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## LAWYERS, CLIENTS, AND CONSTITUTIONAL RIGHTS

Jason Mazzone\*

Margaret Tarkington's insightful article, *Freedom of Attorney-Client Association*, makes a useful contribution to how we think about constitutional protections for associations.<sup>1</sup> While the Supreme Court has understood associations to promote expression and therefore has grounded the doctrine of associational freedom in the First Amendment's Speech Clause,<sup>2</sup> Professor Tarkington rightly recognizes that people associate in order to get things done. In particular, associating with others is a principal means of pursuing political goals: through collective appeals to the legislature in order to produce or shape statutory law; by promoting shared interests within the agencies of the executive branch; and by banding together to file lawsuits to secure legal rights. Members of associations often engage in expression, but basing a freedom of association doctrine on the Speech Clause misses the practical effects of collective endeavors. Instead, as Professor Tarkington observes, the First Amendment right "to assemble, and to petition the Government"<sup>3</sup> is the more relevant constitutional basis for associational freedom.

Professor Tarkington persuasively shows that once associational freedom is understood in terms of political action, lawyering is an important component of the right to associate. Lawyers frame issues in terms that resonate with legislators who write the laws and with the executive officials who implement it. (It is no accident that many professional lobbyists today are lawyers.) Lawyers, of course, are also indispensable to successfully pursuing a grievance in the courts. Without the ability to engage lawyers, many associations would be unable to pursue successfully their goals.

Professor Tarkington's analysis of the significance of lawyering to associational freedom is not historical. She wisely makes no claim that as of 1791 (when the First Amendment was ratified) or 1868 (when the Fourteenth Amendment applied the First Amendment to the states), the Constitution was understood to protect lawyering as an aspect of associational freedom. Instead, Professor Tarkington's account is sensibly grounded in the modern complexities of the government and in an understanding of the tools that are needed to access the levers of power within today's vast administrative state. As Professor Tarkington shows, today, without access to lawyers, the benefits of associating together in pursuit of a common cause will often remain unrealized.

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<sup>1</sup> Margaret Tarkington, *Freedom of Attorney-Client Association*, 2012 UTAH L. REV. 1071.

<sup>2</sup> See *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622–23 (1984) (describing freedom of expressive association). The Court has also recognized a constitutionally protected freedom of intimate association. *Id.* at 618–19; see also *id.* at 631 (O'Connor, J., concurring) (locating the protection as part of the constitutional "zone[] of privacy").

<sup>3</sup> U.S. CONST. amend. I.

While Professor Tarkington succeeds in showing that associational freedom should reflect the important role played by lawyers, her article is less persuasive in setting out the precise contours of protection for the attorney-client relationship that should follow. Professor Tarkington's account amply supports a right of a group of citizens banded together to engage counsel to assist them in pursuing their goals. This is not, however, how Professor Tarkington presents the relevant interests. Instead, Professor Tarkington casts the right at issue as less about laypeople accessing lawyers and more about the interests of lawyers themselves. Thus, she writes, "freedom of association secures an attorney's right to associate with others for the purpose of providing legal advice."<sup>4</sup> Professor Tarkington casts associational freedom as the right of the attorney because she recognizes that, in practice, lawyers do not merely help frame pre-existing claims. Instead, lawyers inform people about claims they did not previously recognize or understand. Moreover, as a long history of civil rights test litigation demonstrates, lawyers are often the ones with the agenda: in order to pursue it in the courts (and comply with rules of standing) lawyers need first to find clients with cognizable injuries who can serve as the vehicle for articulating a complaint.

The problem with Professor Tarkington's approach is that once the interests of lawyers predominate, it is not obvious that the constitutional right of association comes into play. For it is one thing in a constitutional republic to confer protection upon a group of like-minded citizens gathering together in pursuit of common interests and quite another to protect the activities of a lawyer seeking a client to serve as the means to the lawyer's own ends. The latter scenario, having little to do with exporting Tocquevillian notions of association to the modern American state, requires a justification for the value of activist-lawyers within the constitutional order. That a client needs a lawyer does not lead to the conclusion that a lawyer needs the client—and that the relationship merits constitutional protection on this basis. Perhaps there is a relevant constitutional grounding for lawyer-activism but it is not easily constructed upon the foundations of associational freedom that have already been established and upon which Professor Tarkington seeks now to build. Professor Tarkington's lawyer-centered approach represents a claim for a new doctrine of associational freedom rather than a modest extension of existing rules.

As a new account, Professor Tarkington's approach faces a significant hurdle. It runs contrary to entrenched norms governing the role that lawyers play within our modern political and legal system. The legal profession is based on the idea (whether true in practice or not) that lawyers are mouthpieces for hire. They defend murderers and child molesters in criminal court, they represent polluters and discriminators in civil cases, they press for legal reforms that benefit the few over the many—all with the understanding that in so doing they are acting at the behest of the client rather than advocating their own causes. Lawyering, we lawyers tell ourselves and tell the world, is a profession not a cause. In selling her argument for a constitutional right, Professor Tarkington is in the difficult position of asking the legal profession to give up the norm of the disinterested advocate.

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<sup>4</sup> Tarkington, *supra* note 1, at 1086.

A tension internal to Professor Tarkington's lawyer-based account of associational freedom bears also noting. Invoking the fate of the Humanitarian Law Project, which was subjected to a criminal provision of the PATRIOT Act that barred providing "material support" to groups the government has designated as terrorist organizations,<sup>5</sup> Professor Tarkington tells courts to resist the temptation to infer criminal culpability on the part of a lawyer from the lawyer's association with an organization that includes culpable members. "If," Professor Tarkington writes, "attorneys can . . . be prohibited from associating with those involved in a political movement merely because a member or faction of that movement engages in illegal or violent conduct, then access to law or legal processes for the entire movement may be foreclosed."<sup>6</sup> In a world in which lawyers are just mouthpieces for their clients, that argument sounds generally correct. Yet in Professor Tarkington's account, recall, the lawyer is actually the principal player, the client the vehicle. If lawyers are to be understood in the way that Professor Tarkington presents them—as seeking out, encouraging, and engaging clients who serve the lawyer's own agenda—then it is arguably less objectionable to associate the lawyer also with the client's proven misdeeds. One cannot, in other words, have things both ways: "attorney speech and advocacy" protected by the Constitution on one hand,<sup>7</sup> and immunity on the ground that lawyers do not personally agree with the clients they represent<sup>8</sup> on the other.

Professor Tarkington's achievement is to show that associational freedom should encompass lawyering. With that, her article should have considerable impact on academic and judicial accounts of associational rights. In practice, however, the impact is likely to come in terms of protections for the ability of organizations to engage counsel—the right to client-attorney association—rather than, as in her focus, on a right that belongs to and is exercised by attorneys.

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<sup>5</sup> See *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2712 (2010).

<sup>6</sup> Tarkington, *supra* note 1, at 1107.

<sup>7</sup> *Id.* at 1090.

<sup>8</sup> See *id.* at 1115–16.