this article builds on Kateb’s approach. Kateb’s focus on whether a harm is “real” mirrors this article’s focus on whether a person seeking admission into an association—a potential heckler—actually threatens to disrupt that association. As we will see, the dimensions outlined in Part IV aim to identify whether, in Kateb’s terms, admission threatens such a real harm.

III. Heckling and the Heckler’s Veto

At its core, “heckling” is about disruption. The basic idea is that a secondary speaker—the heckler—disrupts (or threatens to disrupt) the ability of the primary speaker to convey the primary’s speaker’s message to an audience.268 In this Part, I focus on the legal dimension of

266 Kateb, 40.
267 Kateb, 40.
268 In general, the primary speaker is the first person to speak, or the first person to announce that she will be speaking. A heckler, meanwhile, is generally the second person to speak, and whose speaking disrupts the first person’s communications to the first speaker’s audience. In the associational context, the association is the primary speaker because the association exists (metaphorically, speaks) before the potential heckler seeks admission into that association. The person seeking admission is ontologically secondary and, because the person seeking admission is one to threaten disruption, she is the potential heckler.
heckling, which emerges most commonly in debates over the “heckler’s veto.” Through a
description of caselaw and scholarship on heckling, I show that it is occasionally required for the
government to restrain hecklers because of the hecklers’ disruptive effects. If the secondary
speaker is not disruptive, the default rule—that the secondary speaker should be as free to speak
as the primary speaker—applies, and any restrictions should be subjected to classic First
Amendment analysis. When the analysis in this Part is extended to the associational context,
it will follow that an association may exclude those people whose admission threatens to disrupt
the association, and the government (through, for example, the courts) must protect that
association’s right to exclude. Additionally, associations may not exclude those who pose no
such threat.

The heckler’s “veto” involves the governmental infringement of a primary speaker’s
speech rights as a direct reaction to a heckler’s actual or threatened disruptive behavior. Thus,
“[t]o confer a heckler’s veto on a speaker would condition [the primary speaker’s] right of free
speech on the approval of” potential hecklers. Famously, the National Socialist Party of
America was denied a permit to march in Skokie, Illinois because of the promised

269 U.S. Const. amend. I (“Congress shall make no law . . . abridging the freedom of speech . . . .”).
270 Police Dep’t of City of Chicago v. Mosley, 408 U.S. 92, 103 (1972) (Burger, J., concurring) (emphasizing that
“the First Amendment does not literally mean that we ‘are guaranteed the right to express any thought, free from
government censorship.’ This statement is subject to some qualifications . . . ”).
271 The relationship between free speech and free association is discussed in greater detail in Part IV.
272 For a greater discussion of the heckler’s veto, see generally Cheryl A. Leanza, “Heckler’s Veto Case Law as a
Veto Today,” Case Western Reserve Law Review 68, no. 1 (2017): 159-89. For a discussion of the heckler’s veto on
college campuses, see generally Charles S. Nary, “The New Heckler's Veto: Shouting Down Speech on College
273 Mark A. Rabionwitz, “Nazis in Skokie: Fighting Words or Heckler's Veto,” DePaul Law Review 28, no. 2
and the First Amendment. Harry Kalven Jr, The Negro and the First Amendment (Columbus, OH: Ohio State
University Press, 1965), 141.
counterdemonstration—heckling—by “12,000 to 15,000 people” organized by local Jewish organizations.\textsuperscript{274} Aside from the Skokie case, which resulted only in a brief \textit{per curiam} opinion,\textsuperscript{275} the Supreme Court has weighed in on the heckler’s veto on only a few instances.

The high-water mark for the heckler’s veto—when the Court recognized the legitimacy of curtailing speech because of potential reactions—was set in \textit{Feiner v. New York} (1951). Irving Feiner was addressing a crowd from a sidewalk in Syracuse, New York, urging the listeners to attend a meeting later that night.\textsuperscript{276} Feiner was, in that case, the primary speaker. Though the police were initially patient with Feiner, observing the protest from across the street, the police finally intervened after “at least one [onlooker] threatened violence if the police did not act.”\textsuperscript{277} The onlookers were, in that case, the hecklers. Feiner was arrested, and the appeal of his conviction reached the Supreme Court, which sided with the police. Though Justice Vinson recognized that “the ordinary murmurings and objections of a hostile audience cannot be allowed to silence a speaker,” Vinson ultimately reasoned that the police had acted appropriately given the “crisis” and the need to “preserve peace and order.”\textsuperscript{278} In short, the Court endorsed a heckler’s veto.

In Justice Black’s dissent, Black critiqued the Majority’s deference to the government, arguing instead for an affirmative governmental duty to protect Feiner. Not only did Black think Feiner’s speech was “lawful[],” but Black squarely rejected “the Court’s opinion that the police

\textsuperscript{275} The Supreme Court reversed and remanded the case to the lower courts to immediately review the Nazis’ First Amendment claim. See Nat’l Socialist Party of Am. v. Vill. of Skokie, 432 U.S. 43 (1977).
\textsuperscript{277} Id.
\textsuperscript{278} Id. at 320–21.
had no obligation to protect petitioner’s constitutional right to talk.” Black argued instead that the police should have protected Feiner from the hecklers before shutting him down. According to Black, the police officers’ “duty was to protect [Feiner’s] right to talk, even to the extent of arresting the man who threatened to interfere.”

In 1969, the heckler’s veto again reached the Court in *Gregory v. City of Chicago* but with different results. Richard Gregory had organized a “peaceful and orderly procession from city hall to the mayor’s residence” to urge desegregation of Chicago’s schools. Pursuant to a Chicago city ordinance, when “onlookers became unruly as the number of bystanders increased,” police intervened and arrested Gregory for disorderly conduct. In siding with Gregory and the other marchers, Justice Warren recognized that the marchers’ peaceful and orderly demonstration “falls well within the sphere of conduct protected by the First Amendment.” Justice Black, in his concurring opinion, again repudiated the heckler’s veto. For Black, the case went to the heart of the Constitution’s promise of liberty, pitting against each other the twin ideals of “promot[ing] order and . . . safeguard[ing] First Amendment freedoms.” Agreeing with Justice Warren, Black lambasted part of the city ordinance that generated the heckler’s veto, saying it violated the First Amendment to convict someone “simply because the form of the protest displeased some of the onlookers.” Because it was the onlookers that threatened disruption, it was the onlookers that should have been restrained—not Gregory or, in the earlier case, Feiner.

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279 *Id.* at 321, 326 (Black, J., dissenting).
280 *Id.* at 327 (Black, J., dissenting).
282 *Id.* at 112.
283 *Id.*
284 *Id.* at 117 (Black, J., concurring).
285 *Id.* at 119.
Both *Feiner* and *Gregory* were about the prosecutions of primary speakers—not the disruptive hecklers. With the exception of Justice Black’s dissent in *Feiner*, what is missing from the Court’s jurisprudence is any serious discussion of how the state should treat those hecklers.\(^{286}\) The fact that the Court has never demanded any regulation of hecklers is unsurprising given the premium placed on free speech (including that of hecklers) in American law. Unlike Supreme Court Justices, scholars have not been reticent to oppose heckling.

In a 1986 article, Owen Fiss presented a new way of thinking about free speech that would enable the regulation of hecklers.\(^ {287}\) Traditionally, Fiss claimed, free speech was about protecting the speech of the “the street corner speaker”\(^ {288}\) from infringement by the government. The street corner speaker was classically threatened by public actors—especially legislators, through laws, and executives through enforcement of those laws. But, in light of changes to the public sphere—resulting from, according to Fiss, technological developments, globalization, and capitalism—Fiss claimed that new threats to free speech now come from private actors. Private entities, especially large, commercial entities, are able drown out the speech of small, individual speakers such as the street corner speaker. Those large, private entities—Fiss, offers as an example, CBS—are also supported by public actors through, for instance, licenses that confer special speaking authority.\(^ {289}\) The resulting imbalance in speaking power between large and small private actors poses as much, if not more, of a threat to small, private speakers than had public actors in the traditional free speech setting. In short, Fiss argued that, “[t]he state of

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\(^{286}\) Eve H. Lewin Wagner, “Heckling: A Protected Right or Disorderly Conduct,” *Southern California Law Review* 60 (1986): 216. (noting the failure of the Court to “directly address[] the question of whether or not a heckler may be arrested for peacefully disturbing or interfering with a public assembly”).


\(^{288}\) Fiss, 1408.

\(^{289}\) Fiss, 1410, 1414.
affairs protected by the first amendment can just as easily be threatened by a private citizen as by an agency of the state.”

Fiss’s key intuition is that the state can sometimes be “a friend of speech” by protecting proverbial street corner speakers from proverbial CBS’s. Like the CBS’s of the world, hecklers also threaten street corner speakers—this was literally the case for Feiner, who was speaking on a public street corner—and it may be incumbent upon the government to intervene on behalf of those speakers. Fiss would no doubt agree with Justice Black who, in his dissent in *Feiner*, claimed the government should have arrested the onlookers to protect Feiner’s free speech right. In his 1986 article, Fiss thus developed a theory that was consistent with Black’s earlier position. Fiss’s contribution to heckling analysis should not be overstated. Fiss was primarily concerned with power imbalances between private parties. The government’s intervention is justified in part, on his account, by the goliath-like threat that powerful, CBSs pose to the much weaker street corner Davids. Such power imbalances do not always exist in the heckling context. Fiss is nonetheless important because he was among the first to recognize the government’s occasional obligation to intervene on behalf of private speakers.

A slightly different approach to hecklers is offered by Eve Lewin Wagner who, also writing in 1986, argued that hecklers should be regulated “when (1) the level of heckling reaches a degree where the audience is unable to hear the primary speaker’s message and/or (2) the speaker reasonably feels compelled to discontinue speaking.” Though a seemingly simple

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290 Fiss, 1410, 1414.
291 Fiss, 1416.
292 *Feiner v. New York*, 340 U.S. 315, 316 (1951). (“Feiner was addressing an open-air meeting at the corner of South McBride and Harrison Streets in the City of Syracuse.”).
293 Fiss, “Free Speech and Social Structure,” 1412.
formula, Wagner’s argument is the result of a complex balance she strikes between the rights of the primary speaker, the heckler, and the audience. For her, the ideal would be a forum in which all viewpoints could be heard; thus, she says that “a complete prohibition of heckling would be unjust.” Wagner’s argument is the result of a complex balance she strikes between the rights of the primary speaker, the heckler, and the audience. For her, the ideal would be a forum in which all viewpoints could be heard; thus, she says that “a complete prohibition of heckling would be unjust.” 295 Her balance aims at “protect[ing] to the greatest extent possible the first amendment rights of each of the actors involved.”

Others have weighed in as well. In 1992, Cass Sunstein hinted that “reasonable crowd control measures are probably constitutionally compelled,” and “[t]he right to speak may well include a positive right to governmental protection against a hostile private audience.” Then, in 1996, before she joined the Supreme Court, Elena Kagan responded to Sunstein and argued for a narrower affirmative duty of governments to “to provide as much police protection for speakers whose ideas officials hate as for speakers whose ideas the officials approve.” Sunstein’s and Kagan’s claims reflect a growing recognition among scholars that the protection of primary speakers may require the regulation of hecklers. And, even if the question has not

295 Wagner, 233.
296 Wagner, 233.
299 Timothy E. D. Horley, “Rethinking the Heckler’s Veto after Charlottesville,” Virginia Law Review 104 (2018): 8. (defending a “modified Brandenburg v. Ohio incitement standard to define when” the regulation of hecklers is justified); Brett G. Johnson, “The Heckler’s Veto: Using First Amendment Theory and Jurisprudence to Understand Current Audience Reactions against Controversial Speech,” Communication Law and Policy 21, no. 2 (2016): 206 (associating with “affirmative” First Amendment theories the idea that “the government has a duty to foster and facilitate certain conditions through which citizens can exercise their First Amendment rights”). Scholars have also opined on contemporary forms of technological heckling. Scott Skinner-Thompson, for example, argues that the government may have an affirmative duty to restrict those who visually or auditorily record “public officials [including] police officers, politicians, and other government officers.” Scott Skinner-Thompson, “Recording as Heckling,” Georgetown Law Journal 108 (2019): 127. Skinner-Thompson appeals to the heckler’s veto as a means of mediating between the rights of citizens to record and the rights of recorded-parties to privacy. Skinner-Thompson, 125. Though Skinner-Thompson ultimately draws a narrower line—concluding that the government’s authority to protect speakers does not always lead to a duty—his recognition of the occasional duty is consistent with Fiss’s, Sunstein’s, and Kagan’s “affirmative” First Amendment arguments. Skinner-Thompson, 167. Skinner-Thompson recognizes that “the Supreme Court is reticent to recognize that the Constitution imposes affirmative

When courts side with primary speakers in the heckling context, those courts assume the governmental role that was endorsed first by Fiss and subsequently by Sunstein, Kagan, and others. The obligation, at least occasionally, of the judiciary to proscribe heckling flows from the same line of reasoning as Black’s demand that police officers “protect [Feiner’s] right to talk.”\footnote{Feiner v. New York, 340 U.S. 315, 327 (1951) (Black, J., dissenting).} In the next Part, this reasoning will be extended in another direction: from the speech context to the associational context.

IV. Associations and Heckling Analysis

In the associational context, the concept of heckling is helpful for mediating between associational freedom and equal access. To best promote those two competing values, it is helpful to think about when it is appropriate for associations to exclude those seeking admission. Like the free speech context described above, thinking about whether those seeking admission are potential hecklers is normatively helpful for preserving associational freedom, on the one hand, and maximizing equal access, on the other.

The close relationship between speech and association permits the application of the heckling concept to discussions about freedom of association. In many ways, associations...
enable speech. The aggregation of resources in groups, for example, allows those groups to better express the views of their members—in parades, in elections, and in politics generally. At the same time, association is itself a type of speech. The decision to align oneself with a group—a union, a political party, a civic association—conveys information about one’s values and commitments. As a result, as seen in cases such as Dale, the Court treats freedom of association cases as types of freedom of speech cases. Within this constitutional paradigm in which free association and free speech are so deeply intertwined, the application of heckling analysis to the context of freedom of association is natural and appropriate.

In the associational context, hecklers are those people outside the association whose admission threatens disruption; they are not current members of the associations. When current members vocalize dissent or opposition from within an association, they are not engaged in

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302 NAACP v. Alabama, 357 U.S. 449, 460–61 (1958) (recognizing the importance of protecting associational freedom to protecting freedom of speech); Seana Valentine Shiffrin, “What Is Really Wrong with Compelled Association?,” Northwestern University Law Review 99, no. 2 (2005): 840–41 (“Associations have an intimate connection to freedom of speech values in large part because they are special sites for the generation and germination of thoughts and ideas.”). The idea that associations enable speech assumes that speech precedes (and is unaltered by) associations. Nancy Rosenblum questions this, noting the “assumption, that voice precedes association, supposes that independent individuals intend the same communication and that association simply aggregates and amplifies their voices. This describes a crowd of cheering sports fans, not a voluntary association.” Rosenblum, Membership and Morals, 205.


305 The role of associations in politics has been considered by, among others, public choice theorists. See text accompanying note 214 above.

306 Reena Raggi, for example, argues that “freedom of association’ has been little more than a shorthand phrase used by the Court to protect traditional first amendment rights of speech and petition as exercised by individuals in groups.” Reena Raggi, “An Independent Right to Freedom of Association,” Harvard Civil Rights-Civil Liberties Law Review 12 (1977): 1. Raggi was writing before many of the important cases described in this article were decided; those cases might impact her argument.

heckling. This is consistent with the analogy to the classic free speech context, in which the heckler and the primary speaker are separate people. Dissenting opinions within an association are significant in their own right, but they are not the focus of the analysis in this article.

In this Part, I describe a set of dimensions that may aid in determining whether one seeking admission is a heckler. Analysis of the below dimensions will not generate clear, categorical rules and thus may not be dispositive of issues before judges in specific cases. Instead, analysis of these dimensions will foster reasonable discussion about which practices of exclusion are legitimate. The core idea underlying the following factors is the potentially disruptive behavior of those seeking admission.

The Supreme Court has considered the risks of disruptiveness in the associational context before. In *Rotary International*, Justice Powell emphasized that admission of women (as mandated by the California public accommodations law) would not “require the [Rotary Clubs] to abandon or alter any of” their core activities. The Court thus implicitly analyzed, and dispensed with, the concern that admission of women would be disruptive to Rotary Clubs. The dimensions described here expand on that analysis.

1. *Size and Resource Constraints.* The size of an association is always significant in evaluating potential disruptiveness. Whether we are dealing with an eight-person bowling team, or an eight million-person fraternity, is significant in evaluating the potential disruptiveness of a particular admission. Adding one more person to an eight-person bowling league is likely to

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308 Lon Fuller, for example, considers the schisms that occur when there is “a quarrel within a church.” Lon Fuller, *Two Principles of Human Association,* in *Two Principles of Social Order,* ed. Kenneth I Winston (Durham, NC: Duke University Press, 1981), 73. Fuller describes the difficulty such quarrels raise for courts that must decide which group has the better claim to the property rights over, among other things, the church building and resources Fuller, 73–75. Such claims are indeed complex but for different reasons than the competing claims of associational freedom and equal access.

disrupt the rhythm of that team (especially if league rules restrict teams to five people). By contrast, all else being equal, adding one more person to an eight-million-person fraternity is unlikely to generate such disruption.310

In the classic heckling context, a speech is less likely to be disrupted if the primary speaker’s voice is metaphorically large relative to that of the heckler. When Representative Joe Wilson shouted “You lie” during President Obama’s healthcare speech in 2009,311 it arguably did little to disrupt the president’s speech. Indeed, the president continued speaking with relative ease. In that case, the voice of the primary speaker was large—like an eight-million-person fraternity—and the disruption was small. Though size alone may never justify a practice of exclusion, it is almost always a helpful starting place in the analysis. Focusing on the size of associations relative to the potential disruptiveness of admission is important, and smaller associations will generally have stronger claims to exclusion than large ones.

Related to size, the relative resource implications of admission are important for evaluating the disruptiveness of potential hecklers. As with size, the disruptiveness of a person seeking admission relates to the potential resource constraints that admission would impose on the association. Some admissions threaten greater resource implications than others. Many associations require membership payments (such as dues) that are justified by the costs that members impose on those associations. But such payments are generally constant, and such flat-rate payments may not fully account for the actual resource costs that additional membership

310 It is also important to take into consideration downstream/indirect effects of admission. In the case of the Boy Scouts, though James Dale was only one person, admission of Dale would entail admission of potentially thousands (or millions) of gay scoutmasters in the future. 311 Angie Drobnic Holan, “Joe Wilson of South Carolina Said Obama Lied, but He Didn’t,” PolitiFact, September 9, 2009, https://www.politifact.com/truth-o-meter/statements/2009/sep/09/joe-wilson/joe-wilson-south-carolina-said-obama-lied-he-didnt/.
imposes on the association. The addition of one person to a backpacking group may necessitate
that the group invest in an additional tent, the full cost of which may not be captured in a flat
membership fee assessed on the additional member. That additional member would be highly
disruptive to the hiking group. Associations’ resource constraints are related to associations’
sizes, even though the two dimensions are not exactly coterminous. Small associations can have
large resource endowments just as large associations can be resource-constrained.

In sum, small and/or resource-constrained associations will generally have the strongest
claims to exclusion because admission is more likely to be disruptive.

2. Publicity. The relative publicity of an association is important. There is a difference
between a secret society (the very existence of which is kept hidden), and a national organization
that conducts public ceremonies and holds itself out as a public service organization. Public
associations are perhaps more prone to heckling, but such associations are also generally better-
insulated from the disruptiveness that hecklers threaten. The secret society is more likely to be
disrupted by new members than is the non-secret society because secrecy is best preserved by
rigid membership control.

In some cases, the analogy to heckling takes us far astray from the classic First
Amendment focus on “expressive speech.” Though expressivity is not the same as publicity,
there is at least some overlap between those two concepts. In Hurley, for example, the Court
emphasized the expressive nature of the public St. Patrick’s Day Parade and the “equally
expressive” implications of the gay, lesbian, and bisexual group’s potential participation in that
parade. The Court traditionally begins by analyzing whether an association is engaged in an

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Scouts, it was the transmission of the Scout’s values, “both expressly and by example,” that constituted the
expressive activity. Where expressivity overlaps with publicity (as was the case in Hurley), heckling analysis inverts the implications of the traditional approach. While the expressiveness of an association generates more protection under traditional analysis, in the heckling context, more expressive—more public—associations have weaker claims to exclusion.

This inversion may generate problems for regular Freedom of Association analysis but may bring that doctrine into greater conformity with other areas of constitutional law, especially the Court’s protection of intimate associations. At least since Griswold v. Connecticut (1965), in which the Court struck down a state law forbidding the use of contraceptives, the Court has emphasized the importance of protecting “intimate” relations such as those between a husband and a wife. In Griswold, Justice Douglas went so far as to characterize the marital association as “intimate to the degree of being sacred.” Private associations—and intimate associations, to the extent that those associations are private—will have stronger claims to exclusion because private associations do not as clearly implicate public speech rights, to which the general public—including a potential heckler—has a stronger claim. In the classic free speech context, heckling in a private setting is more reprehensible than heckling in a public setting in part because primary speakers in public settings have implicated core public rights by choosing to

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expressive behavior in Dale. Boy Scouts of Am. v. Dale, 530 U.S. 640, 650 (2000). That behavior is not necessarily “public,” as that term is used here. Other Scout activities, however, such as participation in parades and public ceremonies might make the Boy Scouts more public.

Thus, in Jaycees, the Court focused on whether admission infringed on the Jaycees’s “freedom of expressive association.” Roberts v. U.S. Jaycees, 468 U.S. 609, 622 (1984). And, in Dale, the Court began its analysis by deciding that the Boy Scouts was engaged in expressive activity. Boy Scouts of Am. v. Dale, 530 U.S. 640, 648 (2000) (emphasizing that “[t]he forced inclusion of an unwanted person in a group infringes the group’s freedom of expressive association if the presence of that person affects in a significant way the group’s ability to advocate public or private viewpoints”).


Id. at 486.
speak publicly. This does not mean that those who speak in public have no claims against hecklers; only that primary speakers’ claims are weaker when they speak publicly. Associations that hold themselves out publicly—through marches, speaking events, and more—are less able to justify exclusion because such public-facing associations implicate public rights and resources to which those seeking admission will have stronger equal access claims to inclusion.

Connected to, but distinct from, the above discussion is another publicity-related consideration: whether an association is plausibly a public accommodation. The last several decades have seen a proliferation of laws limiting the ability of public accommodations—defined in the Civil Rights Act of 1964, for example, to include: inns/motels, restaurants, and “place[s] of exhibition or entertainment” (movie theaters, concert halls, and more)—to discriminate. Such laws have generated mixed reviews, in part due to the malleability of public

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318 The most relevant public accommodations laws to this article are those in Minnesota (at issue in Jaycees) and New Jersey (at issue in Dale). See Minn. Stat. Ann. § 363A.03 (West 2020) (defining “place[s] of public accommodation” to include any “business, accommodation, refreshment, entertainment, recreation, or transportation facility of any kind, whether licensed or not, whose goods, services, facilities, privileges, advantages or accommodations are extended, offered, sold, or otherwise made available to the public”); N.J. Stat. Ann. § 10:5-5(l) (West 2019) (defining “public accommodations” non-exhaustively to include more than fifty types of establishments). Daniel Koontz describes some of the many other public accommodations laws. Daniel Koontz, “Hostile Public Accommodations Laws and the First Amendment,” NYU Journal of Law & Liberty 3 (2008): 197.

accommodations laws. In *Jaycees*, for example, the Court endorsed Minnesota’s “functional definition of public accommodations” that broadly covered all “forms of public, quasi-commercial conduct.”\(^{320}\) In *Dale*, by contrast, the Court criticized New Jersey’s “extremely broad” definition as “directly and immediately affect[ing] [protected] associational rights.”\(^{321}\)

Setting aside the complex legal questions of when civic associations are included in state or federal definitions of public accommodations, such a categorization is normatively relevant to heckling analysis for the same reason as is publicity generally. When associations come closer to resembling “public accommodations” (however defined), the claims of those associations to exclude outsiders are weaker.

The publicity dimension generates an uncomfortable paradox: associations that may be more reprehensible for other reasons—the Ku Klux Klan, gangs, and others—will have stronger exclusion claims than associations engaged in the civilizing and moral activities we generally praise. This paradox highlights a possible drawback of heckling as an analytical device, but it does not defeat the purpose.

3. *Centrality of Mission.* All associations have express or implied missions. The Boy Scouts, for example, argued that the promotion of “moral straightness” was central to its mission.\(^{322}\) The study and protection of birds is central to the Audubon Society’s mission.\(^{323}\) And, in the commercial context, profits are generally central to a corporate association’s mission. By contrast, male fraternity was arguably less central to the mission of the Jaycees, who already

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\(^{322}\) *Id.* at 648–49. The centrality of this value is discussed in greater detail below.

admitted women as “associate members” even before the Court’s decision.\textsuperscript{324} The Jaycees conceded as much in its brief, when it “painted a picture of the ‘virtually unlimited’ ability of ‘women to make valuable contacts with other men and women’ and have leadership experience in a myriad of organizations, including all-female ones.”\textsuperscript{325} The centrality of an association’s mission—in particular, the relevant part of its mission, upon which it seeks to justify exclusion—is significant in evaluating the potential disruptiveness of a person seeking admission. The key intuition here is that some exclusions are less central to the mission (or missions) of an organization than are others; and, less-central missions are less likely to render an association prone to disruption by potential hecklers.

Analysis of an association’s mission is not unprecedented. In \textit{Burwell v. Hobby Lobby} (2014), the Supreme Court addressed and rejected arguments that the sole mission of for-profit corporations is “to make money.”\textsuperscript{326} Though making money is “a central objective,” the Court recognized that corporations can also pursue altruistic causes such as “pollution-control and energy-conservation measures.”\textsuperscript{327} And, in the associational context, the Court considered the “basic goals” of Rotary Clubs in \textit{Rotary International}, dismissing the concern that admission of women would threaten the clubs’ promotion of “of humanitarian service, high ethical standards in all vocations, good will, and peace.”\textsuperscript{328} Like in \textit{Hobby Lobby} and \textit{Rotary International}, it is possible and important to identify the mission(s) of associations when seeking to evaluate their practices of exclusion.

\textsuperscript{324} \textit{Jaycees}, 468 U.S. at 613.
\textsuperscript{326} \textit{Burwell v. Hobby Lobby Stores, Inc.}, 573 U.S. 682, 710 (2014).
\textsuperscript{327} \textit{Id.} at 711–12.
In the classic setting, whether someone’s behavior is “heckling” is partially a function of how the heckler’s behavior (whether words or actions) relates to the primary speaker’s speaking objectives. When a heckler outright prevents a primary speaker from conveying the primary speaker’s message—by shouting from the audience, for example—the primary speaker’s objectives have obviously been disrupted. Less extremely, if a primary speaker is addressing one subject (such as climate change), and an audience member shifts the discussion to another subject (such as the speaker’s age), that shift in the conversation is disruptive to the primary speaker’s objectives, but it is less disruptive than was the complete prevention of speaking in the prior example. In the classroom, professors are no doubt familiar with the disruptiveness of student questions that carry the discussion far astray from the professor’s intended discussion topic. These examples show the importance of the relationship between the primary speaker’s message and the heckler’s behavior to understanding that behavior’s disruptiveness.

Just as message matters to whether behavior is disruptive in the free speech setting, the centrality of mission matters to the legitimacy of associational exclusion. An association will have a weaker claim to exclusion when the mission of the association upon which the association bases its exclusion is less central.

This article sidesteps the separate but related question of who decides what constitutes an association’s central/relevant mission. Plausible authorities include boards of directors and other association leaders; founding charters or current bylaws; and, of course, the members

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330 For example, in considering the centrality of the Boy Scouts’ anti-homosexual message to the association’s mission, I look to the language of the Scout’s 1915 congressional charter. See text accompanying note 345 below.
themselves. Such technical questions are important but those questions risk unnecessarily complicating the heckling analysis proposed here. For the purposes of this dimension, the point is simply that more-central missions provide for stronger claims to exclusion than less-central missions.

4. Justification for Exclusion. Distinct from the centrality of an association’s mission is the justification given by the association for exclusion. An association’s justification does not always have to be based on the association’s mission. The physical safety of an association’s members is always a legitimate ground for exclusion; thus, an association may always exclude those who threaten its members.

When justification is grounded in an association’s mission, analysis should be probing: whether a justification is legitimate depends on (1) the extent to which it relates to the promotion of that mission—in the language sometimes used by the Supreme Court, whether it is “narrowly tailored”—and (2), the significance of the justification to the association. Some justifications may be existential to an organization, and practices of exclusion are stronger in those instances.

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331 For a more prolonged discussion of this issue, see Evelyn Brody, “Entrance, Voice, and Exit: The Constitutional Bounds of the Right of Association,” UC Davis Law Review 35 (2002): 856–65 (describing some of the many plausible organizational structures). Brody observes that “the law generally leaves governance issues to the organization, viewing the extent of the members’ rights (if any) as part of what they have agreed to join.” (Brody, 856). Such complex governance issues are important for deciding who gets to define an organization’s mission.

332 Timothy Garton Ash coined the term “assassin’s veto” to refer to this more extreme and indefensible response to speech. Timothy Garton Ash, Free Speech: Ten Principles for a Connected World (New Haven, CT: Yale University Press, 2016), 130. As Mark Rabionwitz has recognized, another limit to the Heckler’s Veto Doctrine is the Fighting Words Doctrine. For him, “the Heckler’s Veto Doctrine is, in one sense, merely the logical converse of the Fighting Words Doctrine. . . . [T]he cases which support the proposition that speech may not be restrained merely because its message is offensive to some of its hearers may be examined as cases establishing and developing the Heckler’s Veto Doctrine as well as limiting the scope of the Fighting Words Doctrine.” Rabionwitz, “Nazis in Skokie,” 276–77.

333 Fisher v. Univ. of Texas at Austin, 136 S. Ct. 2198, 2208 (2016) (requiring that the use of race be narrowly tailored to achieve the university’s affirmative action goals).
Strong justifications that are narrowly tailored to the needs of the association will be more legitimate than weaker or overly broad justifications.

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The aim of these four dimensions is to focus the judge’s or scholar’s attention on the disruptiveness of potential admission. As such, this analysis necessarily omits other normative considerations that may seem relevant. For example, the above dimensions do not address the motives of persons seeking admission. It would seem that persons with good intentions—those who, in good faith, hope to contribute to the mission of the organization—have stronger claims to admission than those who seek admission for malicious or deliberatively disruptive purposes.

Similarly, the above dimensions do not address the availability of alternative associations. It would seem that a person’s claim to admission is weaker when there are other comparable associations to which the person has access. In a slightly different context, the availability of alternatives was famously central to the dispute between Justices Ginsburg and Scalia in *United States v. Virginia* (1996).\(^{334}\) The Court in that case addressed the constitutionality of the Virginia Military Institute’s (VMI) exclusion of women. Writing for the Majority, which ruled unconstitutional VMI’s exclusive practices, Justice Ginsburg emphasized that the quality and rigor of VMI’s training program was “not available anywhere else in Virginia.”\(^{335}\) By contrast, Justice Scalia emphasized in his dissent the “four all-women’s private colleges in Virginia (generously assisted by public funds)” and other forms of support offered by the state to its women citizens.\(^{336}\) In *Jaycees*, the Court recognized (but did not subsequently

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\(^{335}\) *Id.* at 520.
\(^{336}\) *Id.* at 595 (Scalia, J., dissenting).
consider) the difference between the Jaycees’ “associate membership,” which was available to women, and “regular membership,” which was available only to men—especially the inability of associate members to vote or hold local/national office.\(^{337}\) In that case, associate membership was an available alternative.

The consideration of motives and the availability of alternatives are omitted above because they do not clearly relate to the *disruptiveness* of potential admission.\(^{338}\) A well-intended person who hopes to support an association’s mission may nonetheless be disruptive to that association. To return to an example from above, a student who asks off-topic questions in class can have good faith intentions to influence the direction of the class discussion but may still be disruptive to the professor’s course objectives. Likewise, the availability of alternatives may be relevant to remedies for exclusion but will have no effect on the disruptiveness of potential admission.

Considerations such as motives and available alternatives risk muddying the waters and diluting the potency of the proposed heckling analysis for maximizing associational freedom and

\(^{337}\) Roberts v. U.S. Jaycees, 468 U.S. 609, 613 (1984). In *Moose Lodge No. 107 v. Irvis* (1972), the Court affirmed the right of the Moose Lodge to refuse service to a black guest of one of the Lodge’s members. *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 179 (1972). Irvis argued, among other things, that the state’s granting of a liquor license to the Lodge constituted state action. In rejecting Irvis’ claim, the Court emphasized the “the availability of liquor from hotel, restaurant, and retail licensees.” *Id.* at 177.

\(^{338}\) The decision to exclude the intentions of the potential heckler from consideration is a controversial one. Some have emphasized the importance of intent to classifying hecklers in the traditional free speech context. See Waldron, “Heckle,” 9 (“Heckling has *(and is intended to have)* the effect of making it difficult to proceed with the speech on exactly the primary speaker's own terms.” (emphasis added)). But it is not always clear that intent does, or should, matter. This is especially true with hostile audiences: how is one to classify the reaction of the group as a whole? If some intend only to disrupt while others intend to express legitimate, good faith, grievances with the message of the speaker, should the audience be classified as hostile? For a discussion of some of the difficulties of classification, see generally “Freedom of Speech and Assembly: The Problem of the Hostile Audience,” *Columbia Law Review* 49 (1949): 1118. The same difficulties can be found in the associational context. There is a thin—perhaps nonexistent—line between someone who seeks admission to alter an association’s mission and someone who does so to more fundamentally disrupt that mission. Ultimately, these practical difficulties suggest that one can be disruptive—a heckler—without intending to be, however such intent might be discerned. I avoid such difficulties from excluding intent from the list of relevant dimensions in this Part.
equal access. To further clarify the importance of the above dimensions, I next consider several examples of how heckling analysis might work in practice.

A. Applications

In seeking to apply the above dimensions to the real-world, there are easy cases and hard cases. An easy case would be the legitimate exclusion of an atheist from a small church group that meets weekly to pray. The association is small, and its mission is theistic, so admission of an atheist would severely disrupt the church group’s ability to pray and demonstrate the group members’ devotion to God.

Consider another easy case: it is illegitimate for a large, public-facing, organization to adopt a rule excluding everyone whose names begin with “A.” There is nothing about the letter “A” that threatens to disrupt the large organization, and there is (we assume) nothing central to the organization’s mission to justify such a rule. The arbitrariness of the organization’s exclusion makes it illegitimate when considered through the heckling lens. Equal access is promoted by admission of people whose names begin with the letter “A,” and the organization is not disrupted by such admission. Though such a practice of exclusion might sound trivial, the same analysis would likely apply if, instead of adopting a rule excluding everyone whose names begin with “A,” the same association adopted a rule excluding African Americans. There are obvious differences between people whose names begin with the letter “A” and African Americans, including the long history of discrimination and exclusion of African Americans in this country. Nonetheless, the analysis will look similar. Unless racial discrimination is central
to an association’s mission, a rule excluding people on the basis of race is unlikely to survive
the heckling analysis proposed in this article.

There are hard cases as well. It is difficult, for example, to determine whether a Christian
Student Association may legitimately exclude members of the Church of Jesus Christ of Latter-
Day Saints (Mormons). Such a case is difficult because it is unclear whether Mormonism is at
odds with the association’s Christian mission. Analysis of the association’s exclusion may hinge
on how we construe its mission: if construed broadly, the Christian Student Association’s
mission may accommodate diverse sects of Christianity such as Mormonism; if construed
narrowly, the association’s mission may accommodate only a small subset of Christian
denominations not including Mormonism. The potential disruptiveness of admitting Mormons
depends on that analysis, and the difficulty of construing the association’s mission makes this a
hard case.

Similarly, it would be difficult to evaluate the legitimacy of a pro-life organization’s
decision to exclude pro-life persons who would make exceptions for abortions in cases of rape or
incest (we will call them “pro-life exceptionalists”). The pro-life exceptionalists presumably
support the pro-life organization’s overall mission and, if admitted, they would likely add to that
mission rather than detract from it. But, to the extent that such pro-life exceptionalists threaten
to erode the organization’s pure, non-exceptional, pro-life mission, the pro-life organization may
be justified in excluding them. Like the Christian Student Association’s exclusion of Mormons,
the pro-life organization’s exclusion raises difficult questions in practice.

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339 The most obvious example of an association with such a racially-discriminatory mission would be the Ku Klux
Klan.
B. Dale Revisited

The Boy Scouts’ exclusion of James Dale may also be instructive. Both the size of the Boy Scouts (currently 2.4 million youths\textsuperscript{340}) and its reputation as a public service organization cut against exclusion in general. Additionally, when he was kicked out, Dale was given no other reason than that, according to the Boy Scouts, he was an “avowed homosexual and the Boy Scouts of America does not admit avowed homosexuals to membership in the organization.”\textsuperscript{341} The Boy Scouts did not claim Dale’s admission would be disruptive. In fact, Dale’s lifetime of scouting, and his support for the “civic and ethical responsibility” the group promotes, suggests he was a passionate and faithful scout.\textsuperscript{342} In other words, when looking at the size and publicity of the Boy Scouts, and the justification given for exclusion, the Boy Scouts’ exclusion of Dale seems illegitimate.

But the Boy Scouts did subsequently defend its policy. In its brief, the Boy Scouts focused on its aims—articulated in the Scouts’ Oath—of promoting moral straightness and “purity.”\textsuperscript{343} It is hard to deny that the Boy Scouts promotes both morality and purity, even if it is questionable whether the explicitly anti-homosexual meaning of those terms was central to the Boy Scouts’ mission. Certainly, when the Boy Scouts received its charter from Congress in 1915, views on homosexuality were different.\textsuperscript{344} And, the Boy Scouts’ original congressional charter—codified at 34 U.S.C. §30902—says nothing about either “moral straightness” or

\textsuperscript{340} “About the BSA,” Boy Scouts of America, accessed October 3, 2019, https://www.scouting.org/about/.
\textsuperscript{342} Id. at 6.
\textsuperscript{344} Nancy Knauer describes the status of homosexuality in the early years of Boy Scouts, which was borne at a time that was anything not yet tolerant of “sexual inversion” or anything irregular. Nancy J. Knauer, “Simply So Different: The Uniquely Expressive Character of the Openly Gay Individual after Boy Scouts of America V. Dale,” Kentucky Law Journal 89 (2001): 1023; Hunter, “Accommodating the Public Sphere,” 1593–98 (describing the history and culture of the Boy Scouts).
“purity,” focusing instead on the purposes of promoting “patriotism, courage, self-reliance,” and more. As the Dale Court noted in the Majority opinion, the fact that the Boy Scouts had defended its anti-homosexual policies in other litigation in the 1980s evidenced that it “sincerely [held] this view.” To the extent that Dale’s homosexual identity clashed with the group’s sincerely-pursued mission, his presence threatened to be disruptive. Dale, thus, looks more like a heckler from this standpoint.

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Controversies like those between James Dale and the Boy Scouts reach the Supreme Court because they are difficult. Even though heckling analysis does not yield clear answers in hard cases, analyzing those cases through the heckling lens is still the most productive means of rigorously promoting both associational freedom and equal access. The heckling factors proposed in this article focus our attention on how best to preserve the integrity of associations (like the Boys Scouts) from disruption, while also promoting equal access of all people (including James Dale) to membership. This analysis builds on the claim made by Justice Black in his dissent in Feiner, and subsequently Fiss, Sunstein, and Kagan, that the government occasionally must regulate hecklers to protect the free speech rights of primary speakers. Both associations and those seeking admission into associations have legitimate claims—grounded in associational freedom, and equal access, respectively—but when those seeking admission threaten disruption, it is the obligation of courts to, in Fiss’s words, act as “friend[s] of

345 The full purpose reads: “The purposes of the corporation are to promote, through organization, and cooperation with other agencies, the ability of boys to do things for themselves and others, to train them in scoutcraft, and to teach them patriotism, courage, self-reliance, and kindred virtues, using the methods that were in common use by boy scouts on June 15, 1916.” 36 U.S.C. § 30902.
347 See Part III above.
speech" by protecting the associational right to exclude. And, when those seeking admission threaten no such disruption, courts should promote equal access by requiring inclusion, as the Court did in *Jaycees*.

This coercive power of the courts—coercing associations to admit certain people—can be distinguished from a different type of coercion in the associational context. Other scholars have focused on “involuntary” or “compelled” association, where people are coerced into staying in associations. The coercive role of courts in requiring admission (or, indirectly, upholding of public accommodations laws that require admission) is distinct from any coercion to keep members in associations. This article has not addressed the latter issue, and the heckling analogy does not apply to that other form of coercion.

The heckling analysis proposed in this article differs from the traditional approach to associations under the First Amendment. Classically, in cases such as *Dale* and *Jaycees*, the Court decides whether an association is expressive and then, if expressive, whether there is some sufficiently compelling state interest to override the association’s expressive interest. The

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348 Fiss, “Free Speech and Social Structure,” 1416.
350 The proposed heckling analysis also differs from the alternative analysis proposed by Justice O’Connor in her concurrence in *Jaycees*. O’Connor focuses her analysis on the “dichotomy between rights of commercial association[s] and rights of expressive association[s].” Roberts v. U.S. Jaycees, 468 U.S. 609, 634 (1984) (O’Connor, J., concuring in part); Carpenter, “Expressive Association and Anti-Discrimination Law after Dale,” 1563–87 (defending an approach that builds on Justice O’Connor’s concurrence). O’Connor would afford nearly absolute protection to those associations designated as “expressive.” Linder, “Freedom of Association after Roberts,” 1888. For many of the same reasons that the heckling analysis proposed in this article better promotes the values underlying the Court’s jurisprudence than the Court’s expressive association analysis, the heckling analysis is superior to the commercial-expressive analysis O’Connor proposed in her concurring opinion
351 *Dale*, 530 U.S. at 648.
heckling approach to associations has at least two advantages over that traditional analysis. First, it is more attentive to all associations. The heckling approach has the virtue of accommodating both expressive and non-expressive associations, all of which may serve the moral, civic, pluralistic, and personal functions described in Part II. While traditional analysis focuses our attention on what the First Amendment is classically thought to protect—speech—heckling analysis more faithfully protects associations in the associations’ own right, independent of any associational speech.

Second, the heckling approach is more attentive to both the preservation of associations and the value of inclusion. The expressive association analysis is deferential to associational freedom: after identifying an association’s expressivity, challengers must demonstrate a “compelling state interest” to overcome a court’s protection of the expressive association. By prioritizing expressivity, and then setting a high—“compelling”—bar, expressive association analysis tilts towards associational freedom. Heckling analysis, by contrast, better maximizes both associational freedom and equal access. By focusing on disruptiveness, the heckling approach takes into consideration the complex and nuanced features of associations—size, mission, and more—that actually matter to the associations’ preservation. Additionally, the heckling analysis maximizes equal access by promoting inclusion when there is no real threat of disruption. Just as Kateb focused on whether “the harm [of admission was] really . . . a harm [to the association], not just some vague or speculative imperfection,” the dimensions of heckling analysis described above aid in identifying when admissions threaten real harm to an association.

352 Id. at 640–41 (emphasis added).
Consider an example from earlier: the large, public-facing, organization that adopts a rule excluding everyone whose names begin with “A.” Provided that the organization was engaged in some sort of expressive activity, a court applying the traditional, expressive association analysis might “give deference to [the organization’s] view of what would impair its expression” as the Court did in Dale.\textsuperscript{354} Even in light of the seeming arbitrariness of the organization’s rule, a court might uphold such a practice of exclusion under that deferential standard. By contrast, as discussed above, the heckling analysis would reach the opposite conclusion. Such exclusion is not grounded in any plausible concern for the disruptiveness of people whose names begin with “A.” While the expressive association analysis failed to consider the equal access claims of people whose names begin with “A” (focusing only, or primarily, on the organization’s expressive conduct), the heckling analysis attends to both equal access claims and claims to associational freedom.

Of course, the heckling analysis will also often yield the same outcomes as the traditional analysis. In the case of the small church group excluding the atheist, both heckling analysis and expressive association analysis would uphold that practice of exclusion.\textsuperscript{355} The fact that both analyses often reach the same conclusion is evidence that adoption of the heckling analysis will not require a radical departure from current judicial practices.

Even though heckling analysis does not answer every question, that analysis will better enable courts, scholars, and others to debate the legitimacy of exclusion in a manner that is faithful to both the preservation of a robust civil society and the aspirations of inclusivity.

\textsuperscript{355} Under traditional doctrine, this practice of exclusion would also likely implicate other First Amendment protections afforded to religious organizations. Those other protections are not relevant to the comparison drawn here.
V. Conclusion

As with other metaphors, applying the concept of heckling to associations has its limitations. The emphasis on heckling may seem to obscure important power differentials between the parties to a dispute. To analogize the Boy Scouts to a primary speaker, and James Dale to a potential heckler, fails to capture the differences in political and social capital upon which each may draw in arguing for exclusion versus inclusion. We risk overlooking the differences in power between the CBSs of the world and the street corner speakers that motivated Fiss to defend governmental intervention on behalf of primary speakers.\textsuperscript{356} The analysis proposed here may also not allow us to directly address the types of “compelling state interests” that the Jaycees Court used to promote women’s equal access interests and curb the Jaycees’ associational freedom.\textsuperscript{357}

Though such considerations appear to have been omitted, the proposed heckling analysis may better attend to each of them. Power differentials are relevant to the size and resource constraints of an association (Dimension 1); and the adequacy of state interests may be relevant to the association’s justifications for exclusion (Dimension 4). Concerns about power and state interests also run through the equal access thread of our constitutional tradition. It was, after all, power differentials between men and women, and the state’s compelling interest in affording women greater access to social and political resources that motivated the Court’s decisions in \textit{Jaycees, Rotary International}, and \textit{N.Y. State Club Ass’n}.

The heckling analysis proposed in this article has the potential to shed new light on long-running skirmishes between associations and those seeking admission. The application of

\textsuperscript{356} See text accompanying notes 287–293 above.
heckling to the Court’s Freedom of Association doctrine is helpful for exposing and maximizing
the competing values—associational freedom and equal access—underlying that doctrine. In so
doing, heckling analysis may support a more robust and balanced jurisprudence.
WHOSE JURY: MEDIATING BETWEEN THE COMPETING INDIVIDUAL AND COLLECTIVE JURY RIGHTS

I. Introduction

Since at least as far back as the drafting of the Constitution, there have been two overlapping criminal jury trial rights in American jurisprudence. On the one hand, the jury conveys an *individual* right. This is the primary means through which the jury enters into the lawyers’ mind: as a right exercised by a criminal defendant. It can thus be waived or transferred. The wording of the Sixth Amendment—“the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . .”358—seems to support such a reading, placing the “accused” as the subject.

On the other hand, the jury conveys a *collective* right—a right of the community to adjudicate alleged bad acts. Some have grounded this collective right in the Founding Era’s prioritization of local communities in the adjudication process; 359 others have sought to “democratize criminal justice” through appeals to collective institutions like the jury.360 The right of the jury as a collective may be found both in its common law origins as well as in the Sixth Amendment’s wording (immediately following the clause above), that the jury must be “of the State and district wherein the crime shall have been committed.”361 The “State and district” language guaranteed even more localized control over adjudications than had the Constitution’s Article III language (which had only provided for juries of the “State”), perhaps reflecting the

358 U.S. Const. amend. VI (emphasis added).
359 Laura I. Appleman, “The Lost Meaning of the Jury Trial Right,” *Indiana Law Journal* 84 (2009): 398 (arguing that the original meaning of the jury trial right was a collective right).
360 The high point of this academic movement was the 2016 Northwestern University Law Review *Democratizing Criminal Justice Symposium*. See *Northwestern University Law Review* 111, no. 1 (2017).
361 U.S. Const. amend. VI.
First Congress’ prioritization of the local community’s authority in the criminal justice process. 362

When juries acquit defendants despite overwhelming evidence of guilt, those juries exercise a collective right to nullify. I have chosen to describe this collectivism as a “right,” but that is not to distinguish it in any substantive ways from the collective jury as a “privilege,” or “authority,” or “power.” Each of those terms conveys the same focus on the collective (rather than on the individual defendant against which I juxtapose that focus). 363

Though academics, lawyers, and judges regularly reference both of these criminal jury rights, there is a surprising dearth of scholarship modelling the implications of treating the jury as one of these rights. As I demonstrate in this paper, that lack of attention is a problem. Lurking behind many arguments on all sides of debates over the jury are hidden assumptions about what differing views entail. And yet, having not been brought to the fore, these assumptions remain unquestioned and undertheorized. This problem is not merely academic. The individual jury right conflicts with the collective jury right in numerous, seemingly irreconcilable ways. Take two obvious examples. First, from the individual jury right can be derived the rights of defendants to waive their jury rights, 364 and to move for changes of venues. 365 Both of these motions—whether one favors them or not—wrest decisionmaking power away from local juries and from the local communities from which those juries are drawn. If there is a collective right, it is infringed through waivers and venue changes.

362 Discussed in greater detail in Part III.B below.
363 As discussed in greater detail below, the “collective right” may also be thought of as a Hohfeldian “privilege.” See text accompanying notes 399–405 below.
364 FED. R. CRIM. P. 23(a).
365 FED. R. CRIM. P. 21.
Consider a second example: we regularly see otherwise legitimate collective jury decisions tossed out in constitutional cases in which other individual rights are recognized. Many of the most popular cases in criminal law exemplify this phenomenon. In *Gideon v. Wainwright*, for example, the Supreme Court overturned the jury’s guilty verdict against Clarence Earl Gideon for breaking and entering into a pool hall when the Court recognized Gideon’s constitutional right to have the assistance of counsel at trial.366 In the First Amendment context, in *Texas v. Johnson*, Gregory Lee Johnson’s conviction for burning the American flag was overturned based on the Court’s recognition of flag-burning as “expressive conduct protected by the First Amendment.”367 These examples at least show that the collective jury right sometimes butts up against individual rights—effective assistance of counsel, free speech, and more. At most, these examples demonstrate the Court’s willingness to trump the collective jury right when that right conflicts with individual rights. (As will be discussed in greater detail below, this possible tension hinges on how we understand the nature of the collective jury right.368)

Both of these examples show the occasional incompatibility of the collective jury right with the individual jury right and with other individual rights. The framework I present in this article—bifurcating the individual and collective rights—makes possible greater debate about these zones of conflict. My aim is to explore the contours and corollaries of each right throughout American history and, in so doing, expose the deep tensions within American jurisprudence in the treatment of the jury.


368 See Part II below.
In Part I, I present the general framework within which my argument operates. Though somewhat novel to discussions of the jury, this article is not the first to identify the tensions between individual rights and collective/structural powers in the Constitution. After presenting some of the important scholarship in this area, I offer rudimentary definitions of “individual” and “collective” rights to be applied in this paper. While individual rights are those belonging to, and exercisable by, criminal defendants, collective rights are those belonging to the slightly more abstract collective/community. In Hohfeldian rights terms, the individual jury right may be understood as a claim right, and the collective jury right may be understood as a privilege.\(^{369}\)

In Part II, I apply that framework to the American legal history of the jury. Looking at the historical development of the jury through the lenses of ‘individual’ and ‘collective’ provides a wealth of insights not only into the jury, but also into the more general evolution of rights. Though there is little evidence that the Framers of the Constitution understood the jury in such a starkly bifurcated way (unlike debates over other key issues—such as slavery, or the need for a bill of rights—there were not discrete camps at the Constitutional Convention debating the merits of these alternative views of the jury), it is nonetheless valuable to explore the history, and current understanding, of the jury through these lenses. That exploration illuminates (1) the ways in which the jury has evolved, and (2) what is at stake when we focus on different aspects of the jury.

Through an engagement with Founding Era documents and other historical sources, I argue that the Constitutional right was drafted as an individual right but written against a strong collective right background. In contrast to recent attempts to ground the collective jury right in

\(^{369}\) See text accompanying notes 399–405 below.
the Constitution’s original public meaning. I argue that a more intellectually honest inquiry shows greater ambiguity and complexity—not clarity—at the Founding. I then trace the jury right through American history. Though the two rights existed in tandem for many decades, the collective right disappeared entirely after the passage of the Fourteenth Amendment. For much of the subsequent century, the jury was understood almost categorically as an individual right. Only in recent decades have we begun to see a reemergence of the collective right: at the Supreme Court level, in cases like Apprendi and Blakely, and in the renewed attention to the democratic potential of the jury by criminal justice scholars. It is against the backdrop of this recent shift that I offer this article.

To explore the normative implications of the reemerging collective jury right, I next describe some of the corollaries of each right. In Part IV, I focus on two implications of treating the jury as an individual right: (1) the defendant has the right to waive his jury trial and request a bench trial, and (2) he has the right to request a change of venue. As I will show, neither of these are decisions categorically reserved to the litigant. For example, the prosecutor and the court must both consent to a defendant’s waiver of a jury trial. Nonetheless, these corollaries helpfully exemplify, but do not exhaust, some of the important normative impulses animating the individual jury right: assurance of a speedy trial, and impartiality of the tribunal.

In Part V, I consider some of the implications of treating the jury as a collective right. Recent decades have seen an increased push by legal scholars and activists for greater use of

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370 Appleman, “Jury Trial Right,” 397 (arguing that the original meaning of the jury trial right was a collective right).
371 In the federal criminal context, the Federal Rules of Criminal Procedure establish that no jury is necessary if “(1) the defendant waives a jury trial in writing; (2) the government consents; and (3) the court approves.” FED. R. CRIM. P. 23(a).
collective jury powers. These proponents of the collective right focus especially on the right of the jury to nullify. In this Part, I also describe a second corollary of the collective jury right: the conflict created with other individual rights.

The two corollaries of the jury as a collective right show that dangers may flow from permitting that right to extend too far. With regards to jury nullification, we should be wary about the erosion of the rule of law if nullification is normalized. And, though we often think of nullification as one-directional (juries can nullify when jurors believe the accused is guilty and ought not be punished), there is nothing that would constrain juries from nullifying in the other direction: convicting an accused who jurors believe is innocent because those jurors believe the accused should be punished. Such an extension of jury nullification is possible, even if legally indefensible, because of the broad discretion given to juries in their deliberative capacities.

Regarding the conflicts with other rights, such as the right to the assistance of counsel in Gideon, or the freedom of speech in Johnson, what is to be done when the collective rights of the jury conflict with other individual rights? Was the collective right of the jury trumped in those landmark cases? The tensions between the individual and the collective, have been discussed ad nauseum by liberal and democratic theorists; surprisingly, however, there is a sparsity of that discussion in the specific context of the jury. In exposing the quotidian conflicts between the

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collective jury right and other individual rights, my aim is to enable future conversations and scholarship about this important issue.

Finally, in Part VI, I briefly consider the implications of the preceding analysis for some of the most popular schools of constitutional theory. The historical and normative analysis in Parts III, IV, and V most naturally lends to a moral reading of the law like that developed by Ronald Dworkin in *Law’s Empire*. Legal scholars and judges can understand the evolutions of the jury right in terms of Dworkin’s “chain novel” and justify subsequent chapters in that novel with reference to the normative values underlying the competing jury rights.\(^\text{373}\) In addition to its potential application to a Dworkinian constitutional project, the analysis in this article may prove valuable to a constitutionally pluralistic approach to the law. Philip Bobbit identifies six modalities of constitutional argument—history, text, structure, doctrine, ethics, and prudence—which he argues are normatively significant in the analysis of constitutional questions.\(^\text{374}\) The analysis in this article enables constitutional pluralists to consider all six of those modalities; and, in the jury context, this article may shed light on some of what Bobbit calls “hard cases.”\(^\text{375}\) Finally, the analysis in this article may be helpful to contemporary originalists. I will argue that the Founding generation likely did not think there was any tension between the individual jury right and the collective jury right—there were endorsement of both rights in the Founding Era. Nonetheless, contemporary legal debates necessitate some accounting of both rights. At the very least, the historical analysis in this article raises questions about the accuracy of recent originalist scholarship defending the collective jury right. At most, the analysis in this article may prove

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\(^{375}\) Bobbitt, xiv (describing “hard cases” as those in which “two or more legitimate modalities . . . conflict”).
helpful to originalists operating in the construction zone who seek to address emerging conflicts between the two rights.

There are two important caveats to mention at this point. First, though I explore the jury through the lens of “rights,” the phenomenon I am interested in may similarly be understood as a “focus”: specifically, on whom—the individual defendant, or the collective/community—are we focused? The language of “rights” is a useful short-hand for this broader legal focus, and is helpful for situating the conversation in more traditional legal discussions. In the First Amendment context, for example, we sometimes use the “right to freedom of speech” as a short-hand for a more capacious bundle of rights: to speak, to not speak; to associate with others; to express oneself nonverbally, and more. In this article, the terms “individual jury right” and “collective jury right” are similarly used to bundle together groups of related rights: the right to waive one’s jury trial, and the right to request a change of venue (individual rights); and the right to nullify (a collective right). Though we may lose some nuance by bundling these distinct rights in this way, we also gain analytical clarity about an important area of tension in American jurisprudence.

The second caveat is that this article focuses only on the petit jury in the criminal context. The framework presented here may have implications for grand juries and civil juries, but this article is not about either of those.376

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376 I relatedly omit and abbreviate certain explanations of key parts of the jury such as rules around jury selection and the number of jurors. These omissions are necessary sacrifices on the altar of brevity, but do not reflect any lack of importance of those related subjects.
Jeffrey Abramson has contributed much to political theory scholarship on the jury system. His book *We, the Jury* tells “the story of the eclipse of the deliberative ideal and the reduction of the jury into a mere mechanical fact-finder warned to leave deliberations about law and justice to the judge.” Part of the story Abramson tells is that of the “sea change” from the local-community-drawn jury to the “jury as a distant institution of impartial justice.”

Understanding the transition from “juries of local justice” to “juries of higher justice” is vital to understanding the jury generally. That transition is rooted in the Court’s steady aspiration towards the “impartial jury” promised by the Sixth Amendment.

I build on Abramson’s account by framing the jury right as embodying both an individual and a collective right. Though these two dimensions—(1) impartiality versus partiality, and (2) individual right versus collective right—are coterminous in many places, they are not always so. Some of the corollaries of the jury right as an individual right are built around ensuring *impartiality*: especially, the ability to request a transfer of venue. In that sense, venue transfers are consistent with Abramson’s jury of “higher justice.” Similarly, defenders of the collective jury right appeal to normative principles associated with partiality. Jury nullification, for example, is premised on the collective as the ultimate arbiter of guilt; the jury acts as the

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378 Abramson, 8–9. Abramson’s “juries of local justice” are part of a more general vision of local autonomy. When we appeal to the partiality of juries because of their knowledge of local customs and traditions, we are defending the autonomy of those local communities to adjudicate alleged bad acts based on those local customs and traditions. Though this article will not explore the relationship between the collective jury right and localism, an important normative underpinning of the collective jury right is the desirable autonomy of local juries. For a greater discussion of localism, see, for example, Richard Briffault, “Our Localism: Part I—the Structure of Local Government Law,” *Columbia Law Review* 90, no. 1 (1990): 1-115; Richard Briffault, “Our Localism: Part II—Localism and Legal Theory,” *Columbia Law Review* 90, no. 2 (1990): 346-454. I am grateful to Professor Joshua Cherniss for reminding me of the important relationship between collective rights and localism.
379 U.S. Const. amend. VI (“[T]he accused shall enjoy the right to a speedy and public trial, *by an impartial jury*” (emphasis added)).
“conscience of the community.” Nullification is paradigmatic of Abramson’s jury of “local justice.”

But, if we focus only on impartiality and partiality (Abramson’s categories), we may miss other features of the individual and collective jury rights. For example, though defenses of the individual’s right to waive his jury trial are consistent with Abramson’s juries of higher justice, waiver does not clearly flow from concerns about impartiality. Similarly, nothing about the partiality of local juries captures the conflict I described above between the collective jury right and other individual rights. If we adhere too closely to Abramson’s categories, we miss these other important dimensions of the jury.

By exploring the corollaries of the individual jury and collective jury rights, this article complements and builds on the work of scholars like Abramson. There is much to be gained by thinking of the jury along these two related dimensions. The jury is complex and multidimensional, and my aim in this article is to clarify and articulate one of its underexplored dimensions.

II. Individual Versus Collective Rights, Generally

This Part considers the nature of individual and collective rights generally. It is common in constitutional law to discuss individual rights—those held and exercisable by individuals. Collective rights are more complex and have received less systematic treatment in legal scholarship. As will be shown below, the collective jury right may be thought of as a privilege

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380 This is only a slight exaggeration. As will be discussed below, at Part V.A, jury nullification is of somewhat ambiguous origins. But, as Abramson observes, “historically, jury nullification was debated as one example of the broader claim that jurors decided questions of law.” Abramson, *We, the Jury*, 68. Regardless of whether jurors are deciding questions of law or, less significantly, questions of fact, the nullification power is in either situation flows from the jury’s collective authority. See Part V.A below.
of the collective (the jury, the local community, or the state) to adjudicate alleged bad acts. The historical geneses of the individual and collective jury rights will be described in Part III.

We conventionally divide the Constitution into two categories, “structure” and “rights,” in constitutional-legal discourse. The structural features of the Constitution are those describing, and limiting, the three branches of government. By contrast, rights are those features of the Constitution protecting liberty (usually, but not always, individual liberty), such as the right to freedom of speech, and the right to keep and bear arms. In a recent contribution to this long-running debate, Ozan Varol complicates that classical dichotomy, arguing that the Constitution also includes “structural rights,” which “straddle the rights-structure dichotomy.” Structural rights “generate and distribute power, similar to structural provisions.” In many ways, Varol’s structural rights are what I refer to here as “collective rights.”

Varol is not alone in recognizing other-than-individual rights enshrined in constitutional law, or in our political theory more generally. In The Bill of Rights, Akhil Amar challenges the

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382 U.S. Const. amend. I.
383 U.S. Const. amend. II. Like the jury right, there have been debates in recent decades over the status of the right to bear arms—as an individual right, or a collective right. Much of the “individual rights” scholarship on that subject is summarized in Glenn Harlan Reynolds, “A Critical Guide to the Second Amendment,” Tennessee Law Review 62 (1995): 461. The “collective rights” view can be found in many of the articles that were presented in Carl T. Bogus, ed., “Symposium on the Second Amendment: Fresh Looks,” special issue, Chicago-Kent Law Review 76, no. 1 (2000): 3–600.
385 Varol, 1005.
386 As has already been said, I use the term “collective right” in this article as a short-hand for something more complex. Though the collective right is better understood as what Wesley Hohfeld describes as a “privilege,” we do not miss much by using the “rights” language instead. And ultimately, the “individual right” and “collective right” language is less important than the differential power dynamics each conveys. If it is an individual right, the jury confers power on the criminal defendant. If a collective right, the jury confers power on the jury members or even the larger community from which the jury is drawn.
“conventional wisdom that the Bill of Rights is overwhelmingly about [individual] rights.”

For him, the original Constitution, and even the provisions in the Bill of Rights which are today so universally accepted as rights, were concerned with structure and popular sovereignty. He claims that, after the passage of the Fourteenth Amendment, and through the process of “incorporation,” that all changed.

Originally a set of largely structural guarantees applying only against the federal government, the Bill has become a bulwark of rights against all government conduct. Originally drafted to protect the general citizenry from a possibly unrepresentative government, the Bill has been pressed into the service of protecting vulnerable minorities from dominant social majorities. . . . Like people with spectacles who often forget that they are wearing them, most lawyers read the Bill of Rights through the lens of the Fourteenth Amendment without realizing how powerfully that lens has refracted what they see.

In trying to help his readers see “with[out] spectacles,” Amar goes through the Bill of Rights—which he divides up as the “First Amendment,” “The Military Amendments,” “Searches, Seizures, and Takings,” “Juries,” and “The Popular-Sovereignty Amendments”—showing how the various categories would have been understood prior to the Fourteenth Amendment. He argues, for example, that the First Amendment was originally about protecting “popular majorities,” not oppressed or stigmatized minorities.

In the context most relevant to this article, Amar argues that the jury is a “paradigmatic image [of] the original Bill of Rights.” It was principally a structural creation, rather than a protector of individual (minority) rights. “The jury summed up—indeed embodied—the ideals

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388 Amar, 7.
389 Amar, vii.
390 Amar, 21. Amar recognized, however, that the text of the First Amendment “is broad enough to protect the rights or unpopular minorities (like Jehovah’s Witnesses and Communists).” Amar, 21.
391 Amar, 96.
of populism, federalism, and civic virtue that were the essence of the original Bill of Rights.”

Later, Amar acknowledges that “the present-day jury is only a shadow of its former self.”

In the next Part, I will amicably dispute the accuracy of Amar’s thesis by arguing that the wording of the Sixth Amendment much more clearly conveys an individual right than he allows. But Amar is correct that the original understanding of the jury more generally (beyond the narrower scope of the Sixth Amendment’s language) was as something closer to a collective institution. Though not exactly the same as a “collective right,” Amar’s institutionalism similarly shifts the focus away from the individual. Insofar as the orientation is towards the community—the collective—rather than the individual, the sense in which I use the “collective right” terminology here is consistent with Amar’s account and with Varol’s account of “structural rights.”

So as not to leave doubt about definitions, it will be helpful to flesh out what the terms “individual right,” and “collective right,” mean in this context. For these definitions, I reach beyond the constitutional-legal scholarship. We are accustomed to discussing “individual rights” in American political thought. Those rights are easier to intuit because the idea of a self-enclosed “individual” is generally taken for granted in American law and discourse. As the rights-focused political philosopher Will Kymlicka observes,

A liberal democracy’s most basic commitment is to the freedom and equality of its individual citizens. This is reflected in constitutional bills of rights, which guarantee basic civil and political rights to all individuals, regardless of their group membership. Indeed, liberal democracy emerged in part as a reaction against the way that feudalism defined individuals’ political rights and economic opportunities by their group membership.

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392 Amar, 97.
393 Amar, 97.
394 Will Kymlicka, Multicultural Citizenship: A Liberal Theory of Minority Rights (Oxford, UK: Clarendon Press, 1995), 34. Kymlicka does much to correct the myth that “group-differentiated rights seem[] to rest on a philosophy
“Collective rights,” by contrast, are more difficult to understand, in part because of the competing levels of abstraction at which theorists discuss the “collective.” Kymlicka notes that additional problems arise when people “assume that collective rights are rights exercised by collectives, as opposed to rights exercised by individuals, and that the former conflict with the latter.” In spite of these challenges, I offer a rudimentary definition of “individual rights” and “collective rights” in order to build on those definitions in subsequent sections of this paper.

Individual rights are those belonging to individuals, chiefly criminal defendants. The direct source of those rights is not important for the purposes of this article, but possible sources include natural law, positive law, or social norms. What is important for our purposes is that, by virtue of belonging to the individual, the individual may exercise the rights (or choose not to exercise them). The Constitutional right to freedom of speech, for example, is one that an individual may exercise by speaking, or choose not to exercise by remaining silent. The right to bear arms, similarly, may be exercised by owning and/or bearing firearms, or not exercised by choosing not to own firearms. In the criminal rights context, defendants may exercise their Fifth Amendment right against self-incrimination by remaining silent, or they may waive that right by choosing to speak.

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395 Kymlicka, 35 (arguing that “the category of collective rights is large and heterogenous”); Marlies Galenkamp, *Individualism Versus Collectivism the Concept of Collective Rights* (Rotterdam: Sanders Instituut, Gouda-Quint, 1998), 1 (offering as a few examples of the “collective”: “the world community at large (in the case of the right to a healthy environment), Third World States (in the case of the right to development), the nations, minorities and indigenous peoples (in the case of the right to preserve one’s cultural identity”).


397 The status of the right to bear arms as an *individual* right is still hotly contested, though the Supreme Court has recognized it explicitly in several high-profile cases. See McDonald v. Chicago, 561 U.S. 742 (2010); District of Columbia v. Heller, 554 U.S. 570 (2008).

398 U.S. Const. amend. V (“No person . . . shall be compelled in any criminal case to be a witness against himself.”).
Wesley Hohfeld provides what is perhaps the dominant theory of legal rights. Hohfeld distinguishes between four categories: rights, privileges, powers, and immunities.\(^{399}\) The individual jury right may be understood as a Hohfeldian right—what has been called a “claim right” by Hohfeldian scholars.\(^{400}\) On this reading of the Constitution, the defendant may claim—or choose not to claim—the right to have his trial decided by a jury; and, others (local, state, and federal governments) have an affirmative duty to respect that decision.\(^{401}\)

The applicability of Hohfeld’s rights framework is limited because Hohfeld’s theory best (perhaps only) applies to interactions between two people—not an individual and a collective.\(^{402}\) But if we set aside any aggregation problems associated with measuring what/who the “collective” is, the collective jury right can be thought of as a Hohfeldian privilege.\(^{403}\) In its ideal form, the jury as a collective has the privilege of adjudicating allegations against a criminal defendant; and, with respect to the collective jury, the defendant has no claim against the jury. The criminal defendant still has other rights such as those to due process, a speedy trial, and an impartial trial; but those other rights are not relevant to defining the collective jury right in the Hohfeldian framework. (As was already explained, those other rights are sometimes invoked to trump the collective jury right, exemplifying the occasional tension that exists between the collective right and other individual rights.\(^{404}\)) The fact that the collective jury has no duty towards the criminal defendant—the jury may decide the case on the merits (convict/acquit), or

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\(^{399}\) Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, ed. David Campbell and Philip Aneurin Thomas (Farnham, UK Ashgate/Dartmouth, 2001), 12. Hohfeld suggests that lawyers create confusion by unthinkingly labeling all of these as “rights.” Hohfeld, 12.

\(^{400}\) Hohfeld, xiii.

\(^{401}\) Hohfeld, 13 (“[I]f X has a right against Y that he shall stay off the former’s land, the correlative (and equivalent) is that Y is under a duty toward X to stay off the place.”).

\(^{402}\) Hohfeld, xiii.

\(^{403}\) Hohfeld, 14.

\(^{404}\) See Part V.B below.
it may nullify by declining to enforce the law in the particular case—bolsters the categorization of the collective right as a Hohfeldian privilege.\textsuperscript{405}

Though Kymlicka dislikes the term “collective rights,”\textsuperscript{406} that term is helpful as a starting point. Consistent with the Hohfeldian characterization above, for the purposes of this article, \textit{collective rights are those exercised by the community}. As with individual rights, the collective may choose to exercise its right, or abstain from exercising it. The collective jury may choose to exercise its nullification right, for example, by acquitting a defendant the jury knows to be guilty.

Unlike with individual rights, the means through which the “collective” (at any level of abstraction) chooses to exercise its rights are much more complex and inevitably require some means of determining the collective “will.”\textsuperscript{407} As I describe in greater detail in Part II, there was considerable discussion around the time of the drafting and ratification of the Sixth Amendment about the scope and extent of the “collective.”\textsuperscript{408}

The collective jury right is more difficult to conceptualize for at least two reasons. First, the collective right “holders” are undefined. Is the collective right that of the jury members—the dozens called for jury duty, or perhaps just the twelve selected for service? Is it a right of the local community from which the jury is drawn? If so, is it held by those who are not eligible for jury service—either because of age, criminal history, or lack of citizenship? These are important questions, but I set them aside for the purposes of this article. The analysis below should apply regardless of who ultimately holds the jury right. Though the operation of the collective right

\begin{flushright}
\textsuperscript{405} Hohfeld categorizes privileges and duties as jural opposites. Thus, where there is a privilege, there can be no duty. Hohfeld, \textit{Fundamental Legal Conceptions}, 12.
\textsuperscript{406} Kymlicka, \textit{Multicultural Citizenship}, 45 (arguing that “the term ‘collective rights’ is so unhelpful as a label for the various forms of group-differentiated citizenship”).
\textsuperscript{407} Because it is beyond the scope of this paper, I do not here wade into the literature on group/collective voting aggregation methods or theories.
\textsuperscript{408} See Part III.B below.
\end{flushright}
may vary on the fringes, the power conferred by the collective jury right should not vary as a result of the composition of the holding group.  

The second difficulty in conceptualizing the collective jury right relates to the legal concept of standing. If the collective right is violated, who has standing to seek redress? This, of course, relates to the first difficulty. And it relates to the classic principle, articulated as early as Marbury v. Madison, that “every right, when withheld, must have a remedy.” If there is no clear standing to seek a remedy for the violation of the collective jury right, then the principle articulated in Marbury suggests it is not a “right.” This is another important concern that I set to the side for the purposes of this article.

One possibility for moving past the difficulties raised in conceptualizing the collective jury right is to think about both rights as power conferrals. The individual jury right confers power on the criminal defendant. When a defendant waives his jury trial right, for example, he exercises that power. Even if the prosecutor or judge may object to such a waiver (in only a very loose sense, if the prosecutor/judge are taken as representing the public, this veto power may be deemed “collective”), our federal criminal rules make clear that it is only the defendant that may initiate waiver proceedings. Similarly, when the collective exercises its adjudicatory authority by choosing not to enforce a law in a particular case (jury nullification), the jury

409 Under current standing doctrine, collective rights cannot generally afford judicial standing in the same way as individual rights. See Donald L. Doernberg, “We the People: John Locke, Collective Constitutional Rights, and Standing to Challenge Government Action,” California Law Review 73 (1985): 56 (arguing that “the existence and recognition of collective rights require a modification of standing doctrine so that such rights can be protected through judicial review”).
410 Marbury v. Madison, 5 U.S. (1 Cranch) 137, 147 (1803).
411 Especially for collective rights, the term “exercise” should be understood more broadly than merely those which can be practiced in the judicial setting. This avoid the concerns about standing described above.
412 FED. R. CRIM. P. 23(a) (establishing that, in the federal criminal context, it is the defendant who chooses to waive their jury trial right).
exercises a power. Though we occasionally consider the individual defendant to be a beneficiary of nullification, it is not (at least, not primarily\textsuperscript{413}) the defendant who exercises nullification power; it is instead the jury as a collective.\textsuperscript{414}

As a final point, it is true that individual rights may also belong to individual \textit{jurors}, or to individual \textit{members of the community} who seek to participate on juries. These individual rights are important but go beyond the scope of this paper. While I address some of these other plausible individual rights in passing, my primary concern is with individual \textit{criminal defendants} because (1) criminal defendants are the individuals with whom most judges, lawyers, and legal scholars are concerned, and (2) considering those other possible individuals does not threaten the core argument I make in this paper and thus may be reserved for greater discussion elsewhere.

Though the jury likely cannot be understood in entirely Manichaean terms, the individual-collective framework is valuable for exposing and exploring the tension at its heart. In the next Part, I apply the individual-collective framework to the jury’s history by tracing the ebbs and flows of the two rights through history.

\textbf{III. Origins and First Principles}

Though I will show that our contemporary understanding of the jury has drifted quite some distance from that of our forefathers, it is impossible to understand the contemporary legal jury right without understanding its origins. In this Part, I first describe the pre-constitutional history of the jury and how it arrived in colonial America. Then, I turn to the Constitution. In

\footnotesize{\textsuperscript{413} To the extent that a defendant chooses to be tried by a jury, or develops her trial strategy in an effort to convince the jury to nullify, she may be exercising a right to nullification. This is, however, not how we normally discuss nullification. See Part V.A below.}

\footnotesize{\textsuperscript{414} Moreover, it is not individual jurors as \textit{individuals}, but individual jurors as \textit{members of the collective body}, who exercise nullification.}
particular, I focus on the history of the drafting of Article III’s jury right and, a few years later, that of the Sixth Amendment. Finally, I trace the development of the jury right from the Founding to the present day.

The history of the jury reflects (1) the strong collective jury rights backdrop against which the Constitution was drafted, (2) a growing ambivalence towards that collective right between the Constitutional Convention and the Civil War, and then (3) a century-long individual jury rights regime. Spurned by federal slaveholding interests, as well as other acts of rebellion by local juries, when the Fourteenth Amendment was ratified, the jury right shifted almost categorically in the individual direction (consistent with Amar’s thesis, described above). Finally, after a century-long individual rights regime, the collective jury right has reemerged in recent decades.

A. Common Law Origins

Broadly speaking the modern Anglo-American origins of the jury trial right are found in the Magna Carta, which established that “No mal [sic] shall be taken, outlawed, banished, or in any way destroyed, nor will we proceed against or prosecute him, except by the lawful judgment of his peers and by the law of the land.”

417 MAGNA CARTA, ch. 39 (1215); Joseph Story, Commentaries on the Constitution (Boston: Hilliard, Gray, and Company, 1833), 1173 (“It seems hardly necessary in this place to expatiate upon the antiquity, or importance of the trial by jury in criminal cases. It was from very early times insisted on by our ancestors in the parent country, as the great bulwark of their civil and political liberties, and watched with an unceasing jealousy and solicitude. The right constitutes the fundamental articles of Magna Charta . . .

Prior to the Magna Carta, the origins of the jury system are somewhat unknown. Though W.R. Cornish traces juries as far back as the Norman conquest in 1066, he admits that those “origins of the jury system are uncertain.” William Rodolph Cornish, The Jury (London: Penguin
Magna Carta’s jury was different in that it was “[d]rawn from the immediate neighborhood where the crime occurred, [and] the jurors were chosen for their knowledge of the crime or their ability to find out.”\(^{418}\) Unlike contemporary juries, those early jurors were allowed, and even encouraged, to investigate alleged crimes themselves. Over time, the investigative juries gave way to the juries to which we are today accustomed which are supposed to deliberate about only those facts properly presented at trial. Though still drawn from the communities, jurors are today expected to play a more “passive” role in determining guilt.\(^{419}\)

As early as the Seventeenth Century, settlers began importing the jury to the American colonies. Justice John Marshall Harlan noted that “the first law which was ever entered by the Plymouth Colony on its records was the one recognizing the right of trial by jury.”\(^{420}\) American settlers, over the course of the seventeenth century, continued to import some of the key aspects of criminal jury trial, including its “size, the vicinage, the aspects of compassion or restorative justice, and [its] role of moral arbiter.”\(^{421}\) Laura Appleman observes, however, that the jury system was not imported “unadulterated,” and colonies merged English norms with local customs.\(^{422}\)

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Footnotes:

422 Appleman, 408.
The Founding Fathers almost uniformly revered the jury. Among the many grievances cited in the Declaration of Independence was against the crown “[f]or depriving us in many cases, of the benefit of Trial by Jury . . . .” In light of that complaint, it may be surprising that there was no mention of juries in the Articles of Confederation, written concurrently with the Declaration. That omission should not suggest any oversight by the drafters; to the contrary, it likely suggests the extent to which jury practices were already entrenched in American traditions, and thus that those jury practices were intentionally left in their common law settings. The Continental Congress intended to defer to state judicial institutions, thus preserving states’ jury practices. Daniel Blinka argues that “juries played no special role in national governance between 1776 and 1788,” and the jury was amply protected at the state level. Indeed, the jury right was the only right provided explicitly in each of the twelve state constitutions written prior to the Constitutional Convention.

Many of the Founders saw the jury as necessary to the preservation of liberty in America, including Thomas Jefferson, who said in a 1789 letter to Thomas Paine, “I consider [trial by jury] as the only anchor yet imagined by man, by which a government can be held to the principles of its constitution.” Jefferson’s later-political-opponent, John Adams, expressed similar reverence, noting that “[r]epresentative government and trial by jury are the heart and

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423 The Declaration of Independence (U.S. 1776).
424 Blinka, “This Germ of Rottedness,” 137.
425 Blinka, 137.
lungs of liberty.” Like many other checks incorporated into the Constitution, the jury was designed to protect against overzealous executives by bestowing legal decisionmaking power on the people. Gouverneur Morris went so far as to describe the trial of Peter Zenger (1735) (an important case establishing jury nullification and freedom of speech) as “the germ of American Freedom, the morning star of liberty that subsequently revolutionized America.” Juries regularly subverted English laws and hindered the enforcement of certain laws against colonists. At the same time “[a]s juries exonerated those who resisted English colonial policy, they harassed those who enforced it.”

The pre-constitutional jury was thus (1) largely the product of common law historical developments, and (2) widely revered as a politically important institution. Appleman makes an originalist argument that, in Founding-Era America, “the right to a jury trial . . . was viewed almost exclusively as the people’s right, not as a right of the accused.” Though it is ahistorical to impose “individual” and “collective” rights language backwards onto the Founding generation, Appleman’s scholarship demonstrates that it is a helpful lens through which to understand the development of the American jury. While I respectfully disagree with other parts

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428 Jennifer Walker Elrod, “W(h)ither the Jury-the Diminishing Role of the Jury Trial in Our Legal System,” Washington and Lee Law Review 68 (2011): 8. Adams also said, “As the constitution requires that the popular branch of the legislature should have an absolute check, so as to put a peremptory negative upon every act of the government, it requires that the common people, should have as complete a control, as decisive a negative, in every judgment of a court of judicature.” John Adams, The Works of John Adams, ed. Charles Francis Adams (Boston, MA: Little, Brown and Company, 1850) 253.
429 Alan W. Scheflin, “Jury Nullification: The Right to Say No,” Southern California Law Review 45 (1972): 168 (“After the adoption of the Constitution, the concept of the jury as one of the people’s most essential vanguards against political oppression continued as an underlying principle in the American judicial system.”).
433 Appleman, “Jury Trial Right,” 405. Appleman’s argument is that “an eighteenth-century audience would have genuinely understood the right to a jury trial to be a collective right.” Appleman, 399.
of Appleman’s argument (discussed below), her description of the pre-Constitutional jury is likely correct: few of the pre-1787 accounts of the jury focus on the individual defendant, and many focus on the important role of the community.

Up to, and through the ratification debates, on the issue of the jury, there was apparent agreement between the Federalists and the Anti-federalists about the value of the jury as an institution.\textsuperscript{434} The fight over the jury was central to the American revolutionary cause. Subsequent developments, however, reflect a growing ambivalence towards the collective jury right and increasing recognition of the individual right.

B. The Constitutional Right

As the preceding section shows, the jury was undoubtedly much more important to the Founding generation than a mere positive right inscribed on parchment. Nonetheless, the legal and political status of the jury have been preserved by the Constitution. It is helpful to understand the meaning of the jury right, both in the original Constitution and subsequently in the Sixth Amendment adopted a few years later.

\textsuperscript{434} Alschuler and Deiss, “Brief History of the Criminal Jury,” 871 (recognizing general agreement among the Founders about the “desirability of safeguarding the jury”). In Federalist No. 83, Alexander Hamilton wrote that, “[t]he friends and adversaries of the plan of the Convention, if they agree in nothing else, concur at least in the value they set upon trial by jury; of if there is any difference between them it consists in this: the former regard it as a valuable safeguard to liberty; the latter represent it as the very palladium of free government.” Alexander Hamilton, “The Federalist No. 83,” In The Federalist, ed. George W. Carey and James McClellan (Indianapolis, IN: Liberty Fund, Inc., 2001): 432. Hamilton’s sentiment was echoed by other Federalists like Pennsylvanian John Dickinson. “Trial by jury is the cornerstone of our liberty. It is our birthright; who is in opposition to the genius of America shall dare to attempt its subversion?” James Madison wrote, “Trial by jury is essential to secure the liberty of the people as any one of the pre-existent rights of nature.” The Anti-Federalists, likewise, supported Hamilton’s position on trial by jury. Patrick Henry wrote, “Trial by jury is the best appendage of freedom. I hope that we shall never be induced to part with that excellent mode of trial.” Fellow Virginian Richard Henry Lee stated, “The right to trial by jury is a fundamental right of free and enlightened people and an essential part of a free government.” “Trial by Jury: Inherent and Invaluable,” West Virginia Association for Justice, accessed May 12, 2019, https://www.wvaj.org/index.cfm?pg=HistoryTrialbyJury.
The Constitution, after the 1787 Constitutional Convention and the 1791 ratification of the first ten amendments, referenced the jury in five places:

1. **Article III, Section 2**: “The Trial of all Crimes, except in Cases of Impeachment, shall be by **Jury**; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.”

2. **Amendment V**: “No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand **Jury**, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger . . .”

3. **Amendment VI**: “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial **jury** of the State and district wherein the crime shall have been committed . . .”

4. [Twice in] **Amendment VII**: “In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by **jury** shall be preserved, and no fact tried by a **jury**, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.”

Of these, the second (addressing the grand jury) and fourth/fifth (addressing the civil jury) are not the focus of this paper. The Article III and Sixth Amendment references are those wherein the jury trial right in the criminal context resides, and I thus focus on them here. What is striking about the Sixth Amendment, unlike the other Amendments to the Constitution, is that it was seemingly not necessary. In their *Brief History of the Criminal Jury in the United States*, Albert Alschuler and Andrew Deiss report that the jury right was the “only guarantee to appear in both the original document and the Bill of Rights.” If Article III provided for a jury right, why did the first Congress see the need to reiterate that right in the amendments? To understand the possible answers, and the possible nature of the right being conveyed, it is helpful to look at the histories of the two clauses separately.

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435 U.S. Const. art. III, § 2, cl. 3 (emphasis added).
436 U.S. Const. amend. V (emphasis added).
437 U.S. Const. amend. VI (emphasis added).
438 U.S. Const. amend. VII (emphasis added).
1. *Article III Jury Right*

As has already been shown, Article III was drafted against the backdrop of the Declaration, and the Declaration signers’ expressed grievances of (1) having been deprived “of the benefits of Trial by Jury” in general, and (2) having been transported “beyond Seas” for trials.\(^{440}\) As a result, even the early and rough drafts of the Constitution emphasized the locality requirement.\(^{441}\) Leonard Levy claims that it was the Committee of Detail “on its own initiative” that first introduced the jury trial right in the Constitution;\(^ {442}\) and John Mikhail similarly observes what may have been the first articulation of the jury right by John Rutledge:

Underneath Randolph’s complex jurisdictional paragraph, which someone, presumably Rutledge, deleted, Rutledge first wrote ‘That Trials for Crim[inal] Offences be in the State where the Offe[nce] was com[mitte]d—by Jury’. . . .\(^ {443}\)

Mikhail notes that Rutledge was “an aggressive defender of slavery and state sovereignty” during the convention.\(^ {444}\) Should it be inferred that Rutledge saw juries as a means of preserving slavery? It is plausible that local juries would better protect slaveholders in disputes between (or over) slaves than would a federally-created judiciary. And yet the history of the Northwest Ordinance, which the Continental Congress passed contemporaneously with the Constitutional Convention would suggest that there was no necessary relationship between

\(^{440}\) The Declaration of Independence (U.S. 1776).
\(^{441}\) The earliest available reference to the jury at the Convention was the output of the Committee of Detail, which appeared as: “That Trials for Crimal. Offences be in the State where the Offe was comd—by Jury.” Philip B Kurland and Ralph Lerner eds., *The Founders’ Constitution* (Chicago, IL: University of Chicago Press, 1987), volume 4, article 2, section 2, through article 7, 390–91.
\(^{444}\) Mikhail, “Necessary and Proper Clauses,” 1053.
slavery and the jury at the time of the Convention.\textsuperscript{445} The Northwest Ordinance both proscribed slavery in the territory (which would first become Ohio, and later contribute to several other states), \textit{and} the Ordinance preserved the jury right.\textsuperscript{446} As a matter of original public meaning, it is thus not clear that the language proposed by Rutledge would have been understood \textit{a priori} as protecting slaveholders’ interests.

The Northwest Ordinance is a significant document for understanding the original jury right for another reason as well. Though drafted by the Continental Congress in New York while the Framers met in Philadelphia, what is interesting about the Northwest Ordinance is that it seemed to preserve the jury as a distinctly \textit{individual} right. The Ordinance stated that,

\begin{quote}

The inhabitants of the said territory shall always be entitled to the benefits of the writ of \textit{habeas corpus}, and of the trial by jury . . . .
\end{quote}

That language was, of course, not chosen by Rutledge or anyone else at the Convention. And, owing to the unique nature of the Ordinance—providing for rights in a non-state territory—the individual right meaning does not automatically imply anything about juries in other states. (As Blinka observes, the Ordinance was closer to earlier “colonial charters [than] to the Revolutionary ardor found in the Pennsylvania Constitution of 1776.”\textsuperscript{448}) In other words, notwithstanding the unique connection between the ban on slavery and the protection of an individual jury right, the Northwest Ordinance may not have suggested any broader understanding about the role of juries in 1787-America. It is nonetheless interesting to compare the Northwest Ordinance’s individual-focused language (\textit{“[t]he inhabitants . . . shall always be

\begin{footnotesize}
\textsuperscript{445} Blinka, “This Germ of Rottedness,” 144–45. \\
\textsuperscript{446} “Northwest Ordinance of July 13, 1787,” Yale Law School: The Avalon Project, accessed May 12, 2019, \url{http://avalon.law.yale.edu/18th_century/nworder.asp}. \\
\textsuperscript{447} Yale Law School: The Avalon Project, “Northwest Ordinance.” \\
\textsuperscript{448} Blinka, “This Germ of Rottedness,” 145.
\end{footnotesize}
entitled to”) with the not-necessarily-individual-focused language drafted contemporaneously in Article III (“[t]he trial of all crimes . . . shall be by jury”). The Northwest Ordinance may be the earliest written form of the individual jury right—framing the jury as an entitlement of the individual rather than a prerogative of the community.

Returning to the Constitutional Convention, the language Rutledge inserted on behalf of the Committee of Detail comes close to that later ratified in the Constitution. Thereafter, according to James Madison’s notes, it was Roger Sherman who reported the results of the Committee’s work.449 Though Sherman defended the Committee’s choice to allow legislatures to set the location of trials for crimes not committed in any states, it is noteworthy that he saw no reason (at least, none that was recorded in Madison’s notes) to defend the jury right provision generally.450

After the Committee of Style made its report of the final language—largely the same as that which came out of the Committee of Detail—some at the Convention raised concerns about the lack of any provision “for juries in Civil cases;” and Elbridge Gerry “urged the necessity of Juries to guard [against] corrupt Judges.”451 Other Framers also proposed amending Article III and adding a civil jury provision.452 But the jury language was otherwise uncontested. The general sparsity of debate over the criminal jury language that was finally ratified in the Constitution suggests that it was less controversial than some of the other, more hotly-contested constitutional clauses.

449 Farrand, Records of the Federal Convention, 437–38
450 Farrand, 438 (noting that Sherman said, “[t]he object of this amendment was to provide for trial by jury of offences committed out of any State”).
451 Farrand, 587.
452 Farrand, 628 (noting that Pinkney and Gerry moved to add “[a]nd a trial by jury shall be preserved as usual in civil cases” to Article III).
After the conclusion of the Convention, however, criticisms began to emerge. The anti-federalist Federal Farmer raised at least two concerns that were echoed by others: (1) that “particularly in large states, a citizen may be tried for a crime committed in the state, and yet tried in some states 500 miles from the place where it was committed”; and (2) that the general structure of Article III actually stole power from juries by allowing Congress to establish appellate jurisdiction of federal judges to review the verdicts of juries, “both as to law and fact.”

Regarding the latter, another anti-federalist, under the pseudonym Cincinnatus, opined that the court had become “both judge and jury,” and the “constitution is so admirably framed for tyranny.”

Responding to these concerns in Federalist No. 83, Hamilton wrote that “it must appear unquestionably true, that trial by jury is in no case abolished by the proposed Constitution . . . .” Hamilton was primarily addressing the concerns that the Constitution did not provide for juries in civil cases, but he also responded to antifederalist critiques (like those described above) that jury power was being stolen in criminal cases. The number of the Federalist Paper—83—is noteworthy in that it was among the last. The jury right received little attention in earlier Federalist Papers. Though it is difficult to draw conclusions from this alone, the fact that the jury was only the focus of one of the last Federalist Papers again suggests that concerns about the jury were less important to ratification debates. If the general public to whom Hamilton was addressing his responses were largely unconcerned about the issues raised by Federal Farmer,

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454 Kurland and Lerner, The Founders’ Constitution, Cincinnatus, No. 1, November 1, 1787, 394.
455 Hamilton, “The Federalist No. 83.”
Cincinnatus, and others, then perhaps Hamilton was justified in delaying his response to those concerns until the eleventh hour.

During ratification, James Wilson expressed a similar “confidence” about the preservation of the jury trial right in criminal cases when he addressed the citizens of Philadelphia on October 6, 1787. Wilson attributed the lack of greater attention to the civil jury in the Constitution to the difficulties and impracticalities of writing a “general rule” against the complexity of the common law, which varied in the many states.

Unfortunately, many of these documentary sources shed only limited light on the inquiry into the precise nature of the jury right—especially whether it was an individual or a collective right. The Convention and ratification debates exist against the collective-rights common-law backdrop. But those debates and related historical developments hint at the emerging individual jury right. For one thing, Founders expressed concerns about individual litigants. Cincinnatus, the same antifederalist cited above who worried that federal judges would rob local juries of their power, also worried about criminal defendants, noting that “it was the jury only, that saved [Peter] Zenger.” And the Northwest Ordinance preserved the jury right as a benefit to which inhabitants of those territories were “entitled.” But, at the same time, the expressed preoccupations with locality and vicinage, as well as the common law origins of the jury against which Article III was written, suggest a dueling collective right of local communities to decide cases.

457 Wilson.
458 Kurland and Lerner, The Founder's Constitution, Cincinnatus, No. 1, November 1, 1787, 394.
2. Sixth Amendment Jury Right

It was against this ambivalent backdrop that the following language was introduced when the House of Representatives considered amendments to the Constitution in August 1989:

The trial of all crimes … shall be by an impartial jury of freeholders of the vicinage.⁴⁶⁰

Upon a motion by Congressman Burke, “vicinage” was changed to “district or county in which the offence has been committed”⁴⁶¹; and, at some point the “freeholders” qualification was removed—likely a major loss for southern slaveholders seeking to restrict jury service to the property-owning elite. Another novel concept that existed nowhere in Article III was the “impartiality” requirement, which survived subsequent edits and has been the normative foundation of significant individual jury rights jurisprudence (described in greater detail below).

Inevitably, the final Sixth Amendment language submitted to the states for ratification, was the product of intense debate between the “strongly Federalist” Senate, and the more representative House.⁴⁶² The Senate, for example, cut out the “vicinage” requirement, thus promoting the ability of federal judges to manage trials as those judges saw fit, unconstrained by local sentiments; and limited the jury’s authority in civil cases to only those cases “where the value in controversy . . . exceed[s] twenty dollars.”⁴⁶³ During a conference between the House and Senate, the venue requirements were inserted back in, guaranteeing that juries would be “the State and district wherein the crime shall have been committed.”⁴⁶⁴ Blinka argues that, as a

⁴⁶² Blinka, “This Germ of Rottedness,” 154–56. As Blinka notes, it is challenging to fully understand the debates over these issues because “the record of the Senate debate is incomplete and spotty, and thus shrouds the motives behind many of the Senate’s actions.” Blinka, 155.
⁴⁶³ Blinka, 155; U.S. Const. amend. VII.
⁴⁶⁴ Blinka, 156; U.S. Const. amend. VI.
result of these debates, the final language was largely conservative, and “[n]either the criminal nor the civil amendments extended the right to jury in any meaningful sense.” 465 Notwithstanding Blinka’s assertion, the Sixth Amendment language was different.

How would the Sixth Amendment have been understood at the time of its ratification? 466 Consistent with its ambiguous origins, when looked at alone, the text is of limited support in determining whether the jury was understood as a collective right or an individual right. On the one hand, by making the “accused” the subject of the right, the Amendment clearly lays out an individual right. It is the “accused” who “shall enjoy the right.” 467 The “impartiality” requirement similarly serves to check the otherwise partial intrusions of local justice.

On the other hand, however, the clause is qualified by the phrase, “of the State and district wherein the crime shall have been committed,” 468 which may indicate that the community retains some collective authority to participate in criminal adjudications. The Sixth Amendment went further than Article III’s “in the State” requirement, perhaps to appease some of the anti-federalist critics. The Sixth Amendment’s “State and district” requirement may thus signal the first Congress’ endorsement of a collective right. 469 Amar argues this point forcefully: “[t]he historical answer is unequivocal: [the purpose of the Sixth Amendment was] to guarantee, among other things, a right to a trial by jury from the ‘district’ of the crime. . . . Once again, we see the local communitarian spirit of the Bill of Rights.” 470 But Amar seems to overemphasize the

465 Blinka, 156.
466 Without wading into contemporary debates about the merits of originalism as an interpretive tool, I begin by asking this standard originalist question because it is an increasingly-common starting point in constitutional law inquiries. Lawrence B. Solum, “Originalist Methodology,” The University of Chicago Law Review 84 (2017): 269.
467 U.S. Const. amend. VI.
468 U.S. Const. amend. VI.
469 U.S. Const. amend. VI. Article III is also distinguishable because the “accused” is not the subject of that clause.
470 Amar, Bill of Rights, 105.
collectivist background of the right; and, he underappreciates the individual right framing of the Amendment with its emphasis on the “accused.” In short, the text of the Constitution is not alone dispositive of whether the jury right is an individual one or a collective one.

Scholars have recently sought to shed light on the original public meaning of the jury right. Laura Appleman, for example, argues that “the right to a jury trial, particularly in the criminal context, was viewed almost exclusively as the people’s right, not as a right of the accused.” She urges that even the Sixth Amendment’s language—with the “accused” as the subject of the first major clause—“is actually [only] a restatement of the collective right in Article III . . . [and] was [not] meant to change this historical understanding and confer an individual right on defendants.” But Appleman’s account, like Amar’s, is seemingly incomplete; she gives little weight to the “impartiality” requirement and the historical evidence—like statements by both Federalists and Anti-Federalists—that support the individual rights reading. Alschuler and Deiss argue instead that, at its inception, the jury right fit into both categories—as an individual right, and a structural right. “Jury trial was a valued right of persons accused of crimes, and it was also an allocation of political power to the citizenry.”

Another legal scholar, Suja Thomas, also delves into the jury’s original meaning, although much of her analysis focuses on the Seventh Amendment civil jury right. Though Thomas does not directly address the individual/collective rights question, she argues, in part on originalist grounds, that “the criminal, civil, and grand jur[ies] . . . [should] look more like the

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472 Appleman, 398.
474 The wording of the Seventh Amendment is slightly different, and the civil jury right is modified by the clause, “[i]n Suits at common law.” Suja A. Thomas, The Missing American Jury (Cambridge, UK: Cambridge University Press, 2016), 32.
predecessor jur[ies] that existed in late eighteenth-century England at the time the jury provisions were adopted in America. Thomas, like Appleman and Amar, endorses the collective rights view, saying that, “[I]ke the Fifth Amendment grand jury provision, Article III gives the jury affirmative authority. It grants the jury power to try all crimes except impeachment cases.” Her description of the jury as a “missing branch” (a characterization echoing that of Alexis de Tocqueville’s, described below) further evidences the collective rights view. Thomas argues that the Founders intended for the jury to function like the other three branches—the legislature, executive, and judiciary.

More than these scholars, I argue that the interaction between the Sixth Amendment’s wording and the common law background of the jury right reflect the Constitution’s ambiguous answer to the ‘individual versus collective right’ inquiry. But importantly, that ambiguity shows a shift towards the individual right that would become much starker in subsequent generations.

3. *Early Developments*

There are few Supreme Court cases in the first century after ratification that clarify the meanings of either Article III or the Sixth Amendment. Amar attributes this lack of early caselaw to two phenomena. First, in *Barron v. Baltimore* (1833), the Supreme Court held that “the constitutional criminal procedure rules did not apply against the states.” The Court had

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475 Thomas, 6.
476 Thomas, 86. She further observes that “the Sixth Amendment, other rights in the Bill of Rights, and the original Constitution do not grant authority to any institution other than the jury to try crimes (outside of impeachment).” Thomas, 86.
477 See text accompanying notes 497–503 below.
479 Thomas, 75.
seemingly understood this principle well-before that case, and there are consequently no early Court cases interpreting the jury right. Relatedly, there were far fewer federal criminal laws and thus no opportunities for early federal courts to interpret the Amendment.481

Second, Amar argues that, “for virtually the entire first century of the Bill of Rights, the United States Supreme Court lacked general appellate jurisdiction over federal criminal cases.”482 Thus, even had there been federal criminal cases calling for interpretation of the Sixth Amendment, they may not have made their way up to the Supreme Court. For both reasons, there is little (read: no) early-American jurisprudence interpreting the Constitution’s jury right. Unlike clauses and Amendments that were interpreted in the years following ratification—often by judges who had been present at the Constitutional Convention—we cannot appeal to caselaw from that period for insights into how the jury trial was understood.

It was not until more than a hundred years after ratification that the Court first waded into the jury right, in Sparf and Hansen v. United States (1895)483 and then Strauder v. West Virginia (1897).484 This, of course, does not mean that nothing happened in the intervening century. In the same year in which Congress voted on the Sixth Amendment, it passed the Federal Judiciary Act of 1789, therein leaving to the states the ability to determine juror eligibility in the newly-created federal courts.485 So empowered, states restricted juror membership by race, sex, and sometimes property-ownership. As Alschuler and Deiss observe, those restrictions took longer

481  Amar, “Constitutional Criminal Procedure,” 1124 (“Most criminal law . . . is state law; Murder, rape, robbery, and the like are generally not federal crimes.”).
482  Amar, 1124.
483  156 U.S. 51 (1895).
485  Alschuler and Deiss, “Brief History of the Criminal Jury,” 878 (citing An Act to establish the Judicial Courts of the United States § 29, 1 Stat 73, 88 (1789) (“[J]urors shall have the same qualifications as are requisite for jurors by the laws of the State of which they are citizens . . . .”)).
to overcome than restrictions on the right to vote. “[T]he reform of jury qualifications has often lagged behind the reform of qualifications for voting. In many states, unpropertied white men, African-Americans, and women did not serve on juries until considerably after they gained the vote.”

Blinka has shed light on early-American skepticism of juries, even by those opposed to the strongly-nationalist federal government. He observes Thomas Jefferson’s realization in the 1790s of juries’ “capricious, often emotional decision-making which sacrificed reason and certainty.” The title of Blinka’s article, “This Germ of Rottedness,” refers to the partiality and brokenness of early-American juries; the title is a reference to one of Jefferson’s petitions in which Jefferson proposed the “Election of Jurors” to cure such “rottedness.” Jefferson’s post-ratification shift in attitude towards the jury reflects what Blinka describes as a more general shift in the minds of American jurists in favor of impartiality. The quest for impartiality would be “firmly led by the judge and increasingly bounded by phalanxes of rules.” Blinka’s insights about the early ambivalence (at best) and animosity (at worst) towards juries are invaluable. He recognizes the nationalist ambitions of many of the Founders to overcome precisely the type of localism characteristic of collective jury powers. In Blinka’s words,

What is remarkable, then, is not so much the constitutional guarantee of criminal and civil jury rights [at the Founding], but their seemingly desiccated form and unenthusiastic reception. . . . [N]o political consensus supported jury innovations on the national level because despite affection for the right in the abstract, too many misgivings and doubts shrouded juries’ operation in practice.

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486 Alschuler and Deiss, 878.
487 Blinka, “This Germ of Rottedness,” 140.
489 Blinka, “This Germ of Rottedness,” 140.
490 Blinka, 146.
The fact that the Constitution and Judiciary Act allowed states to continue conducting jury trials may have been part of the larger compromise of the Constitution. To the extent that it was such a compromise, juries bore a close relationship with another key issue on which there was even more debate: slavery. In a recently-published note, Ryan Shymansky argues that “the decline in the power and purview of the American criminal jury is directly correlated with the rise of slave interests in the federal government.”491 Shymansky shows that, when early-American juries began “blocking oppressive fugitive slave laws,” the federal judiciary began curtailing those juries’ powers.492 He is undoubtedly correct that part of the historical evolution of the jury from a collective right to an individual right may be understood as the response to such slave interests.493 Both Blinks and Shymansky recognized the collectivist, local, ambitions of the jury right at the time of the Founding. Blinks and Shymansky similarly recognize the early-Republic’s growing ambivalence about that collectivism—what Jefferson called the “germ of rottedness.”494 While Shymansky reports on the early attempts to temper abolitionist juries, Blinks draws attention to other early skirmishes between the judiciary and partial juries. Prosecutions after the Whiskey Rebellion of 1794 are one such example. When the nascent federal government imposed whiskey taxes, Western Pennsylvanians revolted, prompting federal military intervention.495 In the trials that followed, Blinks observes, “federal judges strain[ed] to control the proceedings.”496 The phenomenon that Shymansky attributes to federal slaveholding interests was thus reflective of a more general distrust of local juries in decades after the

491 Shymansky, “Political Liberties,” 216.
492 Shymansky, 217.
493 This is discussed in greater detail below, Part III.C.
494 See note 488 above.
495 Blinks, “This Germ of Rottedness,” 167–68.
496 Blinks, 168.
Convention. The young nation was still wrestling over the contours of national power, and the jury right was yet another instantiation of that feud.

These early developments—both social and political—help explain the individual-focused language of the jury right in the Sixth Amendment and the Northwest Ordinance. They demonstrate the complexity of the jury in the minds of the founding generation. However, notwithstanding Blinka’s and Shymansky’s revelations about the declining jury power in early-America, the ambiguity of the jury right persisted through the beginning decades of the Nineteenth Century. The contrast between two intellectuals—Alexis de Tocqueville, and Joseph Story—reflect that persisting ambiguity.

Tocqueville was incorrect when he observed, after his 1831 visit to the United States, that “[e]very American citizen can vote or be voted for and may be a juror.” This may call into question the value of his contributions more generally. And yet, Tocqueville’s insights from that visit offer a valuable lens into the American landscape from that time. He observed that, regardless of the class from which the jury was drawn, it introduced “an eminently republican element into the government” insofar as it endowed executive authority into the hands of the people. “The jury is the part of the nation responsible for the execution of the laws . . . .” Particularly because Tocqueville’s project was to study the American penal system, it is

499 Tocqueville, *Democracy in America*, 272.
500 Tocqueville, 273.
interesting that his observations on the jury focus on the jury as a collective rather than on the criminal defendants who would ultimately face the penal system if convicted.

[T]he true sanction for political laws lies in the penal ones, and where that sanction is lacking, the law sooner or later loses its power. For that reason the man who is judge in criminal trial is the real master of society. Now, a jury puts the people themselves or at least one class of citizen on the judge’s bench. Therefore the jury as an institution really puts control of society into the hands of the people of that class.  

Tocqueville’s focus, perhaps indicative of a broader perspective at that time, is of the jury as a collective right. It was precisely the partiality of the jurors to which he appeals when describing the “power” of that “institution.”

Tocqueville’s perspective can be juxtaposed with that of his (slightly older) contemporary, Joseph Story. In Commentaries on the Constitution, written just two years after Tocqueville’s visit, Story writes,

The great object of a trial by jury in criminal cases is, to guard against a spirit of oppression and tyranny on the part of rulers, and against a spirit of violence and vindictiveness on the part of the people. Indeed, it is often more important to guard against the latter, than the former.

While Tocqueville praised the collective potential of the jury, Story saw the need to guard against it. Specifically, it was the individual defendant who needed guarding. The criminal defendant is safe only by “the severe control of courts of justice, and by the firm and impartial verdict of a jury sworn to do right, and guided solely by legal evidence and a sense of duty.”

The nearly-contemporaneous contrast between Story and Tocqueville reflects the continuation of the founding-era ambiguity with regards to the jury. That contrast reflects early

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501 Tocqueville, 272–73.
502 Story, Commentaries on the Constitution, §1774.
503 Story, §1774.
America’s continuing efforts to define the contours of what would subsequently become more clearly the individual and collective jury rights.

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At this stage, we are left without any clear answer to our inquiry into the precise nature of the American jury right. Both the jury’s common law origins, and records from around the Constitutional Convention, left us unmoored—torn between competing collective and individual commitments. As we will next see, subsequent historical and legal developments moved the jury, with a few exceptions, towards an almost-absolute individual right.

C. The Court’s Shifting Jury Right Jurisprudence

Amar argues forcefully that the Civil War, and the Fourteenth Amendment, changed the shape of the jury right. “[B]oth the text of section I [of the Fourteenth Amendment] and the public gloss Congress placed on that text [make] clear that Congress was proposing nothing less than a transformation of the original Bill of Rights.” Shymansky and Blinka show that the shift had been taking place for some time: the mid-Nineteenth century federal judiciary had already done much to curb juries’ collective powers even prior to the Civil War. Curbing of jury powers expanded in the face of increasing racial animus. Everette Swinney, for example, describes the challenges juries presented for the enforcement of the post-War voting laws, and the consequent authority given to southern marshals by the Department of Justice to reject “unfriendly” jurors. The post-War Amendments, and the related social and political

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504 Amar, Bill of Rights, 197.
505 Shymansky, “Political Liberties,” 230 (describing a series of cases showing that “federal judges were limiting jury prerogatives as northern juries became more intractable on the issue of fugitive slaves”).
circumstances surrounding their ratification, explain some of the shift towards a definitively-individual right that occurred over the next century.

Against the backdrop of the Civil War and the Fourteenth Amendment, the Supreme Court finally took up two major cases implicating the jury right in 1895 and then 1897. Both cases demonstrate the decidedly individual nature of the turn-of-the-century jury: while *Sparf and Hansen* curbed the collective right, *Strauder* emphasized the individual right. In *Sparf and Hansen*, the Court was asked to consider the appeal from a murder trial of three crew members of the Hesper accused of killing (and throwing overboard) the ship’s second mate. In addressing the relationship between the trial judge and the jury, the Court held that questions of law were to be decided by judges, and only questions of fact were within the province of jury decisionmaking. The Court thus substantially rolled back the collective power of the jury, diluting (if not effectively abolishing) juries’ collective right to nullify.

Two years later, in *Strauder*, the Court struck down a West Virginia law that limited the jury pool to “white male persons who are twenty-one years of age and who are citizens of this State.” That case was settled on Fourteenth Amendment Equal Protection Clause grounds—focusing on the discriminatory character of the law, not its deprivation of an impartial jury—but Justice Strong’s framing of the central issue indicates the Court’s treatment of the jury right as an individual right. It is the defendant who “has a right to have a jury selected for the trial of his

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507 *Sparf and Hansen v. United States*, 156 U.S. 51, 102 (1895) (“We must hold firmly to the doctrine that in the courts of the United States it is the duty of juries in criminal cases to take the law from the court, and apply that law to the facts as they find them to be from the evidence. Upon the court rests the responsibility of declaring the law; upon the jury, the responsibility of applying the law so declared to the facts as they, upon their conscience, believe them to be.”); Shymansky, “Political Liberties,” 230.


509 *Strauder v. West Virginia*, 100 U.S. 303, 305 (1897).
case without discrimination,”510 not the community. Strong noted that “[t]he very idea of a jury is a body of men composed of the peers or equals of the person whose rights it is selected or summoned to determine.”511 The language used by the Court supports an individual-jury-right reading of that opinion.

Eighty years later, the Court extended the logic of Strauder to women in Taylor v. Louisiana, 512 In his opinion for the Court, Justice White echoed Story’s Commentaries when White described the purpose of the jury as: “to guard against the exercise of arbitrary power—to make available the commonsense judgment of the community as a hedge against the overzealous or mistaken prosecutor and in preference to the professional or perhaps overconditioned or biased response of a judge.”513 Who is it that is being guarded? While theoretically not foreclosing the protection of the community, the more obvious reading of White’s argument is, consistent with that of Story, that the jury is guarding the individual defendant.

Other key twentieth century cases similarly demonstrate the decidedly individual nature of the right. In Duncan v. Louisiana, in which the Court formally incorporated the Sixth Amendment as applying against the states, Justice White again wrote for the majority and articulated a view of the jury as an individual right. 514 He cited, among other places, to the resolutions of the Stamp Act Congress in 1765, and argued that among the “most essential rights

510 Id. (emphasis added).
511 Id. at 308 (emphasis added).
512 419 U.S. 522, 531 (1975) (holding that the Sixth Amendment is violated “by the systematic exclusion of women” from jury service). Justice White looks back to the Founding era, concluding that “the first Congress did not perceive the Sixth Amendment as requiring women on criminal jury trials; for the direction of the First Judiciary Act of 1789 was that federal jurors were to have the qualifications required by the States in which the federal court was sitting and at the time women were disqualified under state law in every State.” Id. at 536. He necessarily rejects the value of this history, saying it “is no longer tenable” to exclude women from juries. Id. at 537.
513 Id. at 530.
514 88 S. Ct. 1444, 1447 (1968). As already mentioned, because Strauder had not been decided on Sixth Amendment grounds, that case did not necessitate incorporation.
and liberties of the colonists” was “[t]hat trial by jury is the inherent and invaluable right of every British subject in these colonies.”\textsuperscript{515} And White again described the jury as a protection for the defendant “against arbitrary action” by the state.\textsuperscript{516} He also left the decision about whether a jury is to be summoned almost entirely to the defendant, saying that, “[i]f the defendant preferred the common-sense judgment of a jury to the more tutored but perhaps less sympathetic reaction of the single judge, he was to have it.”\textsuperscript{517}

Perhaps the most significant development in American criminal procedure was the creation of the Federal Rules of Criminal Procedure. Like the opinions cited above, the early reports of the Advisory Committee tasked with developing those Rules treated the jury in individualist terms. The June 1944 Report of the Advisory Committee recommended that “[c]ases required to be tried by jury shall be so tried unless the defendant waives a jury trial . . . .”\textsuperscript{518} As will discussed further in the next Part, emphasis on the right of defendants to waive their jury rights reflects the growing appreciation of the individual defendant’s control over the criminal adjudication process. The Federal Rules of Criminal Procedure—providing for guilty pleas (Rule 11), waiver (Rule 23), venue transfers (Rule 21), and more—are a signature outgrowth of the individual jury right, reflecting a high water mark of that right in the twentieth century.

It would be impossible to divorce the discussion of twentieth century jury developments from the decline of the jury’s role during that period. Even as the number of criminal cases rose,

\textsuperscript{516} Id. at 1451.
\textsuperscript{517} Id.
the aggregate number of trials declined precipitously over the course of the century.\textsuperscript{519} It is undeniable that the individual rights developments—such as those formally allowing plea deals and jury waivers—contributed to that decline.\textsuperscript{520} Of course, the \textit{Rules} were not written in a vacuum, and the decline of the jury is undoubtedly multifaceted and complex.\textsuperscript{521} Plea bargaining—the chief mechanism through jury trials are avoided—had already been increasing throughout the nineteenth century.\textsuperscript{522} But one can wonder whether such a drastic decline would have been possible had the prevailing regime been that of the collective jury right rather than the individual.

The individual right was rearticulated at the beginning of the twenty-first century. In an important win for criminal defendants, \textit{Apprendi v. New Jersey}, the Supreme Court held that defendants have the right to jury determinations of any facts relevant to sentencing enhancements.\textsuperscript{523} Justice Stevens, writing for the Court, argued that criminal defendants are “entitle[d]” to jury decisions, striking down New Jersey’s practice of allowing trial judges to decide sentence-enhancing facts.\textsuperscript{524} Consistent with the cases above, the majority’s opinion grounded the jury right in a protection of the individual defendant. These cases—from \textit{Strauder

\begin{thebibliography}{9}
\bibitem{Hale} Hale, \textit{Jury in America}, 328 (describing the decline in criminal trials between 1945 and 2013).
\bibitem{Hale2} Hale does an excellent job tracing out some of the many possible contributors to the decline of the jury trial, including “the federalization of crime,” and “sentencing reform.” Hale, \textit{Jury in America}, 335–46.
\bibitem{S30} 530 U.S. 466, 490 (2000).
\bibitem{Id} \textit{Id.} at 477.
\end{thebibliography}
through *Apprendi*—accord with Amar’s argument that the Fourteenth Amendment shifted the core of the first ten amendments from “structure” to individual “rights.”

And yet, recent decades have seen a reemergence of collective jury right attention by scholars, activists, and the Court. The years prior to, and after *Apprendi*, are key to that shift. In Justice Scalia’s concurrence in *Apprendi*, he considered the history of the jury. More than the majority, Scalia emphasized that all the key facts “must be found by the jury,” seeming to suggest a much stronger role for the jury as such (not merely as a protector of the individual).

Four years later, in *Blakely v. Washington*, Justice Scalia went from writing a lone concurrence to writing the opinion of the Court. In *Blakely*, he shifted the Court’s approach from the “entitle[d] to” language used by Stevens in *Apprendi* to a much greater emphasis on the collectivist role of the jury. “Just as suffrage ensures the people’s ultimate control in the legislative and executive branches, jury trial is meant to ensure their control in the judiciary.” Scalia’s focus in *Blakely* is on the guarantee that juries (not judges) “exercise the control that the Framers intended.” As Appleman notes, “the *Blakely* Court gave strong support to the idea that the community must have the final word on criminal punishment.”

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525 Amar, *Bill of Rights*, xiii, 137–295 (“try[ing] to show how the Reconstruction Amendment transformed the nature of the original Bill of Rights, leaving us with something much closer to the Bill as conventionally understood today”).

526 Appleman credits *Jones v. United States*, 526 U.S. 227 (1999), decided one year prior to *Apprendi*, as being “the first sentencing case in which the Court began to rely on the history of the jury to support the jury’s more expansive role.” Appleman, “Jury Trial Right,” 401.

527 *Apprendi*, 530 U.S. at 498–99 (Scalia, J., concurring).

528 Id. at 499 (emphasis in original).


530 Id. at 306.

531 Id.

532 Appleman, “Jury Trial Right,” 404.
observes how “radically” the Apprendi concurrence and its progeny “altered the relationships among juries, judges, legislatures, and sentencing commissions in every federal courthouse.”

Blakely is not the final word on the jury. Several years later, in Oregon v. Ice, Justice Ginsburg wrote for the Court (over the dissent of Justices Scalia, Roberts, Souter, and Thomas), declining to extend the holdings of Apprendi and Blakely. The Ice Court held that the Sixth Amendment does not forbid states from empowering judges to decide whether sentences for multiple offenses should run consecutively or concurrently. According to Ginsburg, “[t]he historical record demonstrates that the jury played no role in the decision to impose sentences consecutively or concurrently.” Ginsburg’s opinion does not as clearly advance an individual rights view of the jury as had earlier cases, but Ginsburg seems unconcerned about the institutional function of the jury articulated by Justice Scalia in the earlier opinions, saying that “other structural democratic constraints exist to discourage legislatures from’ pernicious manipulation of the rules we articulate.” Though departing from Apprendi/Blakely, the bare fact that Ice was apparently a departure reflects the Court’s growing attention to the (ambiguous) history of the jury system.

Even more recently, during the confirmation process of Justice Kavanaugh, Senator Orrin Hatch wrote an op-ed defending then-judge Kavanaugh’s jurisprudential protection of the jury right. Senator Hatch’s op-ed draws on both individual and collective right threads. While he

535 Id. at 168.
536 Id. at 172 (quoting Apprendi, 530 U.S. at 490 n.16). Ginsburg here endorses an argument made by the dissent in that case, and it is seemingly at odds with her recognition that Apprendi’s “animating principle is the preservation of the jury’s historic role as a bulwark between the State and the accused . . . .” Id. at 168.
characterizes the role of the jury as “central to the Constitution’s protection of individual rights,”
the general thrust of Hatch’s argument suggests that Kavanaugh’s appellate jurisprudence favors
a collective right view of the jury.538 As of this writing, Justice Kavanaugh has not authored any
Supreme Court opinions on the jury right but one may suspect he will align more closely with
Justices Thomas and Scalia in their collective rights perspectives.

The cases described above are only a small sample of the Court’s much broader Sixth
Amendment jurisprudence. They serve to demonstrate two points. First, after nearly a century
without any Sixth Amendment cases, the Court’s post-Reconstruction jurisprudence reflected the
Court’s treatment of the jury as an individual right. Second, more recent cases—including
Apprendi, Blakely, and Ice (as a deviant)—reflect a rebirth of the classical, collective right view
of the jury.

Before moving on, two final points should be emphasized. First, it is worth pointing out
that none of the individual rights cases cited above foreclose the possibility of the jury as a
collective right. Because the cases before the Court were brought as appeals from criminal trials
by individual defendants, it is sensible that the Court resolved them as questions of individual
rights.539 But those cases nonetheless reflect the Court’s emphasis on the jury trial right as an
individual right, and accord with Amar’s general thesis about the impact of the Fourteenth
Amendment on Constitutional rights. As Appleman notes, the individual rights view has only

538 Hatch, “Judge Kavanaugh’s Fight for Stronger Jury Rights.”
539 Doernberg, “We the People,” 56 (observing that current standing doctrine effectively precludes the assertion of
collective rights).
recently begun to give way to the collective rights view. Scalia’s opinion in *Blakely* is an early example of the reemergence.

Second, the Court’s Sixth Amendment jurisprudence does not exist in a vacuum and is part of much broader debates over the relevance of history to textual interpretation. Larsen argues that the Court’s jurisprudential ambivalence is a function of this deeper trepidation.

[The historical changes to the jury were] accompanied by, and symptomatic of, other monumental changes in American ideas about justice and law—ideas that rest uncomfortably with the founding generation’s celebration of jury justice. Those ideas, developed over centuries, are unlikely to be displaced by a Court decision thrusting them back upon us; and recognizing this, the Court is unlikely to so decide. That is not to say that the original jury will never be restored; but if that is to occur, its restoration, like its decline, will require a broader shift in the way Americans think about juries, justice, and law.\(^541\)

If Larsen is right, the Court is unlikely to categorically answer the question presented in this article anytime soon. Perhaps such an answer is no longer possible (or palatable) given developments in the federal judicial system and American society.

In the next Part, I move beyond the origins, history, and jurisprudence of the jury trial right to some of the corollaries that the individual and collective rights entail. In so doing, I show that the Court’s recent ambivalence is only part of a much more complex ambivalence in the American legal system towards the jury.

### IV. Corollaries of the Individual Jury Right

In this Part, I consider several important corollaries of the jury as an individual right. Two of the chief corollaries of treating the jury as individual right are (1) the right to jury trial waiver, and (2) the right to request a different venue. Both of these follow logically from—and,

\(^540\) Appleman, “Jury Trial Right,” 398 (arguing that the original meaning of the jury trial right was a collective right).

\(^541\) Larsen, “Ancient Juries and Modern Judges,” 964.
in fact, only make sense within—a legal regime in which it is the individual defendant who holds and exercises the jury right. And, though both are primarily codified in the *Federal Rules of Criminal Procedure*, each corollary rests on broader normative foundations within American jurisprudence. Thus, in addition to demonstrating what the individual jury right entails, this Part highlights some of the normative values underlying the individual right: specifically, the waiver right protects the individual’s access to *speedy justice*, and the right to move for a change of venue protects the defendant’s access to an *impartial* tribunal.

A. Waiver of the Jury Right

First, if the jury right is that of the individual/defendant in a criminal case, the defendant must be allowed to decline it. As early as 1927, scholars such as Michigan Law professor S. Chesterfield Oppenheim began to consider jury trial waiver.\(^542\) Unsurprisingly given the historical account sketched above, such consideration was entirely focused on the criminal defendant. Oppenheim offers numerous arguments—both legal and normative—for expanding the right of the individual to waive the jury trial in favor of a bench trial (by a single judge). His concern was motivated in part by a practical realization that defendants were deprived of another Sixth Amendment right—to a speedy trial\(^543\)—as a result of judicial backlogs of cases.\(^544\)

The keystone of Oppenheim’s argument is that use of the jury “was everywhere regarded as a sacred *personal* right of the accused.”\(^545\) If the jury right is to be thought of as a “weapon to ward off possible oppression by the state,” it would be a sad twist of fate if the state could

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\(^543\) U.S. Const. amend. VI.

\(^544\) Oppenheim, “Waiver of Trial,” 695 (arguing that the greater “adoption and use of an optional non-jury trial in all criminal prosecutions will contribute to a more effective administration of the criminal law”).

\(^545\) Oppenheim, 702 (emphasis added).
compel the individual to suffer through a jury trial if he preferred a bench trial. Oppenheim also points to other related protections afforded to criminal defendants that they may waive: “depositions or former testimony of a deceased or absent witness, thereby relinquishing the constitutional right of confrontation with witnesses”; “a public trial”; the “right to counsel”; and, “[b]y taking the stand, an accused waives the immunity from comment on failure to testify.” Indeed, it would be a strange legal regime if defendants could waive those other rights but not the right to a jury trial. Thus, from its inception, waiver of the jury has been an individual right.

In the federal criminal context, the Federal Rules of Criminal Procedure establish that no jury is necessary if “(1) the defendant waives a jury trial in writing; (2) the government consents; and (3) the court approves.” The emphasis in waiver analysis is on ensuring that “the waiver [is] knowing, intelligent, and voluntary since trial by jury is an important constitutional right.” There is little scholarship on when a court or the government would decline to consent to a “knowing, intelligent, and voluntary” waiver; in fact, to the contrary, some have suggested that it is likely “welcome news to the government and to the public since jury trials are expensive and difficult to administer.”

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546 Oppenheim, 702.
547 Oppenheim, 702–03.
548 It would similarly be strange if no jury trial right existed for “petty offenses,” while the jury trial was forced upon defendants accused of serious offenses. See Callan v. Wilson, 127 U.S. 540, 552 (1888) (establishing that “there are certain minor or petty offenses that may be proceeded against summarily, and without a jury”). There is scholarly debate on this subject as well. Compare Felix Frankfurter and Thomas G. Corcoran, “Petty Federal Offenses and the Constitutional Guaranty of Trial by Jury,” Harvard Law Review 39, no. 8 (1926): 980 (arguing that “[b]oth in England and in the colonies [there was] a clear and unbroken practice” of dispensing with juries in criminal prosecutions of petty offenses) with George Kaye, “Petty Offenders Have No Peers!,” The University of Chicago Law Review 26, no. 2 (1959): 245–46 (rejecting that view).
549 FED. R. CRIM. P. 23(a).
550 Id.
The right of waiver assumes that the jury trial right is an individual right. In *Patton v. United States*, the Supreme Court recognized as much when it held that the jury “was meant to confer a right upon the accused which he may forego at his election. To deny his power to do so is to convert a privilege into an imperative requirement.”\(^{552}\) In that early-twentieth century case, Patton and several others had been indicted for “conspiring to bribe a federal prohibition agent.”\(^{553}\) During the trial, one of the twelve jurors became severely ill and had to be recused. Rather than impanel a new jury, the defendants consented to continuing the trial with only eleven jurors, to which the government and court similarly agreed.\(^{554}\) For Justice Sutherland, who wrote the opinion, there was no difference between waiving the right to a twelve-person jury, and waiving the right to a jury at all.\(^{555}\) In affirmatively recognizing the individual defendant’s right to waiver, Sutherland explicitly rejected the view that the jury was “established as something necessary to protect the state or the community.”\(^{556}\)

It would be difficult to reconcile the notion of waiver with a collective jury right. It is unclear what a collective waiver right might look like. Could a previously impaneled jury collectively vote to abrogate its power to the judge? Would the decision have to be made by the larger “collective” (the local, state, or perhaps national, “community”)? Once we try to convert the waiver question into collective rights terminology, we immediately run into problems.

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\(^{553}\) *Id.* at 286.

\(^{554}\) *Id.*

\(^{555}\) *Id.* at 290 (rejecting “the distinction sought to be made between the effect of a complete waiver of a jury and consent to be tried by a less number than twelve, and [thus treating] both forms of waiver as in substance amounting to the same thing”).

\(^{556}\) *Id.* at 295.
One unsatisfactory possibility is to describe the governmental consent requirement as an exercise of the collective right; but, while formally representing the public, prosecutors make very different decisions than would the public about waiver. The governmental consent requirement does demarcate an important—albeit narrow—exception to the general right of defendants to waive their jury rights. In Singer v. United States, the defendant in a mail fraud prosecution challenged the constitutionality of the governmental (and judicial) consent requirement to his waiver request. Singer’s argument, if accepted, would have taken the individual jury right to its zenith: in arguing that the decision should be left to the defendant alone, Singer sought to wrest all decisionmaking authority from the public (in this instance, from the prosecution and the court). The Singer Court rejected that extreme.

A defendant’s only constitutional right concerning the method of trial is to an impartial trial by jury. We find no constitutional impediment to conditioning a waiver of this right on the consent of the prosecuting attorney and the trial judge when, if either refuses to consent, the result is simply that the defendant is subject to an impartial trial by jury—the very thing that the Constitution guarantees him.

That decision was narrow, however, and, as the above-quoted passage suggests, the Court’s reasoning was premised in part on the fact that obtaining consent was not a “constitutional impediment.” The Singer Court explicitly left open the door to showing such an “impediment” in future cases “where a defendant’s reasons for wanting to be tried by a judge alone are so compelling that the Government’s insistence on trial by jury would result in the denial to a defendant of an impartial trial.” Thus, one possible reading of Singer is that it

558 Id. at 36.
559 Id.
merely stands for the rejection of an individual’s right to a bench trial. On that reading, it need not be interpreted as otherwise impinging the defendant’s waiver right.

Despite the wrinkle created by Singer, waiver of jury trials is an important corollary of treating the jury as an individual right. Waiver is initiated and exercised by the individual, and the emphasis on knowledge and voluntariness of waiver\textsuperscript{560} reflects the judicial system’s primary focus on the criminal defendant.

B. Change of Venue

The second major corollary of the individual jury right is the ability of individual defendants to move for a new venue. The very notion of “venue,” and the related concept of “vicinage,”\textsuperscript{561} has an ancient relationship to the jury. Both venue (referring to the geographic location) and vicinage (referring to the pool of people from which the jury is drawn) reflect the importance of proximity to the crime. As described above, concerns about venue and vicinage were central to the Declaration of Independence, and to the addition of the Sixth Amendment to the Constitution.

Venue was classically about retaining the rights of adjudication in the community in which the crime(s) occurred. Shortly after the Declaration was written, but before ratification of the Constitution, Massachusetts emphasized the importance of venue in its 1980 state constitution: “[i]n criminal prosecutions, the verification of facts in the vicinity where they

\textsuperscript{560} \textit{Fed. R. Crim. P.} 23(a).

\textsuperscript{561} Abramson rightly recognizes the distinction between these two concepts. “The terms ‘venue’ and ‘vicinage’ should be but are not always distinguished. Venue refers to the place of trial, vicinage to the place where the jury comes from. Usually, the place of jurors and the place of trial will be the same, but it is possible to hold trial in one venue while summoning jurors from another vicinage.” Abramson, \textit{We, the Jury}, 258; Drew Kersh, “Vicinage,” \textit{Oklahoma Law Review} 29 (1976): 831.
happen is one of the greatest securities of the life, liberty, and property of its citizens.”\textsuperscript{562} This should come as no surprise given that one of the grievances alleged against the King in the Declaration was that he kidnapped and tried colonists “beyond Seas for pretended offences.”\textsuperscript{563} Local independence (whether from the King, or from some other removed authority) was thus related to despotism; vicinage and proximity, by contrast, secured liberty.

When it was ratified, the Sixth Amendment emphasized that the jury must be “of the State and district wherein the crime shall have been committed.”\textsuperscript{564} Remember that this went further than the “in the State” language included in Article III, thus preserving an even greater degree of local control in jury trials.\textsuperscript{565} Dennis Hale has written about the importance of vicinage to general debates around the adoption of the first ten amendments. Those debates happened concurrently with discussions of the Judiciary Act, which created federal courts. And as Hale observes, “[m]uch of the debate on the judiciary concerned objections to the establishment of federal district courts, which were seen as an unnecessary duplication of the functions of state courts and a dangerous intrusion on the states.”\textsuperscript{566} As with being tried for colonial crimes in British courtrooms, the concern over removing judicial authority to higher levels of abstraction was about taking that authority away from the vicinity in which the crimes were committed.

Despite its history, venue and vicinage are today generally subordinated to the individual jury right. The \textit{Federal Rules of Criminal Procedure} establish that the defendant may move to transfer his trial to another district (1) because of “prejudice against the defendant . . . in the

\textsuperscript{562} Mass. Const. 1780, art. XIII.
\textsuperscript{563} The Declaration of Independence (U.S. 1776).
\textsuperscript{564} U.S. Const. amend. VI.
\textsuperscript{565} See Part III.B above.
\textsuperscript{566} Hale, \textit{Jury in America}, 86.
transferring district [such] that the defendant cannot obtain a fair and impartial trial there,” or (2) “for the convenience of the parties, any victim, and the witnesses, and in the interest of justice.”

As if to drive home the ‘individual right’ nature of transfer, the Rules emphasize that such a motion—either for prejudice, or convenience—may be made only by the defendant. In a 1993 article, Laurie Levenson observes that, “[d]espite the general movement toward ‘victims’ rights,’ change-of-venue law is still very much tied to the rights of the defendant. The interests of the victim and community are rarely factors in the selection of a new trial site.”

In Skilling v. United States, addressing the securities fraud prosecution of the former-CEO of Enron, the Supreme Court provided a set of factors to consider in evaluating change of venue motions: (1) “the size and characteristics of the community in which the crime occurred”; (2) whether news stories about the crime contained any “blatantly prejudicial information of the type readers or viewers could not reasonably be expected to shut from sight”; (3) how much time had elapsed between the alleged crime and the trial; and (4), whether the jury’s verdict indicated bias. Notably absent from that list is any consideration of the community’s right to deliberate and adjudicate about the criminal behavior.

567 FED. R. CRIM. P. 21.
568 Id. It is worth noting that this right is not categorical, and the burden is on the defendant to demonstrate “(1) actual or identifiable jury prejudice resulting from publicity; (2) community prejudice actually infecting the jury; or (3) sufficient evidence that pretrial publicity has been so inflammatory, prejudicial, and pervasive as to render virtually impossible a fair trial by an impartial jury.” Id. Establishing any of those is no small feat. The point, though, is that the right is exercised by the individual defendant, and the decision is left to the judge. The jury’s collective right is not a factor to be considered.
The individual right to request a venue transfer makes sense given the constitutional guarantee of an “impartial jury.” The venue transfer inquiry, as articulated by the *Skilling* Court, is chiefly about identifying possible jury bias. Unsurprisingly, given that Court’s focus on publicity, many high profile cases involve motions for change of venue. James Fields Jr., who drove his car through a crowd of counter-protesters at the 2017 Charlottesville rally, for example, moved for a change of venue, citing “community prejudice.” Though the district judge declined Fields’ request, Fields’ plea was grounded in a concern about his ability to obtain a fair (“impartial”) trial in that venue by jurors drawn from that vicinage. Levenson similarly describes the successful attempt by the Los Angeles police officers who beat Rodney King to move their trial out of Los Angeles, and the subsequent criticism that move received because of the new venue’s demographic differences (along racial, social, and economic lines). These are prime examples, like jury waiver, of an area in which the individual right to a jury trial clashes with the local collective’s jury right to deliberate about criminal behavior. Though cases are no longer removed “beyond Seas,” as the Founding Fathers lamented, cases are still occasionally taken from the hands of local juries.

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The rights to waiver and to move for a change of venue are not the only corollaries of the individual jury right. As has already been mentioned, the very notion that defendants can sometimes plead to lesser offenses, or that they can plead guilty at all, also follows only from an

571 U.S. Const. amend. VI.
individual jury right. What the preceding sections have shown is (1) the extent to which the individual jury right has entrenched itself in American law, and (2) that there are important reasons to defend and preserve the jury as an individual right. On the latter point, it is worth sketching the ways in which other provisions of the Constitution actually reinforce the individual jury right.

First, one of the other Sixth Amendment guarantees—of a “speedy trial”—justifies, and may actually necessitate, the individual jury right.\(^\text{575}\) This justification draws further support from the Due Process of Law Clause(s) in the Fifth and Fourteenth Amendments insofar as prolonged jury trials likely raise due process concerns.\(^\text{576}\) The First Congress placed the “speedy trial” before the jury right in the Sixth Amendment, perhaps reflecting its prioritization. Access to justice is a bedrock principle in Anglo-American law, with origins at least as ancient as the Magna Carta.\(^\text{577}\) Speedy access was famously emphasized in Martin Luther King Jr.’s “Letter from Birmingham Jail,” when King announced that “justice too long delayed is justice denied.”\(^\text{578}\)

Jury trial waiver preserves access to speedy justice. As we saw in Patton, had the district judge required a completely new trial after one juror became ill, the trial process would have been slowed.\(^\text{579}\) A forced jury trial would thus have jeopardized the defendants’ rights to a speedy trial. In Oppenheim’s article about the individual waiver right, Oppenheim recognized that defendants could waive their speedy trial right, but also that the default position should be

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\(^{575}\) U.S. Const. amend. VI.

\(^{576}\) U.S. Const. amend. V; U.S. Const. amend. XIV.

\(^{577}\) MAGNA CARTA, ch. 40 (1215). (“To no one will we sell, to no one will we refuse or delay, right or justice.”)


that defendants need not suffer through a prolonged jury trial if they are willing to abrogate that “buffer between the state and the individual.”\textsuperscript{580} In light of the costs to the government (and, consequently, taxpayers) of impaneling and funding jury trials and judicial backlogs, waiver of the right to a jury is a desirable, alternative avenue to justice. Beyond mere timing-to-verdict, there are other equity concerns raised by forced jury trials as well, given the propensity of some courts to shift court costs onto already-indigent criminal defendants.\textsuperscript{581}

Second, the protection of “impartiality” similarly justifies certain individual right corollaries like that of venue transfer. In \textit{Groppi v. Wisconsin}, for example, the Supreme Court struck down a state law that categorically prohibited changes of venue.\textsuperscript{582} The defendant in that case, who had been charged with resisting arrest, exhausted all his peremptory challenges in the jury selection process. He argued that the local publicity of his offenses justified a change of venue.\textsuperscript{583} In striking down the Wisconsin law, the Supreme Court acknowledged local “fires of prejudice” and recognized that sometimes only a change of venue could “assure the kind of impartial jury that is guaranteed” by the Constitution.\textsuperscript{584} Similarly defending venue changes, Darryl Brown argues that “juries representative of their jurisdictions may nevertheless be homogeneous and unrepresentative of the broader regional or national populace; [and] that such

\begin{footnotes}
\textsuperscript{580} Oppenheim, “Waiver of Trial,” 702, 703.
\textsuperscript{581} Joseph Shapiro, “As Court Fees Rise, the Poor are Paying the Price,” NPR, May 19, 2014, https://www.npr.org/2014/05/19/312158516/increasing-court-fees-punish-the-poor. Shapiro explains the findings of a “yearlong NPR investigation . . . that the costs of the criminal justice system in the United States are paid increasingly by the defendants and offenders. It’s a practice that causes the poor to face harsher treatment than others who commit identical crimes and can afford to pay.” (Shapiro, “Court fees.”)
\textsuperscript{582} Groppi v. Wisconsin, 400 U.S. 505 (1971).
\textsuperscript{583} See \textit{id.} at 505–06.
\textsuperscript{584} \textit{Id.} at 510.
\end{footnotes}
juries can cause public skepticism of the criminal justice system even though they meet Sixth Amendment requirements.”

Both of these justifications—speedy justice, and impartiality—and undoubtedly others, illuminate the normative desirability of the individual jury right. In the next Part, I consider some of the corollaries of treating the jury as a collective right, showing the ways in which those corollaries may conflict with the corollaries of the individual jury right. There are obvious benefits to treating the jury as a collective right; but, in contrast to the praise the collective right has received in recent decades, I raise concerns about allowing that collective right to extend too far.

V. Corollaries of the Collective Jury Right

As the historical account sketched earlier makes clear, there is plenty of evidence that the Founding generation understood the collective powers, and rights, of juries. Prior to, and through, the passage of the Constitution, local communities preserved their rights to adjudicate the crimes within the “States and districts” wherein the crime(s) occurred. And, until Sparf and Hansen in 1895, juries often had the rights to decide law as well as fact. Despite that understanding, the collective rights view of the jury receded for much of American history, particularly in the wake of the Civil War and Fourteenth Amendment. Recent decades have seen a renaissance in attention to the collective right by Justices, scholars, and activists.

At its broadest level, those participating in this renaissance can be loosely divided between those treating the collective jury right as an end-in-itself, and those treating it as a

means to other political objectives such as criminal justice reform. Though the starkness of this
distinction should not be overstated, it is a helpful way to understand much of the renewed
attention to the collective potential of the jury. On the one side, are scholars like Suja Thomas,
who calls the jury the “[m]issing [b]ranch”\textsuperscript{586} of government, and Laura Appleman who calls for
“a return to [the] original common-law and constitutional meaning” of the jury.\textsuperscript{587} To the extent
that Thomas and Appleman see preservation of (what they perceive to be) the Constitution’s
original meaning, they treat the collective jury right as an end-in-itself. On the other side are
scholars such as Paul Butler who calls for the use of jury nullification for “the subversion of
American criminal justice” and to “dismantle the master’s house with the master’s tools”;\textsuperscript{588} and,
activist groups like the Fully Informed Jury Association (FIJA) which seek to “empower jurors
to uphold individual rights and liberty.”\textsuperscript{589}

Perhaps more than those described in the previous Part, the corollaries of treating the jury
as a collective right, if carried to their extremes, would have serious implications for our justice
system. In this Part, I first explore one of the most commonly cited instances of the jury
exercising its collective right: jury nullification. Historians, scholars, and judges have all
recognized the power of juries to acquit defendants those juries believe are guilty. After
explaining the relationship between nullification and the more general collective jury right, I
consider a few of the potential dangers of jury nullification. While scholars have discussed jury
nullification power as exclusively one-directional\textsuperscript{590}—juries can vote to acquit defendants who

\textsuperscript{586} Thomas, \textit{The Missing American Jury}, 49.
\textsuperscript{587} Appleman, “Jury Trial Right,” 399.
\textsuperscript{588} Butler, “Racially Based Jury Nullification,” 680.
\textsuperscript{589} Fully Informed Jury Association, “About FIJA.”
one way—in favor of not guilty verdicts.”).
the juries believe are guilty but cannot vote to convict defendants who the juries believe are innocent—it is hard to square this one-directionality with the notion of the jury as a collective right.591 In fact, if there is a collective jury right, the jury should be equally able to convict defendants the juries believe are innocent. Though not legally recognized, this other-directional nullification power may be used more often than we realize.

Second, and relatedly, I explore a seemingly more controversial—and yet, less discussed—corollary of treating the jury as a collective right: that courts might not be allowed to overturn jury verdicts that conflict with other individual rights. If the jury has absolute collective authority over determinations of guilt, it should be no defense to argue that a different individual right (for example, the freedom of speech) is implicated. My aim in raising this corollary is to expose an uncontroversial way in which courts already regularly curtail the collective power of juries. Unless we are to be abandon the protection of other individual rights, those rights demarcate clear barriers against which the collective jury right cannot encroach.

Both of these discussions show two potentially problematic consequences of treating the jury as a collective right (and, importantly, as only a collective right). They thus serve as additional evidence of the tension that exists between the individual jury right and the collective jury right.

A. Jury Nullification

In a foundational work on the subject, Clay Conrad describes jury nullification as “the act of a criminal trial jury in deciding not to enforce a law where they believe it would be unjust or

591 It is worth pointing out that the term “nullification” can apply to both guilty and innocent verdicts. To nullify is to “[m]ake legally null and void; invalidate.” “Nullify,” Oxford English Dictionary, accessed May 10, 2019, https://www.oed.com/view/Entry/129061?redirectedFrom=nullify#eid. A jury can thus “invalidate” the law either by acquitting an innocent party known to be guilty, or by convicting a guilty party known to be innocent.
misguided to do so.” There is an important distinction between nullification of a law and nullification of the enforcement of the law. Conrad describes the power of early juries to review both law and fact. In the nineteenth century, as described above, that power was eroded; today, it is understood that judges decide law and juries decide only fact. Though the distinction between nullification of law and nullification of enforcement of a law (in other words, nullification of the factual application of the law to the particular case), that distinction is less relevant to this discussion. Both versions of nullification flow from the collective jury right. Nullification of law is a stronger collective right and the seizure of that right by federal judges in Sparf reflects part of the shift towards the individual right. But nullification of enforcement is still an important corollary of the collective right.

Nullification is among the most controversial aspects of the jury system. On the one hand, it is the zenith of the collective jury right, where jurors are most able to participate in the legal process. On the other hand, it poses serious problems for classic rule of law principles; and, without limits, it may lead to unjust or undemocratic outcomes. In this section, I describe the complexities of jury nullification towards the end of showing the need for limiting principles around the collective jury trial right. After briefly describing the origins of jury nullification

592 Conrad, Jury Nullification, xix; Butler, “Racially Based Jury Nullification,” 700 (defining jury nullification as “[w]hen a jury disregards evidence presented at trial and acquits an otherwise guilty defendant, because the jury objects to the law that the defendant violated or to the application of the law to that defendant”).
593 Conrad, Jury Nullification, 65.
594 Conrad, 65.
595 Discussed in greater detail at Part III.B.3 above.
596 Conrad, Jury Nullification, 8 (“There is probably no doctrine in the study of criminal law that is more controversial than the doctrine of jury independence.”).
597 Conrad describes an important debate over whether jury nullification should properly be framed as a “power,” or a “right.” Conrad, 9. Though important, the subtlety of the distinctions drawn in that debate are beyond the scope of this article, and are not necessary to flesh out for the purposes of my argument.
in more detail and explaining the ways in which nullification serves as the fullest embodiment of the collective jury right, I consider why normative limits ought to be set on nullification.

1. Sources of the Collective Right to Nullify

The long and complex development of jury nullification, which cannot be divorced from the history of the jury more generally, has been well-documented elsewhere. As a legal matter, jury nullification is derived from the jury’s independence: the jury is revered and promoted as an institution independent of judges or legislatures. James Joseph Duane argues that this independence is a product of both the Sixth Amendment’s “inviolable right to a jury determination,” and the Fifth Amendment’s Double Jeopardy Clause, which guarantees that, “[e]ven where the jury’s verdict of not guilty seems indefensible, that clause prevents the State from pursuing even the limited remedy of a new trial.”

The precise nature of jury independence is a subject beyond the scope of this paper, but it is worth mentioning an important distinction: jurors are independent to nullify the application of laws in particular cases, but do not to nullify the laws themselves. It is the role of legislatures to amend laws, and the role of judges to (occasionally) deem those laws unconstitutional. The jury, whose role is limited to the specific case(s) for which the jury is impaneled, can only choose not to apply laws in that case. As stated by Conrad, “[j]ury independence is a doctrine of lenity, not of anarchy.”

599 “[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb . . . .” U.S. Const. amend. V.
600 James Joseph Duane, “Jury Nullification: The Top Secret Constitutional Right,” Litigation 22 (1996): 6–7; Conrad, Jury Nullification, 7 (“The doctrine [of jury independence] states that jurors in criminal trials have the right to refuse to convict if they believe that a conviction would be in some way unjust.”).
601 Conrad, 143.
There are at least two reasons why jury nullification should be thought of as a corollary of the collective—rather than individual—right: (1) it is a power exercised by the jury alone, not by the criminal defendant; and (2), the source of the jury’s power does not hinge on anything particular to the defendant for whom, or against whom, it is exercised. Activist groups like the FIJA appeal to jurors directly to exercise those jurors’ nullification powers. Similarly, when defense attorneys, like Johnny Cochran during the murder trial of O.J. Simpson, tell jurors that they are “the consciences of this community,” those attorneys appeal to the jury as a collective institution.

Jury nullification has been hailed as a democratic means through which criminal justice reform can be achieved. Butler argues, for example, that the doctrine of jury nullification gives African American jurors the power to acquit African American defendants charged with non-violent drug offenses, reducing the impact that incarceration has on black communities. As the number of federal crimes has proliferated, and the power (and discretion) of investigators and prosecutors has expanded, jury nullification is a means through which the people can practice resistance and implement reform at the local level. John Clark likewise urges judges and attorneys to instruct juries of their nullification power as a means of promoting “true deliberations rather than confusion, caprice or bad faith.”

Of course, neither the virtues nor the vices of jury nullification can be adequately understood without recognition of its mirror image: judicial nullification. Numerous scholars

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have brought attention to the ways in which judges regularly nullify through procedural means. Michael Saks argues that “by effectively and persistently offering juries instructions that cannot be understood, judges regularly nullify the law.” Additionally, as will be discussed in greater detail below, judges are empowered to set aside jury convictions upon motions by the defendants. Though beyond the scope of this paper, a critique of jury nullification is incomplete and unfair if it does not recognize judicial nullification.

Jury nullification has been praised in recent decades for the occasional mercy juries show in harsh cases. Conrad describes nullification in the trials of “medical users of marijuana, doctors assisting terminally ill patients to end their suffering, or battered spouses who kill their abusers after years of torment.” He further recognizes the downstream impact of mercy nullifications, which may urge police to stop arresting those types of defendants and prosecutors to stop charging in such cases. But despite its laudable potential, the jury nullification power carries with it certain dangerous potentialities, which display some of the more general dangers to which the collective jury right is prone.

2. Dangerous Possibilities of Jury Nullification

Though the power to nullify is “as well settled as any other rule of constitutional law” and “is a cornerstone of American criminal procedure,” Duane argues that it is effectively kept secret by the courts. He reports that “no state or federal appellate court in decades has held

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607 Fed. R. Crim. P. 29(c)(2) (“If the jury has returned a guilty verdict, the court may set aside the verdict and enter an acquittal.”).
608 Conrad, Jury Nullification, 300.
that a trial judge is even permitted—much less required—to explicitly instruct the jurors on their undisputed power to return a verdict of not guilty in the interests of justice.”610 This creates a curious anomaly: juries have the right to nullify, but not the right to know that they have the right to nullify.

The judicial aversion to instructing juries about jurors’ rights may stem from the fact that nullification is, as one court noted, “a tolerated anomaly in the rule of law.”611 Because all federal judges are required to take an oath to “perform all duties . . . under the Constitution and the laws of the United States,”612 it is possible that judges feel themselves personally incapable of encouraging or allowing the lawlessness of nullification. The Second Circuit reasoned along such lines when it directly addressed jury nullification in a 1997 appeal by several individuals convicted of federal drug crimes.613 The defendants appealed their convictions after the trial judge dismissed one of the jurors, over “unanimous opposition from defense counsel,” based on the judge’s assessment that the juror was likely to nullify.614 Though the Second Circuit remanded the case for retrial, Judge Cabranes emphasized that nullification is a “violation of [the] juror’s sworn duty to follow the law as instructed by the court” and that judges “have the duty to forestall or prevent such conduct.”615

610 Duane, 7–8 (noting that “[n]ot since the storming of the Bastille have the forces of government been so tightly united in their opposition to a popular uprising”).
612 The full oath required to be taken by all federal judges is, “I, __________, do solemnly swear (or affirm) that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent upon me as _______ under the Constitution and laws of the United States. So help me God.” 28 U.S.C. § 453 (emphasis added).
613 United States v. Thomas, 116 F.3d 606 (2d Cir. 1997).
614 Id. at 610–11.
615 Id. at 616.
Judge Cabranes and others emphasize the extent to which nullification clashes with rule of law principles. As Butler has recognized, nullification may “subvert[] democracy.” Such subversion is not necessarily unjust—Butler cites, for example, the injustice of the Fugitive Slave Act as warranting nullification by jurors—but it is undeniable that the collective jury clashes with the larger political collective when the jury nullifies.

Another possible explanation for the lack of nullification instructions by judges is that judges recognize some of the dangerous potentialities of nullification. There are at least two types of malignant nullification: (1) nullifying guilty verdicts for unjust reasons; and (2), nullifying innocent verdicts. These possible types, like jury nullification more generally, are virtually impossible to identify with any degree of confidence. Because jurors, unlike judges, do not justify their verdicts with written opinions, the reasoning underlying verdicts—whether true belief (such as “reasonable doubt”) or nullification—is rarely possible to identify.

Though my aim in this article is not to present a complete critique of jury nullification, the following sections provide evidence that is helpful in mediating between the individual and the collective jury rights more generally.

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617 Conrad, Jury Nullification, 7 (“Jurors are not obliged to justify their conclusion to the court.”).
a. Nullifying Guilty Verdicts for Unjust Reasons. The first, and better theorized, danger to which nullification is prone is when juries nullify for unsavory or unjust reasons. Though anecdotal, stories of this type of nullification are common throughout history and have often involved race. Conrad, for example, documents the “malevolent history of all-white juries allegedly acquitting those who participated in lynch mobs or in the murders of civil rights workers.”618 Similarly, he and others describe the widely-held belief that the police officers accused of beating Rodney King were the beneficiaries of this type of nullification.619 Critics of nullification worry about instructing juries of jurors’ rights to nullify precisely because it could lead to these sorts of “hateful” acquittals.620

When jurors nullify for unjust reasons, they may create, or replicate, social and political inequality. This is the dangerous inverse of Butler’s argument for nullification of black defendants in nonviolent drug cases. Though by no means a product of Butler’s argument, when nullification is permitted without normative restraints, it may have the effect of creating more, not less, injustice.

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618 Conrad, 167.
619 Conrad, 167–68; Abramson, We, the Jury, 10.
620 Candace McCoy, “The Truth of Nullification: A Response to Professor Scheflin,” in Jury Ethics: Juror Conduct and Jury Dynamics, ed. John Kleinig and James P. Levine (Abingdon, UK: Routledge, 2006), 176 (arguing that it is possible that greater use of “nullification instruction[s]” by judges could “cause more juries to be hateful, as in the cases of acquittal of the murderers of civil rights workers in the Court in the 1960s”).
b. Nullifying Innocent Verdicts. A second, admittedly more speculative, danger of jury nullification comes about when juries nullify in cases in which jurors believe a defendant is innocent but nonetheless find him guilty. This type of nullification has been described by the psychologist Norman Finkel as “vengeful” nullification.621 Finkel cites as an example the second trial prompted by the beating of Rodney King. After the first trial, in which all the police officers were acquitted, two officers were charged with federal crimes. In the federal trial, those two officers were convicted. And, just as questions were raised about nullification in the first case, Finkel questions whether the federal jury nullified vengefully.

After all, there was talk in the press and on network news, and by the mayor and the police chief, that if the second jury also brought in a “not guilty” verdict a second riot might erupt. Perhaps the second jury nullified in the vengeful direction, bringing in a “guilty” verdict despite reasonable doubt, to stave off a riot and soothe the citizenry.622

Yet more anecdotal evidence of this type of nullification is offered by Gilbert King in Devil in the Grove, a history of the 1950s prosecutions of the black “Groveland boys” in rural Florida for the alleged rape of a white woman.623 Describing the propensities of all-white, southern juries to convict black defendants—even ones the juries believed to be innocent—King claimed that “[a]nything less than the death penalty was how a lawyer knew that the jury believed the defendant was innocent.”624 Though framing them as acts of mercy (the juries were affording black defendants life in prison rather than imposing the death penalty), King identifies race-based “vengeful” nullification of innocent defendants by racist juries.

622 Finkel, 38.
These anecdotal appeals may be unpersuasive to those seeking firm evidence of the dangerous potential of nullification. Because of the secrecy of jury deliberations and the lack of any requirement that juries justify their verdicts, it is difficult to measure either type of nullification. Unlike the first type of problematic nullification, however, this form of nullification is more obviously at odds with American legal traditions and the strong presumption of innocence.\textsuperscript{625} If there are gradations in the vices of juries, vengeful nullification stands at one extreme.

B. Conflicts Between the Collective Jury Right and Other Fundamental Rights

Judges may not \textit{convict} defendants after jury acquittals. There are, however, situations in which judges may \textit{acquit} defendants after jury convictions. The \textit{Federal Rules of Criminal Procedure} allow judges (upon a motion by the defendant) to set aside a jury verdict.\textsuperscript{626} In general, this form of post-hoc judicial nullification is a direct threat to any notion of the jury as a collective right. It is an apparent rejection of the jury’s deliberated convictions and may pose legitimacy problems for any criminal justice system in which it is exercised too frequently. The decision to set aside the jury’s guilty verdict is left entirely to the judge(s) under the \textit{Federal Rules}.

Within the broader category of cases in which judges (or Justices) circumvent jury verdicts is a narrower set of cases in which the circumvention is—at least according to the judges—\textit{not} discretionary: conflicts with other fundamental rights. Unlike jury nullification, which is framed above as a collective \textit{right}, this conflict is a non-right corollary of the collective

\textsuperscript{625} For example, consider William Blackstone’s often-cited quote that “[i]t is far better that ten guilty escape than that one innocent suffer.”\textsuperscript{626} \textit{Fed. R. Crim. P.} 29(c)(2) (“If the jury has returned a guilty verdict, the court may set aside the verdict and enter an acquittal.”).
jury right: if the jury entails a collective right, then it follows that there will be conflicts with other constitutionally-protected rights. The history of constitutional law affords countless examples of such conflicts, a few of the most famous examples of which are:

- **Gideon v. Wainright** (1963): the Court overturned the jury’s guilty verdict against Clarence Earl Gideon for breaking and entering into a pool hall, recognizing Gideon’s constitutional right to have the assistance of counsel at trial.627

- **Miranda v. Arizona** (1966): after the jury was shown Ernesto Miranda’s “written confession,” he was “found guilty of kidnapping and rape.”628 In reversing the jury’s verdict, the Court held that the “statements were inadmissible” because Miranda had not been advised of his right to remain silent.629

- **Furman v. Georgia** (1972): the Court struck down Georgia’s imposition of the death penalty for William Henry Furman’s murder conviction, on the grounds that its exercise was a violation of the Eighth Amendment’s prohibition against cruel and unusual punishment.630 In his dissent, Justice Powell lamented the Court’s circumvention of the jury, saying that the “jury is given broad discretion to decide whether or not death is ‘the proper penalty’ in a given case, and a juror’s general views about capital punishment play an inevitable role in any such decision.”631

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629 Id.
631 Id. at 440 (Powell, J., dissenting).
• *Texas v. Johnson* (1989): Gregory Lee Johnson’s conviction for burning the American flag was overturned based on the Court’s recognition of flag-burning as “expressive conduct protected by the First Amendment.”

There are undoubtedly more. Countless prosecutions never even reach juries when judges dismiss criminal charges because of conflicts with rights such as these. In some cases, the only way to vindicate *individual* rights may be through subjecting oneself to prosecution (and conviction) to establish standing for the purposes of challenging unconstitutional laws.

It is exceedingly rare that jury findings trump other fundamental rights and, when jury findings do, it is not fully acknowledged by the Court. One example is *Wisconsin v. Mitchell*, a 1993 case in which the defendant, Todd Mitchell, had his aggravated battery conviction enhanced “because he intentionally selected his victim on account of the victim’s race.” Mitchell, who was black, beat and robbed a white victim. Because the jury found that Mitchell had chosen the victim because of the victim’s race, Wisconsin law allowed for an increase in Mitchell’s sentence. When Mitchell challenged the enhancement, the Wisconsin Supreme Court struck down the law as violative of the First Amendment and overbroad. In overruling the Wisconsin Supreme Court and upholding the law, the US Supreme Court did not defer to the jury’s collective authority on the matter. Rather, Chief Justice Rehnquist, writing for the Court, distinguished speech from the “bias inspired conduct” proscribed by the law. Even though Justice Rehnquist did not root his opinion in either conception of the jury right, *Mitchell*

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634 *Id.* at 480.
635 *Id.* at 481–82.
636 *Id.* at 487–88.
exemplifies the tension between jury findings (in that case, of racial bias) and other protected rights (freedom of speech).

There is a dearth of scholarly attention to the prevalence of potential conflicts in this area of constitutional law. Perhaps that is due to the enormous premium placed on individual rights in American jurisprudence: our favoritism for the many individual rights supposedly defined in the Constitution makes it easy to justify circumvention of any plausible collective jury right. But, if judges, Justices, and scholars continue to appeal to the jury’s collective right, a better answer will need to be provided.

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As with the corollaries of treating the jury as an individual right, these corollaries of the collective jury right are not exhaustive. As examples, they illustrate the conflicts that exist between the individual jury right and collective jury right. When defendants waive their jury rights or move for new venues, those defendants impinge on the collective right. When judges recognize individual constitutional rights, those judges similarly impinge the collective right. When juries nullify, by contrast, juries import partiality into the supposedly impartial jury process and thus impinge on the individual’s jury right.

Though these corollaries are frames as potential dangers of a collective jury right, there are advantages to a collective right as well. The democratic potential as well as the potential for criminal justice reform to which scholars like Butler appeal are laudatory ideals. Recent attempts to “democratize criminal justice”637 are praiseworthy to the extent that they promote an active and engaged citizenry committed to impartial justice. And Butler is right about the great

criminal justice potential of local juries to redress past racial injustices, provided collectivist juries can be constrained against practicing the more vicious forms of nullification. Ideally, there is some middle-ground where we can reap the benefits of both the individual right and the collective right. Such a middle-ground would have to rest precariously between the extremes I described in this and the previous Part.

VI. Implications for Constitutional Theory

What are the implications of the preceding analysis in this article? Thus far, through the lenses of the individual and collective jury rights, I have surveyed the history and contemporary status of the jury right. Both in its origins and in its contemporary setting, the jury right is characterized by ambiguity. This was evident at the jury right’s constitutional genesis: against the common law background, the language in Article III and the Sixth Amendment neither clearly communicates an individual jury right nor a collective jury right. The collective right eventually gave way to the less ambiguous individual right that dominated for the next century. During that time, as the judicial system strived for impartiality and fairness, legal procedures such as the Federal Rules carved away at the localism and partiality of collective jury powers. In Part IV, I described two formal examples of this transition: the increasing empowerment of jury trial waiver by criminal defendants, and the increased permission of defendants to move for changes of venue to avoid prejudiced juries.

After its hundred-year hiatus, the collective jury right has reemerged in recent decades, brought back by Supreme Court justices, scholars, and activists. In cases like Apprendi v. New Jersey and Blakely v. Washington, the Supreme Court has begun to revive what some consider

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the original—collective right—meaning of the jury right. Appleman appeals to the jury right’s original public meaning to defend the need for fewer bench trials and more jury trials.\(^{639}\) Criminal justice reform scholars like Butler, though less reliant on originalist methodology, defend jury nullification as a democratic means of reforming racially-unjust criminal laws.\(^{640}\) At the same time, libertarian advocacy organizations, including FIJA, seek to raise awareness about the “secret power” of jurors to nullify.\(^{641}\)

The preceding analysis has potential value to many different schools of constitutional theory. In this Part, I briefly consider three: a Dworkinian moral reading of the law, constitutional pluralism, and originalism.

A. Dworkinian Moral Reading

First, the foregoing analysis may be most helpful to those engaging in a Dworkinian moral reading of the law. The ebbs and flows of the jury right, as well as the tension inherent in the corollaries of each right, are ripe for a normative framework. Ronald Dworkin’s ‘law as integrity’ theory is fit for the task. Mediating between the two rights—both historically, and normatively—may be accomplished by an interpreter of Herculean proportion.

Dworkin argues that “any successful constructive interpretation of our political practices as a whole recognizes integrity as a distinct political ideal that sometimes calls for compromise with other ideals.”\(^{642}\) The significance and scale of the questions raised in this article demand an approach that is attentive to the integrity of the American legal system. For Dworkin, integrity is the principal objective to which legal interpreters ought to aspire.

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\(^{639}\) Appleman, “Jury Trial Right,” 399.

\(^{640}\) Butler, “Racially Based Jury Nullification.”

\(^{641}\) See note 372 above.

\(^{642}\) Dworkin, Law’s Empire, 215.
Integrity as a political ideal fits and explains features of our constitutional structure and practice that are otherwise puzzling. . . . [A] community of principles, which takes integrity to be central to politics provides a better defense of political legitimacy than the other models. It assimilates political obligations to the general class of associative obligations and supports them in that way. This defense is possible in such a community because a general commitment to integrity expresses a concern by each for all that is sufficiently special, personal, pervasive, and egalitarian to ground communal obligations according to standards for communal obligation we elsewhere accept. 643

Dworkin compares the judge’s task to that of “the literary critic teasing out the various dimensions of value in a complex play or poem.” 644 With regards to the jury right, these dimensions include not only the immediate corollaries I have described and alluded to here—the waiver right, the ability to move for a change of venue, jury nullification, and so on—but also the values underlying the tension I identify: impartiality, the speedy but fair disposition of criminal accusations, and the community’s input about allegations of criminal conduct. These are some of the dimensions of what Dworkin would describe as the jury’s “novel.”

As Dworkin notes, the novel is actually a “chain-novel,” in the sense of being the product of a “group of novelists” (judges, scholars, lawyers), each of whom writes his own chapter(s) when it is his turn. 645 Some of those authors undoubtedly take the story in different directions than previous (or concurrently-writing) authors expected. This lends to the complexity of the interpreter’s task. The contemporary jury comes to us as just such a jumble of overlapping chapters. The history of the ratification debates, and early developments by thinkers as varied as Alexis de Tocqueville and Joseph Story, reflects two different storylines that were written concurrently. 646 The authors of the contemporary jury rights include not just philosophers, academics, and judges, but also Congress who first preserved the jury in the Sixth Amendment,

643 Dworkin, 215–16.
644 Dworkin, 228.
645 Dworkin, 229.
646 See Part III.C above.
and much later authorized the *Federal Rules of Criminal Procedure* through which many of the individual right corollaries continue to flow.

The complexity of these overlapping and competing historical-legal developments call for Dworkin’s hero. “Call him Hercules.” The Herculean judge is he who best continues the chain-novel.

The judge’s decision—his postinterpretive conclusions—must be drawn from an interpretation that both fits and justifies what has gone before, so far as that is possible. But in law as in literature the interplay between fit and justification is complex. Just as interpretation within a chain novel is for each interpreter a delicate balance among different types of literary and artistic attitudes, so in law it is a delicate balance among political convictions of different sorts; in law as in literature these must be sufficiently related yet disjoint to allow an overall judgement that trades off an interpretation’s success on one type of standard against its failure on another.

The foregoing analysis makes possible such an interpretation. By looking at the jury right through the two lenses—the individual, and the collective—Herculean judges, as well as other legal practitioners, will be able to better understand the jury. When questions arise, these lenses make it possible to interpret the jury right in a way that “both fits and justifies” the story of the jury in American law.

The individual right has developed out of normatively desirable emphases on *impartiality*, and the practical assurance of a *speedy trial*. The collective right, by contrast, is prone to abuses like those associated with undesirable types of jury nullification. As I then sought to show, we regularly check the collective jury right, without controversy, when judges undermine jury decisions that implicate other individual rights such as the freedom of speech or

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647 Dworkin, *Law’s Empire*, 239.
648 Dworkin, 239 (emphasis added).
the right to counsel. In sum, mediating between the individual and collective rights described in this article is a problem ripe for a Dworkinian judge.

B. Constitutional Pluralism

Second, the analysis in this article may prove valuable for constitutional pluralists. At the most general level, constitutional pluralism accommodates multiple plausible theories of constitutional interpretation. A constitutional pluralist may draw on the tools of various other constitutional theories: Dworkinian moral reading and originalism (described in this article), Thayerianism, common law constitutionalism, and others. In this way, like Dworkin’s moral reading, constitutional pluralism is capable of integrating the insights from numerous different sources: history, caselaw/doctrine, constitutional text, and ethics. Stephen Griffin defends pluralism as “the best descriptive-explanatory account of constitutional interpretation” because appealing to those many different sources is what judges actually (and should) do. But constitutional pluralism is more malleable than Dworkin’s moral reading because the pluralistic interpreter is not (or, perhaps, is just less) constrained by the requirement of fitting his interpretation onto what came before. A pluralistic interpreter need not understand the law as a “chain novel”; each case may be treated on its own terms.

The analysis in this article provides all the tools necessary for answering specific legal questions pluralistically. Part III provides the historical and textual starting point for

understanding the jury—where the two rights came from, how they evolved over time, and where they are now. Parts IV and V examine some of the many values undergirding both jury rights: impartiality, access to speedy justice, democratic participation, and more. And finally, throughout this article, there has been discussion about the textual and doctrinal understandings of the jury. None of these factors—history, text, doctrine, or values—take priority over the others. Instead, constitutional pluralists draw on each of them to resolve concrete disputes over jury right issues. Richard Fallon, for example, calls on the “constitutional interpreter to assess and reassess the arguments in the various categories in an effort to understand each of the relevant factors as prescribing the same result.”\footnote{Fallon, “Constructivist Coherence Theory,” 1193.} Fallon is optimistic that, in most cases, each of the factors will yield the same results. Only in the exceptional cases where coherence among the several factors cannot be achieved does Fallon assign a “hierarchical order” to the factors; he claims such incommensurability of the factors will happen “very rarely.”\footnote{Fallon, 1193–94, 1239.}

In sum, the analysis in this article is well-suited for constitutional pluralism. The range of considerations in Parts III, IV, and V provide the starting point for any pluralistic attempt to resolve a legal question implicating the jury right.

C. Originalism

Finally, though the analysis in this article is \textit{not} originalist, this article may nonetheless be helpful to contemporary originalists. Originalism is today a family of theories.\footnote{Solum, “Originalist Methodology,” 269.} The most popular theory within that family is public meaning originalism, which treats as legally authoritative the meaning the Constitution’s text would have conveyed to the general public at
the time of ratification. An older theory of originalism—original intent originalism—focuses on the textual meaning that was originally intended by the drafters of the Constitution’s language. I do not attempt to situate this article’s analysis in either camp, and general conclusions may flow to public meaning originalists, original intent originalists, and others within the larger family.

I argue in Part II that the Founders did not consider there to be two jury rights: the individual right and the collective right. Though I focused mostly on key figures who played some role in drafting of the Article III and Sixth Amendment language, that conclusion is likely applicable to the general public as well. It would not have occurred to the Founding generation that there were inconsistencies between defending an individual’s right to a jury trial, on the one hand, and the right of the community to participate in the adjudication process, on the other. Moreover, and perhaps more importantly, the jury—and the legal role of the jury—has changed substantially since 1791; and, it was only as a result of some of those changes that the tension between the collective right and individual right began to emerge. For example, twentieth century expansions in the individual right to waive a jury trial may be understood as necessary responses to an overburdened judicial system, which Founding Era Americans likely could not have predicted. Despite the fact that Founders may not have understood the jury right in the individual and collective rights terms I have used here, the analysis in this article may be helpful to originalists in several ways.

657 See Part III above.
First, by framing the jury in these terms—individual right versus collective right—the historical analysis in Part III exposes interesting facets of early-American law. That historical analysis suggests that important work still needs to be done. I disputed Appleman’s argument that “an eighteenth-century audience would have genuinely understood the right to a jury trial to be a collective right.”658 Id. at 399. I called into question her conclusion by pointing to the Sixth Amendment’s placement of the “accused” as the subject of the Clause as well as to the early Americans who praised the protective power of the jury for the criminal defendant.659 To the extent that the Supreme Court’s jurisprudence replicates Appleman’s misreading of the historical record in cases like Apprendi and Blakely, this article urges caution in future cases. In short, the first lesson for originalists is that much more work needs to be done.

Second, the analysis in this article may be helpful to originalists operating in the construction zone.660 The construction zone is “the range of legal content that is semantically available” to the legal interpreter.661 While the meaning of the Constitutional text—such as the Sixth Amendment’s guarantee that “the accused shall enjoy the right to a speedy and public trial, by an impartial jury”662—may accommodate certain developments in the jury, it may preclude others. Construction zones results from the existence of indeterminate meaning. Again, though this article does not focus on indeterminacy or originalism, the analysis in Parts III, IV, and V

659 See Part III.B above.
660 Lawrence B. Solum, “Originalism and Constitutional Construction,” Fordham Law Review 82 (2013): 453. (describing constitutional construction as “the activity that determines the legal effect given the text, including doctrines of constitutional law and decisions of constitutional cases or issues by judges and other officials”). I do not engage in originalist analysis here; however, to the extent that the constitutional text accommodates both pluralism and equal access, the analysis in this article may clarify those values and aid indirectly in the construction process.
662 U.S. Const., amend. VI.
may provide a starting place for just such an analysis. In Part III, I began the arduous task of parsing the language and historical meaning of Article III and the Sixth Amendment. The textual variance between those two provisions of the Constitution generates at least some constitutional indeterminacy. And, the framework of this article may be helpful to those grappling with contemporary legal questions within the construction zone that indeterminacy creates.

Finally and relatedly, Randy Barnett and Evan Bernick recently defended appeals to the “spirit” of the Constitution to resolve issues in the construction zone. They argue that, when interpretation of the text is insufficient, judges ought to draw on “spirit—or ‘original function’—of the relevant constitutional provision” and devise “implementing rules that are calculated to give effect to both the letter and the spirit of the text in the case at hand and in future cases.”663

To the extent that the “spirit” of the Constitution was shaped by the Founding-Era competition between these two conceptions of the jury right, judges may find it helpful to consider contemporary questions in those terms. Additionally, the light this article sheds on the individual jury right, to the extent that there was such a right at the Founding, demands more attention than the Court gave that right in cases such as *Apprendi* or *Blakely*.

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As the preceding discussion shows, the analysis in this article is valuable to many different schools of constitutional theory. Dworkin’s moral reading approach, constitutional pluralism, and originalism are only some of the most popular means of answering contemporary constitutional questions. This Part also demonstrate how much more there is to say about the

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constitutional jury right. By exposing some of what is at stake in debates over the jury, a goal of this article has been to spark future discussions about the viability and desirability of various jury right developments.

VII. Conclusion

This article traces the jury through two dimensions: the historical and the normative. No one has previously followed the historical developments of the jury through the lenses of individual and collective rights. I believe that much can be gained from such analysis. In Part III, I sought to show that the individual, constitutional right language was written against the collective right-common law background, reflecting early ambiguous understandings of the jury. After the passage of the Fourteenth Amendment, that ambiguity gave way to a much more pronounced individual right that dominated legal discourse for almost a century. Associated with that individual right are common corollaries, including procedures for jury right waiver and venue transfer. The individual right provides for the preservation of bedrock normative ideals including access to speedy justice and impartial tribunals.

Recent decades have seen the reemergence of the collective jury right at all levels of legal discourse: among scholars, practitioners, judges, and Justices. In Part V, I focused on some of the corollaries of treating the jury as a collective right. For all that can be praised about the democratic potential of the collective jury, I also sought to demonstrate some of the dangerous proclivities to which a collective jury may be prone. These include the more pernicious and unjust types of jury nullification—none of which are explicitly advocated for, but all of which are possible. I also argued that we already curb the collective jury right when we preclude and overturn jury verdicts that infringe on other individual rights (speech, counsel, and more).
The jury is an association and, like so many other associations in American society, the value of the jury is normatively ambiguous. It has been both praised for reaching decisions the public agrees with and lambasted for replicating hierarchies of power through the acquittal of bad actors. At its broadest level my aim in this paper has been to expose some of that tension by laying out the analytical boundaries of the two jury rights. I hope to have made possible the enormous task set for lawyers, judges, and Justices who everyday wrestle with these important questions.
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