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**Global Perspectives on Freedom of
Association: Why and How Freedom of
Association is Protected**

Maria Cahill



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Considering How and Why Freedom of Association is Protected: Reflections on the State of the Art

*Maria Cahill**

Introduction

This paper is a reflection on the question of ‘how to protect freedom of association’ and the question of ‘why we would protect freedom of association’, as well as the internal momentum between those questions. Addressing the ‘how’ question means considering the complexity of the right, the kinds of disputes that arise and the relevant context within which the right is being interpreted and applied. Addressing the ‘why’ question means considering theories of freedom of association that offer some perspective on the value of this right. The paper unpacks the current state of the art in relation to each question, and in doing so it notes the internal momentum between the two questions: knowing *how* to protect freedom of association means appreciating the different interests and values in play in a particular context and how to reconcile them in line with the deepest purposes of the right, while knowing *why* we are protecting freedom of association means articulating the deeper purposes of the right in the context of and in reflexive relationship with the circumstances in which it is invoked. Having considered existing scholarship on freedom of association in these ways, the paper concludes by hypothesising on fruitful avenues for future research.

Doctrinal scholarship on the right to freedom of association is an emerging field, particularly relative to the volume of literature that exists on other human rights and constitutional values. Single jurisdiction research exploring how the right is protected within a particular legal system and culture helps to reveal the ‘multicoloured picture’ of how freedom

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of association is protected in legal systems and courts around the world.¹ Sensitive to that variability, this chapter considers the types of cases that arise, the kinds of contexts within which they emerge, and the range of options available to courts in resolving them. It seeks to understand the nature and scope of the right to freedom of association independently of its neighbours: the more well-known rights to freedom of expression, freedom of assembly and freedom of religion. Thus, for example, it does not seek to define the contours of freedom of association by taking caselaw on religious associations and freedom of religion as a starting point. Similarly, it does not take an approach to freedom of association that considers it to be a type of free expression. As a result, it does not take United State Supreme Court jurisprudence as a north star, because although that Court recognises freedom of association as an unenumerated right protected by the First Amendment, it largely interprets freedom of association as a right to *expressive* freedom.² The reality is that there are, of course, cases in which alleged violations of other rights are raised alongside alleged violations of freedom of association and difficult to disentangle from them, but this paper wants to consider options for answers to the ‘how’ question that seek to find value in the unique terms of the right to freedom of association itself, rather than tethering it to another right and interpreting it according to those terms.

Theoretical scholarship on the right to freedom of association offers us two paths to justification for the right to freedom of association. On one hand, there are defences of freedom of association that focus on its capacity to protect the right of individuals to live their lives as they see fit and by committing to freedom of conscience at the individual level also thereby protect pluralism at the societal level. On the other hand, there are defences of freedom of association that focus on its capacity to protect democracy and, under that umbrella, both to guard against state tyranny and to protect a space within which civic virtue can be cultivated. These theories do not always engage directly with the gritty endeavour to define the contours of this right in the context of live disputes, but even so they sometimes offer a perspective on how freedom of association should be protected.

¹ Maria Cahill, Dwight Newman & Seán Ó Conaill, ‘Introduction to Global Perspectives on Freedom of Association’ (2025) 12 (1&2) *European Journal of Comparative Law and Governance* (forthcoming). The collection features articles exploring how freedom of association is articulated, interpreted and applied in the following jurisdictions: Australia, Canada, China, Egypt, Ethiopia, Finland, France, Ireland, Italy, Japan, Mexico, Nigeria, Peru, Poland, South Africa, Spain, the United States, as well as international human rights systems such as the Council of Europe, the Inter-American System of Human Rights and the United Nations. The Societas Working Paper series is available through CORA, the UCC Open Access Repository: [Law - Societas Working Paper Series](#).

² Dale Carpenter, ‘Expressive Association and Anti-Discrimination Law After Dale: A Tripartite Approach’ (2001) 85 *Minnesota Law Review* 1515-1590; Thomas Emerson, ‘Freedom of Association and Freedom of Expression’ (1964) 74(1) *Yale Law Journal* 1- 35; John Inazu, ‘The Unsettling Well-Settled Law of Freedom of Association’ (2010) 43(1) *Connecticut Law Review* 149-208. See also, Larry Alexander, ‘What is freedom of association, and what is its denial?’ (2008) 25(2) *Social Philosophy and Policy* 1 and Amy Gutmann (ed.), *Freedom of Association* (Princeton University Press, 1998).

The chapter is structured as follows: Part I will address the challenge of finding a theory of freedom of association that connects answers to the ‘how’ and ‘why’ questions and whether we can maintain hope for a theory uniting them. Part II will outline dimensions of the ‘how’ question, as well as the context and complexity within which that question must be answered. Part III will discuss possible answers to the ‘why’ question by reference to notable theories that protect freedom of association for the sake of conscience and pluralism and for the sake of democracy. A concluding Part IV will then draw the strands of the previous sections together, offer some reflections on the work done to date, and seek to identify some possible future directions for scholarship on freedom of association.

I. Can There be a Theory of Freedom of Association?

Freedom of association is a tricky legal instrument, not least because through it we are seeking to recognize and vindicate through the person of the individual a right that by its nature cannot be exercised alone. Peter de Marneffe once opined that while it would be ‘interesting’ to have a theory of freedom of association, ‘the prospects for such a theory seem dim’, on the grounds that:

‘The reasons against interference that have moral priority over the reasons there are to interfere are simply too diverse. There is nothing that all the good reasons against government interference have in common, *no master value that generates or collects them all*’.³

In place of a master value or a grand theory, he suggests that we focus on the detail of each case,⁴ and continue to reflect on and articulate why freedom of association is valuable and why one might want to restrict it:

‘It does not follow, though, that we cannot say anything interesting or informative about associational rights. We can – by identifying the good reasons there are against interference in each case and considering carefully whether these reasons have moral priority over the good reasons there are to interfere’.⁵

In the language of this paper, de Marneffe seems to be saying that it is difficult if not impossible to connect the answers to the questions of ‘how’ and ‘why’ freedom of association should be

³ Peter de Marneffe, ‘Rights, Reasons and Freedom of Association’ in Amy Gutmann (ed.) *Freedom of Association* (Princeton University Press, 1988) 145, at 167. Emphasis added.

⁴ *Id.*, at 156.

⁵ *Id.*, at 167.

protected, so we should concentrate on doing the ‘how’ and keep thinking and talking about the ‘why’ in the background. If de Marneffe’s deep scepticism about the project of integrating ‘how’ and ‘why’ questions seems to present an insuperable obstacle, his roadmap for how to proceed in the meantime seems eminently sensible.

Yet, this paper resists any despair of ever joining the dots between these two crucial questions, for three reasons. First, the argument from prematurity. Research – even doctrinal work on how freedom of association is articulated and protected in courts around the world, not to mention doctrinally-informed comparative, empirical, theoretical and interdisciplinary scholarship – on the right to freedom of association is still emerging and at least arguably neither plentiful nor developed enough for us to conclude at this stage that there is no hope of a master value and no prospect of a theory. Every field of law is complex for different reasons, but even if it might be that freedom of association is inordinately complex (for the reasons that will be discussed in Part 2), still it is arguable that we might still be able to uncover a simple compelling truth underneath all of the complexity which grounds the intuitive pull and power of this right as one of the fundamental rights that ought to be protected. And it could be – although this might also be a trite or unfair comment to make – that part of the difficulty for de Marneffe is that he is writing in the context of the US context: perhaps it is more difficult to find a master value for freedom of association when it is so entangled with freedom of expression.

Secondly, the argument from ambition. There are several precious values and concepts orbiting around law and its respect for civil society, values like solidarity, social cohesion, subsidiarity and pluralism. The challenge for these values is to find concrete expression within law that does not hollow out their depth and richness. Freedom of association is at least potentially a particularly important legal instrument precisely because it allows considerations of the social dimension of the human experience and intersubjectivity and sociality to come to a point within law. It might be a legal instrument that could offer some indirect expression for the kinds of things that these values seek to uphold, and yet it has often been overlooked. At least potentially, the right to freedom of association could allow us to protect ‘the ties that bind’ not simply by abstractly lauding the value of human cooperation but by deploying the cutting-edge of human rights law. Given that, unlike some of these other concepts and values, freedom of association recognises the social dimension of the human experience, and in such a way that it comes to a point that can be litigated in court, there is an extra sense in which it behoves us to articulate as best we can both how it should be protected and why it should be protected so that other concepts and scholarship can benefit from that clarity.

Thirdly, the argument from pragmatism. De Marneffe's argument is that it's difficult if not impossible to connect the 'how' question with the 'why' question, but it's also true that it's difficult if not impossible to separate them. As he notes, practical resolution of a legal dispute involving freedom of association involves giving priority to one set of considerations over another: either one set of reasons for protection are more persuasive than another set of reasons for interference, or vice versa, which means that practical decisions are being made in courtrooms all the time about what the right to freedom of association stands for. So long as that remains the case, it is not only good to focus on the detail of the case and to keep track of the good reasons supporting each side of the argument, but achieving doctrinal clarity and consistency will mean that it is necessary to systematically engage with identifying and refining what those reasons as well as the reasons behind those reasons are. The particularity of the associational and jurisdictional contexts will mean that case-by-case analysis is always necessary, but ideally that would be done with a sensitivity to the weight of the answers and their connection to the deeper motivations behind this right. If we only consider 'how' without considering 'why' then we end up with a formalist conception of the right to freedom of association which cannot help us answer the 'how' question in complex cases. If we only consider 'why' without considering 'how' then we end up with a hypernormative account of the right to freedom of association that cannot be applied on the ground and therefore cannot advance the 'why' it seeks to achieve. But aside from the logical interdependence of these answers, there is also a dynamic momentum from one to the other: curiosity about 'how' we should protect freedom of association leads to questions about 'why' and curiosity about 'why' leads to insights about 'how'. In a sense, as will be discussed in Part 2, there is no answer to the 'how' question that does not also incidentally answer the 'why' question, albeit that that answer may not be fully articulated. Moreover, as will be discussed in Part 3, there is no answer to the 'why' question that does not have a bearing on the answer we should give to the 'how' question, albeit that that answer may not be as granular as is needed to resolve a real-life dispute.

This paper seeks to keep alive the hope of a theory of freedom of association because we have not done enough work yet to conclude that it is hopeless, because freedom of association offers a unique opportunity in allowing considerations of the social dimension of the human experience to come to a point within law, and because – pragmatically speaking – there is an interdependence and a strong internal momentum between the questions of how and why we protect freedom of association.

II. How to Protect Freedom of Association: Contexts and Complexities

This section considers the question of how to protect freedom of association, at three levels. The first is at the level of the right itself and how it breaks down in terms of the dimensions of its exercise. The second is at the level of the types of disputes that arise and the types of review that could be used to resolve them. The third is at the level of the variety of the contexts in which disputes arise and how different kinds of context bear on the answer to the ‘how’ question. As a particular dispute unfolds, of course, a court’s attention may also be drawn to a myriad of other issues: from questions of standing to details of procedure, from issues about fact-finding or evidence to decisions the parties make about how to run or settle the case, at a level of detail and jurisdiction-specificity that is beyond the scope of this chapter.

Dimensions of the Right

The first answer to the question of how we protect freedom of association is that, within the right to freedom of association itself, there are two possible types of subjects and two possible dimensions of exercise. In respect of the first, the right to freedom of association is often interpreted to have both a *positive* dimension – the right to form or to join an association – and a *negative* dimension – the right to leave and to refuse to join an association. In respect of the second, freedom of association is often considered to have both an *individual* dimension – the right of members, prospective members, putative members to exercise the positive and negative dimensions of the right – and a collective and/or corporate dimension – the right of the association itself to establish itself and govern its own affairs, as well as the right of the association to form, join or leave other associations.⁶ The distinction between the collective and corporate dimensions are maintained without separating them for the purposes of this paper, in order to capture both the cooperation of the members as a collective acting together and the action of the association as a legal entity with legal personality. In some jurisdictions, this distinction collapses into the corporate dimension alone because legal registration of the association is necessary to avail of the protection of the right and not only fiscal and other benefits that may flow from its formal legal existence, while other jurisdictions specify that the

⁶ To see how these dichotomies are considered in different jurisdictions, see, for example, José Anzures Gurría, ‘Freedom of association in Mexico’, Societas Working Paper 01/2024; Guillermo Morales Sancho, ‘Freedom of association in Spain’, Societas Working Paper 04/2024; Maria Cahill, ‘Freedom of association at the European Court of Human Rights: A right in service of democracy’, Societas Working Paper 08/2024.

right inheres in unregistered as well as registered associations, albeit to a lighter degree.⁷ The right to freedom of association is usually not considered to be an absolute right in any of its dimensions: courts, while reviewing claims under this heading, will consider the strength of the case as well as the countervailing considerations in the light of the particular dispute and the context within which the dispute arises.

Types of Litigation

One type of dispute that arises is the *association v. state* scenario, where the members of the association and/or the association itself invokes the right to freedom of association against the state. This type of dispute arises in the following way: the members seek to set up or to register or to remain in existence as an association and pursuing its own purpose and goals, and believe that the state is unduly interfering with that right. Alleged state interference can run from deny registration to dissolution, from imposing certain conditions to denying certain benefits, from subjecting the association to regular inspections to requiring the association to assent to certain values and positions that may be out of alignment with its organic development.⁸ In the language of the previous section, the positive individual dimension and the positive collective and/or corporate dimension of the right to freedom of association are being invoked, the right of the members to set up an association and to pursue its purpose together. In terms of ‘how’ to protect freedom of association, these cases turn on the way in which the court considers the nature and legitimacy of the interference. Judges may examine, for example, whether the interference is *legally justified* as being grounded in law (issues of legal clarity and legal interpretation may be litigated), *reasoned* (issues of the legitimacy of the reasons may arise), and *proportionate* (issues of the breadth, type and effect of the interference may be litigated). In essence, the ‘how’ question in this scenario becomes ‘which level of intensity will the court

⁷ In China, for example, registration as an association is required by law, while in Spain and Italy, for example, the right to freedom of association inheres prior to registration. The European Court of Human Rights and the United Nations retain the right to review and criticise, respectively, registration regimes that fail to properly protect the right to freedom of association. See, Shaoming Zhu, ‘Freedom of association in contemporary China: An examination of its structure, content, and nature’, Societās Working Paper 03/2024; Guillermo Morales Sancho, ‘Freedom of association in Spain’, Societās Working Paper 04/2024; Matteo Monti, ‘Freedom of association in Italy: Genesis, evolution and limits of protection of associations in the Italian legal system’, Societās Working Paper 02/2024; Maria Cahill, ‘Freedom of association at the European Court of Human Rights: A right in service of democracy’, Societās Working Paper 08/2024; Ruairí McIntyre, ‘Freedom of association under the treaties of the United Nations: A right of intrinsic or instrumental value?’, Societās Working Paper 10/2024.

⁸ For examples of state interference with freedom of association as well as courts’ responses to such action, see, for example, Vanessa Barbé, ‘Freedom of association in France: A freedom in danger?’, Societās Working Paper 15/2024; Nick Aroney & Mark Fowler, ‘Freedom of Association in Australia’, Societās Working Paper 05/2024; Rafael Jerez Moreno, ‘An approach to the basis of the right to freedom of association according to the Inter-American Court of Human Rights’, Societās Working Paper 17/2024; Shaoming Zhu, ‘Freedom of association in contemporary China: An examination of its structure, content, and nature’, Societās Working Paper 03/2024; Maria Cahill, ‘Freedom of association at the European Court of Human Rights: A right in service of democracy’, Societās Working Paper 08/2024; Ruairí McIntyre, ‘Freedom of association under the treaties of the United Nations: A right of intrinsic or instrumental value?’, Societās Working Paper 10/2024.

subject the actions of the state to?’ and the answer to this question has to be determined by considering what the right to freedom of association means externally, vis-à-vis the state.

A second type of dispute that arises is the *member v. association* scenario, where a putative or current or former member of the association invokes their right to freedom of association against the association itself.⁹ This type of dispute arises in the following way: an association has been formed with its own purpose and set of internal rules (which may be more or less formal, more or less sophisticated, and more or less contested within the group). These internal rules set out how the association is internally regulated, including, for example, its membership policy, the rules for appointment to leadership positions and the internal disciplinary procedure that can be invoked against members. The individual in question may seek to avoid the consequences of those internal rules on themselves: despite the effect of the internal regulations, they may wish to join or to be appointed to a senior position or to not be expelled and they may their own positive individual right to association to bring the case to court. On the other side, the association and all of the (other) members want to be able to design the association as they decide and conduct the affairs of the association according to their internal agreement about how that should be done. In the language of the previous section, the member is invoking the positive individual dimension of the right to freedom of association, but invoking it against the positive collective and/or corporate dimension of the right to freedom of association which the association itself is invoking in response. In this second type of dispute, freedom of association is being invoked ‘against itself’, as it were, and the court is not reviewing the action of the state, but the action of the association. In terms of ‘how’ to protect freedom of association in this scenario, these cases turn on the way in which the court considers the scope of the autonomy which the association has. Judges may, for example, determine that they do not have the expertise or authority to review the internal rules of the association accurately and give a wide latitude to the association itself to define the terms of its own existence. Alternatively, they may decide to engage in substantive review of the internal rules, examining their merits and potentially ruling that those internal rules are not in conformity with the court’s or the state’s idea of how such associations should be organised. A further option would be for the court to engage in procedural review, examining the matter to

⁹ For examples of these types of disputes, see Sahara Nankan, ‘Freedom of association in South Africa: Democratic pluralism and the interplay between collective interests and individual flourishing’ Societās Working Paper 07/2024; Femi Amao, ‘Freedom of association in Nigeria: A cacophony of contestations’, Societās Working Paper 09/2024 and Ash Bhagwat, ‘Why association?’ Societās Working Paper 06/2024. In certain jurisdictions, the right of a member to ensure that the rules of the association are adhered to form a separate dimension – the *inter privatos* dimension – of the right: Guillermo Morales Sancho, ‘Freedom of association in Spain’, Societās Working Paper 04/2024; Matteo Monti, ‘Freedom of association in Italy: Genesis, evolution and limits of protection of associations in the Italian legal system’, Societās Working Paper 02/2024.

see if the association has followed its own rules. While the first option offers a very wide scope to the association to govern itself, and the second restricts that freedom considerably, the third option is a kind of middle way, which affirms the association's positive collective and/or corporate right to freedom of association while at the same time ensuring a measure of procedural justice to the individual. In essence, the 'how' question in this scenario becomes 'which level of intensity will the court subject the actions of the association to?' and the answer to this question has to be determined by considering what the right to freedom of association means internally, vis-à-vis the members.

Although the shape of these disputes is different and the position of the court vis-à-vis the association is quite different in each case, both types of disputes can be politically charged and culturally sensitive, because they take place within a specific set of circumstances, involving particular associations and particular jurisdictions, with all the variety and complexity that they bring.

Associational and Jurisdictional Contexts

As a court considers 'how' to protect freedom of association, the answers will be contextualised by relevant associational and jurisdictional context, which are made manifest in the details of the evidence as well as the particular laws being interpreted and the regulatory decisions that have been taken. Associational variety is manifest in three ways: associations are different in kind, in position and in organisational complexity.

First of all, associations are various in their *kinds*: they can be unregistered or registered; they can be very large, with dozens or hundreds of members or they may be quite small. They can pertain to subject matters of various kinds (trade unions are regulated by labour law, sporting organisations are regulated by sports law, charities are regulated by charity law, etc). Moreover, they can be associations whose design and purpose makes them tightly connected with identity (ethnic or cultural or religious or other), or they can be associations where identity is not such a defining feature of the association.

Secondly, associations are various in their *position*: some associations, like political parties, operate in clear proximity to the apparatus of the state, while others, like NGOs, are perhaps less embedded in the apparatus of the state but nonetheless in close contact with it, and others again, like residents' associations, are further removed from the apparatus of the state and operate more or less entirely in the private sphere. Associations may be self-funded, state-funded, funded philanthropically, or some hybrid of these options, e.g., a charity which is funded through donations but has a state contract to provide a certain kind of service in a local

community. Apart from positioning vis-à-vis the state, some associations may occupy a position of dominance or even monopoly in a particular field, e.g., a trade union, while in other fields there may be dozens or hundreds of associations existing alongside each other, e.g., student societies. Finally, although non-exhaustively, consideration of associational positioning must be attentive to the fact that while some associations' purposes and values will be broadly in line with those of the democratic majority and the state while others will represent minority values and goals.

Thirdly, associations are various in their *organisational complexity and resources*: some may be very formal, with clear internal structures and sophisticated rules that have been formally agreed and regularly reviewed and reconfirmed while others may be more informal, with an organisational structure that relies more on relationships and cooperation than it does on rules and internal regulation. Some may be federated, with dozens or hundreds of branches, while others will be unitary. Some associations may be professionally run by paid employees, while some will be organised on an entirely voluntary basis, and others have a combination of employees and volunteers. Some may operate on a commercial basis with significant resources while others will not. Some may be internally democratically organised, while others will operate using a more hierarchical or ad hoc decision-making structure.

Not only do we need to contend with associational variety, jurisdictions also take different approaches to civil society. Within some jurisdictions, there will be an already-vibrant civil society and culture of associational involvement, while in others this instinct for associational involvement will be culturally absent. The cultural context affects and is affected by the regulatory context. Within some jurisdictions, the state may assume so much responsibility for the general welfare that there is little space for private initiative, while in others the state may be so overburdened that private initiative is incentivised. Some states may seek to cultivate associational involvement and the flourishing of associations by developing a supportive regulatory regime, while others may be more indifferent or even hostile to associations, particularly if the values of the association are not aligned with the values of the state. The detail of legislative and regulatory regime within which associations operate can only be known jurisdiction-by-jurisdiction, but the legal framework within which the right is litigated affects both the interpretation of the right and the capacity of the court to vindicate it when a dispute arises.

Along with the formal dimensions of the right and the pathways to dispute resolution, associational and jurisdictional variety also bear on how law protects freedom of association. This is true at a very mundane level: disputes involving particular associations need to be

resolved by interpreting and applying the relevant laws from the specific jurisdiction: a dispute about the legitimacy of a dissolution of a trade union in Mexico or Egypt or France needs to be interpreted in that specific regulatory context. It is also true at a less mundane level, as José Anzures Gurúa explains: a court may be more suspicious of, for example, government interference with the registration process of new political parties and subject such state actions to more rigorous scrutiny; a court may be more protective of, for example, associations with minority values and less tolerant of state measures that encourage or compel those associations to come into line with the values of the state; and a court may have higher expectations of, for example, associations that hold a dominant position in their field, subjecting the activity and internal rules of those associations to higher scrutiny.¹⁰ All of that is to say that cases that arrive before the courts bring their context with them: the kind and position and organisational complexity of the association as well as the legislative, constitutional and even cultural framework within which it operates will bear on the way in which the case is resolved, whether at national or international level. Moreover, answering the question of ‘how’ to protect freedom of association in the context of all of that specificity means having at least an intuitive and instinctive understanding of why freedom of association is important and what it is ultimately designed to protect and not protect. The ultimate inextricability of the ‘how’ from a deeper if latent ‘why’ is something that cannot be easily discounted. For the purposes of this chapter, however, the point is a simpler one: there is an internal momentum from the specificity of ‘how’ we protect freedom of association to ‘why’ we protect freedom of association.

III. Why to Protect Freedom of Association

This section considers theories of freedom of association offering an account of why we should protect freedom of association. There are two main categories: one focussed on protecting freedom of association for the sake of conscience and pluralism, and the other focussed on protecting freedom of association for the sake of democracy. As well as outlining the contribution they make in terms of articulating the value of freedom of association, this section will also consider any perspective they offer – directly or indirectly – on ‘how’ courts should consider cases arising before them, charting any internal momentum from ‘why’ back to ‘how’.

¹⁰ José Anzures Gurúa, ‘Judicial Review of Associative Agreements’ Societās Working Paper 21/2024.

For the sake of Conscience and Pluralism

For some scholars, the right to freedom of association is not an incidental freedom but a right that is fundamentally important both for the sake of individual conscience and for the sake of an open, diverse, pluralistic society. These answers to the ‘why’ question are typically presented as two sides of the same coin: protecting the conscience of individuals aggregates to an open diverse pluralistic society while protecting pluralism entails protection of the conscience rights of individuals. They also offer advice or guidance on ‘how’ to interpret the right to freedom of association in a dispute, advice that is based on the answers they offer in respect of the ‘why’ question.

According to William Galston and Chandran Kukathas, the right to freedom of association is designed to protect a space for individuals to live their lives in accordance with their own ideas about how best to do so. Galston considers freedom of association to be an expression of ‘the principle of *expressive liberty*’, which is a ‘rebuttable presumption in favour of individuals and groups leading their lives as they see fit, within a broad range of legitimate variation, in accordance with their own understanding of what gives life meaning and value’.¹¹ Although understood in the context of the principle of *expressive liberty*, Galston’s instinct is quite conscience-oriented, it seems, since he argues that freedom of association must be deeply respected to protect ‘fit’ between peoples’ ‘outward existence and inner conceptions of value’.¹² For Kukathas, similarly, freedom of association allows individuals to pursue the natural diversity of their interests and alliances, allowing them to live life in a way that aligns with their conscience.¹³ So crucial is it to their capacity to live a good life on their own terms that he asserts that ‘*the fundamental principle* of describing a free society is the principle of freedom of association’.¹⁴ Although he acknowledges that ‘other liberties – of speech, for example – are [not] unimportant’, they are subordinate to this ‘more fundamental freedom’,¹⁵ and that ‘[i]n a free society ... *only* the freedom to associate is fundamental’.¹⁶

Both scholars believe that the right to freedom of association is also designed to respect and facilitate the natural diversity of an open society. In the case of the Galston, the essence is that the principle of expressive liberty manifested in freedom of association is ‘not just a philosophical abstraction; it is anchored in a concrete vision of a pluralist society in which

¹¹ William Galston, *Liberal Pluralism: The Implications of Value Pluralism for Political Theory and Practice* (Cambridge University Press, 2002), at 3. Emphasis in original.

¹² *Id.*, at 10.

¹³ Chandran Kukathas, *The Liberal Archipelago: A Theory of Diversity and Freedom* (Oxford University Press, 2003), at 4-9.

¹⁴ *Id.*, at 4. Emphasis added.

¹⁵ *Id.*, at 115.

¹⁶ *Id.*, at 5. Emphasis added.

different modes of individual and group flourishing have found a respected place...'.¹⁷ In the case of the Kukathas, the place of freedom of association in fostering an open society simply cannot be over-stated:

‘A free society is an open society and, therefore, the principles which describe its nature must be principles which admit the variability of human arrangements rather than fix or establish or uphold a determinate set of institutions within a closed order. Such principles should take as given only the existence of individuals and their propensity to associate ... the fundamental principle describing a free society is the principle of freedom of association.’¹⁸

The vision that freedom of association offers is not that of a unitary society with a single set of institutions, but rather, in the image that Kukathas proposes, ‘an archipelago of different communities operating in a sea of mutual toleration’.¹⁹

Having articulated these broadly similar answers to the ‘why’ question, Galston and Kukathas go on to offer some thoughts on what the answer to the ‘how’ question should be and, in this too, they align. The starting point for both is that the state should presumptively refrain from interfering with associational life. Galston’s rebuttable presumption in favour of individuals and groups leading their lives as they see fit goes together with a ‘corresponding presumption (also rebuttable) against external interference with individual and group endeavours’.²⁰ Kukathas opines that, as a starting point ‘[g]iven what we know of human nature, and of the nature of society, the good society must be one in which no particular social formations are protected or privileged, but human beings are *left free* to associate: to form, reform, or transform the associations under whose authority they would live’.²¹ This general principle is made more concrete in two implications, on which Galston and Kukathas agree, and which implications are themselves mutually informing and mutually reinforcing.

The first implication is that one of the aspects of the negative individual right, that is, the right to leave an association which they call the ‘right of exit’ must be protected to a very high degree. (They do not address the other aspect of the negative individual right, *viz.*, the right to refuse to join.) For Kukathas, indeed, the right of exit is inalienable: ‘members have

¹⁷ Galston, at 123.

¹⁸ Kukathas, *supra*, at 4.

¹⁹ Kukathas, *supra* at 8. He offers the metaphor of the archipelago as an alternative to Rawls’ well-ordered society, Plato’s ship of state, and the metaphor of the ‘body politic’ all of which assume a single coherent entity, while his image seeks to convey that what we need is an account of coexistence, rather than coherence as ‘an archipelago of competing and overlapping jurisdictions.’ *Id.*, at 8.

²⁰ Galston, *supra*, at 3. Since public institutions should exist to support the principle of expressive liberty, they should be ‘instrumental rather than intrinsic’, and ‘limited’ rather than ‘plenipotentiary or architectonic’. *Id.*, at 5-6.

²¹ Kukathas, *supra*, at 93. Emphasis added.

the inalienable right to leave – to renounce membership of – the community. Such communities are not entitled to force individuals to remain, even if the consequence of those individuals leaving might be the destruction of the association’.²² In both theories, the right of exit is a corollary of the connection between freedom of association and conscience: a person has a right to lead their life in the way they see fit, which means not only that they must be allowed the freedom to join and form associations, but also that they must not be trapped inside those associations²³ or, as Galston pithily puts it, ‘coerced membership is a denial of expressive liberty’.²⁴ Galston cautions that this protection should be not only formal, but truly meaningful, and he goes on to specify the conditions for a meaningful right of exit, which are: awareness of alternative associations one could join, capacity to access those alternatives if it becomes attractive to do so, psychological freedom to leave the association of which one is currently a member and the ‘ability ... to participate effectively’ in other associations.²⁵ Even if some of these facilitating conditions he mentions could not all that easily or effectively be litigated, the connection between a meaningful right of exit (as an answer to the ‘how’ question) and the overall purpose of freedom of association as protection of conscience (as an answer to the ‘why’ question) is very clear.²⁶

The second implication concerns the place of the association itself vis-à-vis the state. Presuming a meaningful right to exit, Galston then goes on to articulate a very robust freedom for associations to establish and conduct themselves as they please. In our language this means a strong version of the positive collective and/or corporate dimension of the right. The values and goals of an association do not have to align with those of the wider society: ‘Within broad limits, civil associations may order their internal affairs as they see fit. Their norms and decision-making structures may significantly abridge individual freedom and autonomy without legitimating external state interference’.²⁷ Kukathas similarly envisages a wide freedom for associations in the way that they conduct their affairs, manifesting in an authority over both goals and practices that are pursued:

‘This view of the rights of the individual gives *a great deal of authority* to the community or association of which the individual is a member. It imposes no requirement upon these associations to be associations of any particular kind. It does

²² Kukathas, *supra*, at 96.

²³ Kukathas, *supra*, at 93.

²⁴ Galston, *supra*, at 122.

²⁵ Galston, *supra*, at 122-3.

²⁶ ‘Securing this liberty will require affirmative state protections against oppression carried out by groups against their members.’ Galston, *supra*, at 123.

²⁷ Galston, *supra*, at 122.

not even require that they be associations that value or honour individual freedom, or themselves tolerate dissent: they may indeed be quite illiberal. But if members of such communities or associations wish to continue to live by the terms of the association, the outside community has no right to intervene to prevent those members acting within their rights.’²⁸

In his case, then, the positive individual dimension of the right is what grounds and animates the positive collective and/or corporate dimension of the right, meaning that neither the state nor the courts should intervene too much.

In sum, the theories of Galston and Kukathas present a two-sided justification for freedom of association by reference to the primary of conscience and the value of pluralism. Having offered those answers to the ‘why’ question, they suggest that the right way to protect freedom of association is to secure the right to exit and (then) to allow the association a wide latitude in how it operates. This means that, in the language of this paper, the negative individual dimension of freedom of association is stoutly protected alongside the positive collective and/or corporate dimension of the right. These two protections are mutually reinforcing: the right to leave justifies the strong internal authority of the association while the strong internal authority of the association is what gives rise to the need for a robust right to leave.

For the Sake of Democracy

The most common answer to ‘why’ question is that freedom of association should be protected because it protects democracy. Courts in various jurisdictions protect freedom of association as a political right, and the European Court of Human Rights even describes this right as a litmus test for the quality of democracy in the relevant jurisdiction.²⁹ At the same time, at least to my knowledge, there is no single theory of freedom of association which presents this idea comprehensively, explaining what exactly we mean when we say that freedom of association protects democracy, how that could be operationalised in practice, what other values it would come into contact and possible conflict with and how to resolve such tensions. Nonetheless, there are rich insights from different theories that contribute to this question. This section pieces

²⁸ Kukathas, *supra*, at 96. Emphasis added.

²⁹ See, for example, Kelali Kiros Negesse, ‘The purpose and potential of freedom of association in Ethiopia’, Societas Working Paper 14/2024. In the case of *Sidiropoulos and Others v Greece*, the European Court of Human Rights noted that ‘[t]he way in which national legislation enshrines this freedom and its practical application by the authorities reveal the state of democracy in the country concerned’. 10 July 1998, Reports of Judgments and Decisions 1998-IV, para. 40. This passage has been cited with approval in the leading judgment of *Gorzelik and Others v Poland* [GC] App no 44158/98 (ECHR, 17 February 2004).

together different parts of the answer to the question of why we should protect freedom of association for the sake of democracy.

Within Tocqueville's *Democracy in America*, which famously touted the place of associations albeit without specifically engaging with the legal right to freedom of association, there were two themes. The first was that Tocqueville believed that participating in associations changes the political and social landscape around us, contributing directly to the quality of our democracy by relativising the place of the majority and preventing majoritarianism from becoming tyranny. It does so, in his view, by providing space for the individuals to 'learn the art of uniting with those like them to defend [their freedom]',³⁰ and thus 'to weaken the moral empire of the majority'.³¹ The second was that he believed that associations contribute to our democracy indirectly, because being a member of an association changes us on the inside: within associations '[s]entiment and ideas renew themselves, the heart is enlarged, and the human mind is developed only by the reciprocal action of men upon one another',³² and our civilisation is a product of us developing and perfecting 'the art of association'.³³ Both of these themes – associations as an antidote to populism and a school in which we learn civic virtue – are taken up in a more recent book by Paul Kahn, *Democracy in our America*, which is both an homage to local associations and a revisiting of the Tocquevillian case for associational involvement.³⁴ It is still true, he argues, that local government associations, political parties, trade unions, non-governmental organisations, and civil society groups contribute to democracy by participating in different ways in democratic processes: raising issues, influencing policy, contributing to the development of legislation, participating in governance. And it is also still true that political and nonpolitical associations are important in shaping debate, providing space for care, for the articulation of values and viewpoints and for bringing people together in cooperation.

The direct connection between associations and democracy, based on the idea that associations relativise and weaken the moral empire of the majority, has been taken to a different level within the theory of associative democracy defended by Paul Hirst. Hirst's starting-point is that the state is 'burdened by too many expectations, inefficient and broken', and he argues that associations are already and should be further encouraged to step 'into the

³⁰ Alexis de Tocqueville, *Democracy in America* (Harvey C. Mansfield & Debra Winthrop, eds., University of Chicago Press, 2000), at 489.

³¹ *Ibid.*, at 185.

³² *Ibid.*, at 490.

³³ *Ibid.*, at 490.

³⁴ Paul Kahn, *Democracy in Our America: Can we still govern ourselves?* (Yale University Press, 2023). Cf. Maria Cahill, 'The Non-Fungible Value of Associations and its Invisibility to Law' (2023) 24(4) *German Law Journal* 672-685.

breach'.³⁵ He proposes associative democracy as 'a way of redrawing the public-private divide', by increasing the level of funding available to private associations and the range of responsibilities they assume.³⁶ These associations would largely govern themselves, having their own internal rules and being accountable to their shareholders, receiving public funding in a manner that is proportionate to the level of uptake on the service they provide, and subject only to light regulation by the state and interference only in the case of serious harms to individual rights or other associations.³⁷

The indirect connection between associations and democracy, based on the idea that associations are schools of civic virtue making good citizens and therefore good democracies, resonates in the recent work of Jérôme Grand and Seana Shiffrin.³⁸ Jérôme Grand puts the spotlight on non-political social associations such as 'sports clubs, self-help groups, and artistic and scientific associations'.³⁹ Such spaces are valuable, he argues, because they 'hold a definite importance' for the members,⁴⁰ and provide an opportunity for individual members to 'find in associations mutual support for particular conceptions of the good life and resources to develop a form of self-confidence necessary to pursue their plans'.⁴¹ In Grand's work, we have a defence of freedom of association that is rooted in self-development, self-confidence and 'especially' the social basis of self-respect,⁴² which is vital to the broader development of the person in a political sense and therefore are 'essential' to the project of political liberalism and democracy.⁴³

Meanwhile, Seana Shiffrin seeks to move beyond the limited 'predominantly outward-looking, message-centred approach' favoured by the US Supreme Court that ties the value of the right to the message that it sends,⁴⁴ and towards 'an inward, thought-centred approach'.⁴⁵

³⁵ Paul Hirst, *From Statism to Pluralism: Democracy, Civil Society and Global Politics* (UCL Press, 1997), at 19ff.

³⁶ *Ibid.*, at 31-32.

³⁷ *Ibid.*, at 30.

³⁸ Nancy Rosenblum offers an account of the value of associations that is focused on their capacity to foster character and the morality of the participants, and so her answer to the 'why' question is grounded in moral and psychological development, for the sake of which she defends a strong presumption in favour of the autonomy of the association. Her theory is not connected to democracy though and so it is not treated at length here. Nancy Rosenblum, *Membership and Morals* (Princeton University Press, 2000).

³⁹ Jérôme Grand, 'Rawls Against Rawls: On the Political Value of Social Association' (2022) 5(1) *Ethics, Politics & Society* 93, at 95-96. Grand's paradigmatic social association is an informal neighbourhood association established with the aim of throwing a party for the local community: it has 'no message to express' but is instead a 'people with the same desires, same needs, and perhaps the same vision', they can carry out a plan they could not achieve alone' and 'find moral and emotional support' for plans and their conception of the good life. *Ibid.*, at 94-5.

⁴⁰ *Ibid.*, at 94-5.

⁴¹ *Ibid.*, at 97.

⁴² *Ibid.*, at 94.

⁴³ *Ibid.*, at 119.

⁴⁴ Seana Shiffrin, 'What is really wrong with Compelled Association' (2005) 99 (2) *Northwestern University Law Review* 839, at 841. Shiffrin takes Justice Brennan's judgment in the case of *Roberts v. Jaycees* 468 US 609 (1984) as an example of the standard message-based accounts of freedom of association that she opposes.

⁴⁵ *Ibid.*, at 852.

In her view, associations are valuable ‘because of what happens inside of them’.⁴⁶ They are important as ‘places where ideas are formed, shared, developed, and come to influence character’:

‘Ongoing, congenial interaction with others fosters mutual interests, and common *agendas* (though not necessarily shared beliefs or ideas). Ideas are tested, developed, and accepted or rejected within social settings. The views one considers and comes to have are heavily influenced by who one interacts with and especially who one trusts and cares for.’⁴⁷

Her answer to the ‘why’ question is then that ‘[s]ocial associations full of diverse, disagreeing people’ are worthy of constitutional protection in themselves, and not just for the messages that they send.⁴⁸ Her answer to the ‘how’ question follows as a consequence: precisely because associations are spaces of special connection and trust, therefore, they ‘merit strong forms of protection’.⁴⁹ Shiffrin believes that ‘[t]he right of association, if it is to protect the interests that underpin it, suggests a corresponding right to exclude unwanted members’ and even that that right to exclude ‘should be fairly absolute and need not require justification’.⁵⁰ In Shiffrin, too, therefore, we have a clear movement from an articulated answer to the ‘why’ question to an articulated answer to the ‘how’ question.

The general point that freedom of association supports a healthy democracy and that respect for the right of freedom of association is a hallmark of democracies seems plausible. At the same time, there is room for more scholarship here, developing different aspects of this broad answer that freedom of association is important for the sake of democracy and reflecting still further on the commensurate dimensions of the momentum from ‘why’ to ‘how’.

IV. Conclusion: Towards an Integration of How and Why

Freedom of association is an unusual and fascinating and tricky legal instrument, seeking, as it does, to protect through the person of the individual a right that by its nature cannot be exercised alone. The central purpose of this paper has been to consider the available answers to the questions of how and why to protect freedom of association and also to consider the internal momentum between those two questions. We are led from ‘how’ to ‘why’ when we need to

⁴⁶ *Ibid.*, at 865.

⁴⁷ *Ibid.*, at 865. Emphasis in original.

⁴⁸ *Ibid.*, at 888.

⁴⁹ *Ibid.*, at 870.

⁵⁰ *Ibid.*, at 873.

weight considerations in favour of an association's freedom against the legitimacy of state interference and/or the associative rights of individual members. We are led from 'why' back to 'how' when we need to express in more detail what the implications of our headline values are in concrete situations. The dimensions of the 'how' question was considered in Part 2 while theories justifying the right to freedom of association for the sake of conscience and pluralism or for the sake of democracy were considered in Part 3. They do not fully line up. The complexity of the picture on the 'how' side is obscured somewhat by more black and white answers on the 'why' side.

Does this mean that de Marneffe is right, after all? That none of these approaches offers a fully compelling account of why freedom of association should be a fundamental personal right. Or that we need several different master values – and we can choose only one – because there is such a degree of associational variety and jurisdictional variety that one value is not enough. Perhaps some associations are particularly amenable to a justification focused on conscience and pluralism while others are more amenable to a justification focused on democracy? Perhaps they should be able to pitch themselves in one way or another? Still, there are the arguments from pragmatism and ambition and prematurity. Possibly fruitful further avenues of research include a more comprehensive theory of the interaction between democracy and freedom of association, deep consideration of other possible justifications for freedom of association, and even more analysis of the relationship between 'how' and 'why' we protect freedom of association in different jurisdictions around the world.