Political Studies Association | POLITICAL STUDIES

Article

Associations in Social Contract Theory: Toward a Pluralist Contractarianism

Political Studies
1–18

DOI: 10.1177/0032321719854303
journals.sagepub.com/home/psx
SAGE

Kevin Vallier

Abstract

Liberals can be distinguished from one another in a number of ways, including by what they regard as the greatest threats to liberty. According to Jacob T. Levy, "rationalist" liberals think that nonpolitical institutions are the chief threats to freedom and that democratic governance can free people from these private tyrannies. By contrast, "pluralist" liberals think that governments are the chief threats to liberty, and civil associations are a bulwark against encroaching state power. Levy has recently argued that the rationalist and pluralist strands of the liberal tradition cannot be combined into a single political theory. In this essay, I disagree. My strategy is to develop a version of contractarian political theory that treats associations as sources of legitimacy. This *pluralist contractarianism* solves two problems. It shows that the social contract theory can survive the pluralist critique. And since the social contract theory is often understood as rationalist liberalism *par excellence*, it shows that we can combine rationalist and pluralist insights into a single theory, contra Levy.

Keywords

freedom of association, liberalism, pluralism, contractarianism, public reason

Accepted: 10 May 2019

Liberals can be distinguished from one another in a number of ways, including by what they regard as the greatest threats to liberty. Some liberals think that nonpolitical institutions, like firms and families, are the chief threats to freedom; in contrast, democratic government can liberate persons from these private tyrannies. Other liberals claim that government is the chief threat to liberty; in contrast, nongovernmental institutions like civil associations can limit the threat of government overreach. Jacob T. Levy has recently dubbed these two strands of liberalism as "rationalist" and "pluralist" respectively. As he puts it:

Philosophy Department, Bowling Green State University, Bowling Green, OH, USA

Corresponding author:
Kevin Vallier, Philosophy Department, Bowling Green State University, Bowling Green, OH 43403, USA.
Email: kevinvallier@gmail.com

> On one side of this divide lies a liberalism I will call "pluralist"; skeptical of the central state and friendly toward local, customary, voluntary, or intermediate bodies, communities, and associations. On the other we see a liberalism I will call "rationalist": committed to intellectual progress, universalism, and equality before a unified law, opposed to arbitrary and irrational distinctions and inequalities, and determined to disrupt local tyrannies in religious and ethnic groups, closed associations, families, plantations, and the feudal countryside, and so on (Levy, 2015: 2).

It is hard to formulate a liberal political theory that is both rationalist and pluralist. Levy thinks it can't be done. But I want to try.

My strategy is to introduce a new kind of social contract theory that I call *pluralist contractarianism* and argue that it can combine rationalist and pluralist insights. The central distinguishing feature of pluralist contractarianism is that it allows nonstate organizations to function as sources of legitimacy. Contractarian agreement includes agreement on the norms governing political institutions, agreement on the norms governing civil associations, and agreement on norms for resolving disputes between them. Political and nonpolitical institutions *together* express the will and reason of the public. We thereby combine the pluralist insistence that there are multiple, and in many ways competing, sources of political legitimacy with the rationalist insistence that social disputes be resolved by the tribunal of the reason of the public (Muñiz-Fraticelli, 2014: 183).

Pluralist contractarianism, in my view, solves two related problems. First, since pluralist contractarianism is a variant of the social contract theory, we can answer the pluralist critique of the social contract theory *as such* as excessively rationalist. Second, since the social contract theory is often understood as rationalist liberalism *par excellence*, pluralist contractarianism shows that we can combine rationalist and pluralist insights into a single theory, contra Levy.

Pluralist contractarianism is a variant of the dominant contemporary branch of the social contract theory known as public reason liberalism, specifically one that understands public justification as an overlapping consensus of diverse reasons on common institutions and social rules (Rawls, 2005: liii). It is also distinct in insisting that public justification applies not merely to "constitutional essentials and matters of basic justice" or even merely coercive state law. Public justification also applies to the class of social norms that comprise what P. F. Strawson (1974: 29–49), Kurt Baier (1995: 195–224), Joseph Raz (2009: 41–43), and Gerald Gaus (2011: 2–13) have called a "social morality," a system of moral rules and associated moral demands in which persons hold each other responsible for violations of publicly recognized moral requirements.[1]

But pluralist contractarianism goes beyond social norm-directed public justification by understanding associational norms as a part of social morality. Thus, associations can be justified in a kind of state of nature, a *legal* state of nature, where the rules of a social morality, or *moral rules*[2] exist, but law and government have yet to form. This means that associations can be publicly justified independently of the state, its laws, and legislation. If associations can be so justified, then they can function as their own sources of legitimacy, and can even restrict the public justification of state power. For state power can only be publicly justified insofar as the state can perform important functions that associations cannot. Associations can pit their legitimacy against the legitimacy of the state, another pluralist insight.[3]

I will here assume that freedom of association is one of the most fundamental publicly justified basic rights. One can arrive at this result with different contract theories,

say those advanced by Rawls (1971), Gaus (2011), and David Gauthier (1986). I will not argue for the public justification of freedom of association here, save to say that persons will contract to respect each other's associational rights on the grounds that doing so is both rational and reciprocal for each person. People will want associational rights regardless of their comprehensive doctrines, worldviews, and so on when they choose associational rights through a suitably structured contractarian choice procedure. They will prefer to protect their pursuit of their own values from encroachment by others (Vallier, 2019: 206–207).

I will also assume that violations of social norms are not always "everyone's business," as Baier (1958: xviii-xix) and Gaus (2011: 224) have put it. Baier and Gaus understand the rules that comprise our social morality as ones that always or nearly always license indignation among those who observe an infraction of the rule, and resentment from those who were harmed or insulted by the infraction. Yet, there are many publicly recognized moral rules that not everyone has the standing to enforce. In the Catholic Church, for instance, only some people have the standing to insist that a member confess her sins or obey the directives of the church hierarchy. If an atheist insists that her Catholic friend confess, the atheist lacks the standing to do so even if her friend acknowledges that she should go to confession. In this case, the Catholic friend is liable to think that *the atheist* has violated a moral rule of minding her own business because she is not a Catholic.

Elsewhere, I have called rules that specify the standing to criticize and hold responsible "jurisdictional rules," publicly recognized moral rules that specify which moral violations are everyone's business, such as rules determining whether atheists have no authority to demand that their Catholic friends go to confession (Vallier, 2018). The rules protected by standing rules do not have to be justified to society as a whole; instead, associational rules only have to be *sub-publicly* justified to association members, whereas the standing rules protecting the unique standing of group members to hold other group members accountable must be justified to all.

From here, I proceed in eight parts. "Moral Associations" outlines the idea of a *moral association*, a complex of formal and informal moral rules aimed at uniting a group of persons around some project or common goal. "Civic Associations" and "Commercial Organizations" identify two types of moral associations—civic associations like churches, and commercial organizations like firms and unions. In "The Priority of Moral Associations," I explain the way in which moral rules comprising these institutions are sources of legitimacy and how they restrain state power. "Private Tyranny and Balkanization"—"Who Resolves Jurisdictional Disputes?" address four common concerns about robust freedom of association. In "Private Tyranny and Balkanization," I argue that my justification for freedom of association is not vulnerable to worries about associations forming private tyrannies that are beyond state control. I will also claim that my account of freedom of association will not usually produce associations that "balkanize" civil society into organizations that undermine well-functioning political institutions. In "Feminism and the Discrimination Objection," I argue that my account of freedom of association does not allow for excessively harmful discrimination. In "Who Resolves Jurisdictional Disputes?," I address the important question of who decides how certain jurisdictional disputes are resolved and whether adequate justifications for state intervention have been provided. Finally, "Pluralist Contractarianism" explains how pluralistic contractarianism achieves the aims of the essay.

Moral Associations

What I will call a *moral association* is a local unity of moral rules, and sometimes legal rules,[4] with two features. First, as Lon Fuller (1969: 6) has said of associations, a moral association's moral rules are organized to promote a common end, or a *commitment* shared by its members. Moral associations also include a *legal principle*, which "refers to the situation where an association is held together and enabled to function by formal rules of duty and entitlement" and these rules are moral in character. Most moral associations have express, formal rules of operation, but others are simpler, like families, whose moral rules are often tacit and unarticulated. But all moral associations have mechanisms for their own preservation; and these mechanisms typically involve the articulation and enforcement of internal rules.

Fuller is far from alone in his understanding of associations. The great British pluralist G. D. H. Cole (1920: 37) defines associations as:

> … any group of persons pursuing a common purpose or aggregation of purposes by a course of cooperative action extending beyond a single act, and, for this purpose, agreeing together upon certain methods and procedures and laying down, in however rudimentary a form, rules for common action.

So, like Fuller, Cole finds in associations two principles of organization—shared commitment and a legal principle. I will understand moral associations similarly.

Fuller (1969: 8) contends that while all associations have both shared commitment and a legal principle, the two properties "stand in a relation of polarity—they fight and reinforce each other at the same time." Associations have legal principles that facilitate its shared commitments, but in some cases its legal procedures may frustrate its shared commitment. Similarly, the shared commitments of associations might undermine the proper functioning of its internal procedures, just as it might sustain those procedures. Fuller argues that as associations grow larger, the legal principle tends to dominate; and as associations shrink, the shared commitment tends to dominate.

Controlling the moral rules of an association is usually the exclusive right of group members or some subset of group members. If a moral association violates moral rules to which all members of the public are subject, then non-members will have standing to criticize association members, but otherwise not. The business of controlling the moral rules of an association is again given exclusively to its members. Associations thereby form *jurisdictions* where decision-making is made in a decentralized to group members and away from all of society.

Associations have non-moral rules, such as those governing etiquette, decorum, a esthetics, and the like. But an association's moral rules mark it as an association, since moral rules specify the group's normative aims, its membership conditions, and decision-procedures that, if violated, generate the reactive attitudes of resentment and indignation in its members (Strawson, 1974).

Civic Associations

One important type of moral association is the civic association, which goes beyond familial bonds or the bonds of friendship. Civic associations take many forms: religious organizations, sports teams, universities, and colleges, charitable organizations and

service clubs, hospitals, media organizations, and neighborhood associations, or "any kind of formalized, non-governmental, human interaction" (Tamir, 1998: 216).

In civic associations, the legal principle is fairly well developed, especially in contrast to families. Civic associations typically have explicit shared commitments or aims. Christian churches aim to produce and disciple Christians, to confer the forgiveness of sins, and offer a path to eternal life. A university aspires to educate persons for professions and, in some cases, for citizenship. Importantly, membership in civic associations is typically voluntary; even associations who assign membership by birth typically allow adult members to exit the group. This does not mean that members can always choose the rules of the association, though they sometimes can.

Civic associations are distinguished from commercial organizations because they are typically nonprofits. While civic associations seek economic resources and provide economic benefits to their members, they seldom understand themselves primarily as profit-seekers. In fact, civic associations often strongly prohibit all profit-seeking activity in its name or by its officials. Similarly, simony laws, the prohibition on the sale of ecclesiastical offices and privileges, are recognized and enforced by basically all religious institutions.

Standing to criticize the inner workings of these organizations is typically restricted to members. For example, not everyone has a stake in the internal behavior of the Catholic Church, so non-Catholics typically lack standing to criticize matters of internal church decision. We do not generally think it is the business of society to determine whether the Catholic Church should ordain female priests or allow divorce in more circumstances than it does now.[5]

Civic associations are now thought of as institutions that constitute "civil society" or an arena "within which voluntary associative relations are dominant" (Warren, 2001: 57). A literature in political theory focuses on characterizing the relationship between civil society and the state, and a variety of relations have been described, such as the idea of civil society "apart from" the state, "against" the state, "in support of" the state, and "beyond" the state (Chambers and Kopstein, 2006: 364).

The idea of civil society arose gradually, starting in the seventeenth century, as a contrast to both the nation-state and the growing commercial order (Levy, 2015: 19). For most of human history, social institutions could not be divided into these neat categories because the functions of government were spread across these institutions. Churches had coercively enforced legal systems; the medieval Catholic Church was no mere religious organization.

The fact that civil society as a social domain separate from the state is relatively historically new might suggest that civic associations cannot exist without a formal public legal system or legislative body. But this is not so. People still form churches, schools, hospitals, and professional organizations in the absence of public legal systems and legislators. These institutions are less stable and effective in such environments, but they form under many conditions, and so are fundamental to social order in a way that modern nation-states are not (Vallier, 2019: 132). Critically, many civic associations *did* exist prior to the formation of modern nation-states, such as the medieval period in Europe. Social and religious organizations have existed for thousands of years.

Given that civic associations can exist in the absence of many forms of law and politics, they play a foundational role in establishing a stable social order. Normatively speaking, this means that they can constrain the reach of state power insofar as their constituent

moral rules are sub-publicly justified to their members. If a civic association can adequately perform various important social functions in ways that can be justified *to its members*, then on my account of public justification, the state should not interfere unless the organization imposes some harm or restriction on non-members.[6] More precisely, if civic associations exercise their key social functions in ways that can be publicly justified to their members, that is, there is an adequate public justification to its members, then the state is not publicly justified in interfering.

It is for this reason that the state has no role in determining the curriculum of universities, but does have a role in regulating how universities handle cases of sexual assault. In the former, the state has no particular expertise over the university and the harms of poor curricula are modest. But in handling cases of sexual assault, universities try too hard to preserve their own interests. After all, universities have more at stake than states in resolving cases in unfair ways. Furthermore, the costs of getting incorrect judgments are enormous, for victims or the falsely accused. So the latitude afforded to civic associations is by no means absolute. When associations cannot perform a critical social function to an adequate degree, a public legal system can permissibly intervene if it can clearly execute that function.

Commercial Organizations

We now turn to for-profit institutions like the firm, and associations that aim to ensure a certain distribution of profit, like unions and professional bodies. Their common goal is typically to maximize the economic and political resources of their members. Seana Shiffrin (2005: 877) identifies two main features that distinguish commercial associations from other kinds of association: (1) commercial organizations are centrally concerned with "access to material resources and mechanisms of power," and commercial associations (2) "have a fairly focused singular purpose whose pursuit is largely guided by [the] aim of profitable operation." James Nelson argues similarly that within what he calls "organizations" people "do not integrate collective goals and values with the core aspects of their identities, and they perform their tasks largely motivated by explicit or implicit threats of coercion or offers of inducements" (Nelson, 2013: 1581–1582, 2015: 1617). Commercial associations resemble Nelson's organizations, while civic associations resemble Nelson's description of "collective communities" which are "constructed out of a cluster of identification relationships" where "individual members view their affiliation with the collective as a central aspect of their identities." So commercial organizations are also distinguished by a lack of collective community among their members. This is not always true, since a small business owner might deeply identify with a cause her business promotes, or members of a union could value their membership to realize their political ideology. But the paradigm commercial organizations are importantly different from civic associations in these respects.

It is harder to defend institutional autonomy for commercial organizations than civic associations. The reasons for this are complex. While some commercial organizations will exist in a legal state of nature, that is, in the absence of a public legal system, they will tend to be small businesses or sole proprietorships or professional organizations like farmers, craftsmen, lawyers, and doctors. These jobs are sufficiently essential to human society that we can expect them to exist in the absence of a public legal system.[7] But large commercial organizations depend extensively on legal rules that would not exist without *norm-creating* institutions that go beyond custom and moral rules, such as legislatures. For example, large commercial organizations depend on complex credit relations and

financial instruments that depend on public legal rules for their existence. So commercial organizations are more dependent on legal rules than families and civic associations.

Nelson (2013: 1581) argues that businesses are fairly unique in using threats and material incentives, which makes their activities subject to more rigorous scrutiny. Since bosses typically lead and control commercial organizations, and they recognize that workers depend upon jobs to survive, bosses can exercise more ostracism and control over their members that leaders of civic associations. Second, civic associations can also have a "conscience" in ways that commercial organizations frequently do not (Nelson, 2013: 1583). As Nelson says, "For-profit businesses are not generally bound up with deep ties of identity and attachment" whereas nonprofit organizations tend to be "more hospitable to individual identification" such that associational claims should be stronger in the latter case than the former (Nelson, 2015: 511).

For these reasons, a publicly justified polity, one whose constituent moral and legal rules are justified to all, provides fewer protections for commercial organizations than civic associations. Social morality poses less of a barrier to legal intervention and the reasons for interference are generally stronger. This does not mean that the state may do what it wants. Closely held firms and many small businesses have practices and aims that make them more like civic associations (Tomasi, 2012: 66). These businesses, therefore, are entitled to more protection because their operation is more tightly tied to the conscience and life projects of their owners and operators. The same is true of many trade unions. So the mere fact that a group pursues profit is not enough to undermine its protections against state predation and control.

Protection is especially weak for *publicly traded* firms, since there is no real case that such organizations have anything like a conscience, even if members exhibit some sense of social responsibility. This is because the leadership, operation, and ownership of the firm are open to the public for a price. Ownership can easily change hands; different people may own the firm tomorrow than owned it today.

Unions and professional organizations are harder cases (White, 1998). They are not exactly for-profit organizations, even though they attempt to increase the income of their members and engage in quality control. We are typically less friendly to interventions into these organizations, which I suspect is because these groups are seen as engaging in primarily *defensive* activities or have non-financial motives in addition to financial ones. Unions are seen as protecting their members from the greater economic power of employers, whereas professional organizations like the American Medical Association (AMA) are seen as motivated by concern for patients rather than their own bottom line.[8] This is not always true, however, and to the extent it is false, these institutions may be liable to legal interference.

Another reason for providing unions and professional organizations with strong protections is that many are ancient and survive in somewhat premodern forms, like masonic guilds. So unlike large, publicly traded commercial organizations, we can expect these commercial organizations to exist in the legal state of nature. That means public reason supports broad protections for freedom of association for these groups. Focusing on unions, we can publicly justify protections for workers to unionize in whatever industry they like, in whatever way they like, so long as the contractual relations established do not harm third parties. It is possible that some firms will prod workers into signing contracts that relinquish their right to unionize. But state enforcement of these contracts might not be publicly justified, especially if the contracts are signed under duress. That said, unions have no right to use state power or their own social power to destroy

competitor associations. If a group of doctors wants to start an alternative to the AMA, their right to freedom of association protects them from legal retaliation by the state on behalf of the AMA. And unions have no right to coercive protections from competition by firms within the same nation.

Here I have ignored political organizations—groups dedicated to changing the behavior of government and the use of state coercion. Of course, these organizations would not exist in the absence of legislatures and political bodies generally, since there would be no point in having them. But the mere fact that the institutions would not exist in those conditions does not mean they merit no protections.

The Priority of Moral Associations

Gaus (2011: 456) argues that social morality has priority over political processes—law is *not* the preeminent response to moral disagreement. Legal and political procedures are not the only way in which we can solve problems that arise in the legal state of nature, since we can appeal to our capacity to create, sustain, and alter moral rules. Law has various advantages, but if the moral rules comprising a society are publicly justified, then legal and political procedures should be limited, if for no other reason than that the coercion might impose unjustified rules. If we already live under justified moral and private legal rules, "we should be most reluctant to modify it through the political process" (Gaus, 2011: 460). Thus, if our moral rules are publicly justified and adequately perform their social functions, coercion cannot be publicly justified.

My account of the priority of social morality is stronger than Gaus's because I aim to establish the priority of moral associations. The legal state of nature contains many of these institutions, in particular families, civic associations, and some commercial organizations. If these institutions can perform key social functions, they must be granted autonomy to act as the state would in their place. If civic associations can better organize charitable activities for impoverished members of society, the state should not redistribute wealth that would crowd out their efforts. If private firms succeed in generally producing adequate levels of food to reduce hunger, the government should avoid interfering in ways that would undermine that capacity. More strongly, given that moral associations often contain formal legal systems, such as universities and churches, if these associations can control and maintain private legal rules with adequate efficiency and justice, then the state's legal system should not displace those associational legal systems.

So I agree with Gaus that moral rules have priority, but when we see that these moral rules can be organized into moral associations, the priority of social morality is even more resistant to state intervention. On the best model of public justification, civil society has priority, such that groups have a strong right of freedom of association against the state.

In this way, my view somewhat resembles Paul Hirst's (1997) associationalism which holds that "the organization of social affairs should as far as possible be transferred from the state to voluntary and democratically self-governing associations" (Hirst, 1997: 32).[9] Although, in contrast to Hirst, I do not insist that associations be democratic, just sub-publicly justified to their members. I also resist Hirst's aim of "recruiting associations as partners in governance," because, as Victor Muñiz-Fraticelli (2014: 92) has argued, we can easily miss the "distinct and perhaps oppositional nature" of associations.

The priority of moral associations must be stressed against philosophers who defend more extensive states on the grounds that nation-states have priority over other institutions. For instance, Jack Knight and James Johnson (2011) have defended the priority of

democracy over the market as essential for performing "crucial second-order tasks involves in the ongoing process of selecting, implementing, and maintaining effective institutional arrangements" such as institutions that coordinate ongoing interactions (Knight and Johnson, 2011: 19). Market order cannot have priority over democracy, because only democracies have the right amount of "reflexivity" in determining "which institutions arrangements to rely on across different domains" (Knight and Johnson, 2011: 23). In particular, "markets do not facilitate the types of communication necessary for the tasks of institutional assessment and monitoring" (Knight and Johnson, 2011: 170). Only democracy, then, can set the boundaries and forms of institutions. Cécile Laborde (2017: 163–168) has recently offered a similar argument that democratic states are sovereign over civil associations when "citizens reasonably disagree about where jurisdictional boundaries are drawn" between civil associations and the rest of social life. Both Laborde and Knight and Johnson thereby reject the priority of moral associations in favor the priority of the democratic state.

These theorists make an important mistake that is often hard to see. Indeed, moral associations will disagree about their jurisdictional boundaries, and we will want democratic institutions to sometimes settle those disputes. And in some cases, democratic intervention will be superior to allowing civil associations to decide these questions themselves. But this does not mean that the democratic nation-state has authority over moral associations. Rather, democratic states are only licensed to restrict associational freedom, both in civil society and, in some cases, the market, when the moral order consistently fails to generate publicly justified moral rules and imposes or retains reasonably rejected rules. All Knight, Johnson, and Laborde establish is that we sometimes need democracy to intervene in associational life, but if my approach to public justification is correct, this does not establish the general priority of the democratic state.

One reason that democratic intervention will be limited is that we often underestimate the resourcefulness of persons in the moral order outside the state and even the law. In many cases we resolve disputes in the workplace or in church through deliberation and discussion or social punishment. We should not leap to embrace state power unless we are sure that state intervention will improve matters rather than make them worse.

I should also note that states cannot always or even usually intervene to change social norms when people have internalized those norms as morally appropriate, and so often the only feasible institutional means of settling the boundaries of associations will *have* to be left to civil society and other parts of the moral order (Barrett and Gaus, 2018).

Private Tyranny and Balkanization

We must now address two objections to my defense of freedom of association. Here is the first:

> The *Private Tyranny* objection: without more limits on freedom of association, associations will unjustifiably limit the liberties of their members.

We can elaborate the Private Tyranny objection as holding that associations should be structured much like liberal democratic government in order to avoid the inequality and oppression found within hierarchical organizations. John Stuart Mill, despite writing over a century and a half ago, provides an excellent characterization of this concern on the grounds that state tyranny can in some respects be much less worrisome than local

associations. Mill: "Obedience to a distant monarch is liberty itself compared with the dominion of the lord of the neighboring castle" (Mill, 1963: 416). As Levy (2015) notes, Mill was especially concerned about "the enforcement of … soul-enslaving, individuality-stunting norms through the oppressive combination of public opinion and local personalized power" (Levy, 2015: 218).[10] Today, the tendency to worry about private tyranny manifests itself as an insistence that we democratize associations to prevent private tyranny; Nancy Rosenblum (1998: 46) calls this analogy between governmental and private tyranny the "congruence approach" to civil society.

Chandran Kukathas (2007: 107) articulates the Private Tyranny objection as the claim that "freedom of association, underpinned by freedom of exit, does not make for a free society because, in itself, it says nothing about the cost of exit." Kukathas (2007: 93–103) has argued, in response, that freedom of exit from oppressive associations is sufficient to counteract their tyrannical effects. One might answer that a citizen is not free to exit unless she can exit with relatively limited costs. In reply, Kukathas (2007: 109) insists that high costs do not undermine the fact that persons freely consent to the organization; people are still free even if they can barely afford to exit the relevant, potentially oppressive, association. Kukathas's response is inadequate because we can easily imagine an unfree society of free associations, given that strong, potentially corrupt hierarchies can direct each person's life.

Fortunately, my account of public reason has more resources to respond to the Private Tyranny objection. Moral associations only have authority over their members when the moral rules imposed upon members are publicly justified. Thus, some uses of associational authority are illicit if they are based on rules that are not justified to their members. Consequently, there is moral ground for the member to disobey the oppressive rule, and if powerful members of the association excessively punish those who justifiably disobey, there may be a role for the state to interfere with the association to protect the member. If a religious authority abuses a parishioner's child and tries to discipline the parishioner for speaking out, the religious authority has violated the rights of the parishioner, not to mention the child. If the parishioner is powerless to seek justice for her child, then the state is not only permitted, but required to interfere to protect the basic rights of parishioner and child.

My account of public justification nonetheless faces hard cases. Civic associations and commercial organizations are often organized as strict hierarchies and liberals have often argued that these hierarchies harm subordinates; perhaps my approach has a similar problem. However, if the information demonstrating that these hierarchies are harmful is epistemically accessible to moderately idealized members of the public, then the information can count toward a decisive objection to those social arrangements. Furthermore, people voluntarily join hierarchical organizations all the time. And in many cases, voluntary submission is a good proxy for public justification. Choice provides powerful evidence that the agreed-upon arrangement is publicly justified for the person that makes the agreement.

Voluntary agreement can only justify so much, however. Government has no business enforcing contracts that secure extremely harmful relationships, like slave contracts. It plainly should not support or protect associations that attempt to control persons who have freely exited the organizations in question. And government should be concerned that some putatively voluntary agreements are not voluntary due to unequal bargaining power between the parties to the association. In this way, I acknowledge that private businesses can operate as harmful, private tyrannies that dominate their employees, and my

account of public justification requires that, in the absence of a moral solution, that law and policy be used to eliminate or constrain those forms of domination and control.

I now turn to the Balkanization objection, which holds that extensive freedom of association rights will be used to undermine social and political institutions:

> The *Balkanization* objection: without more limits on freedom of association, associations will undermine social trust and political stability by producing inwardly focused citizens.

Rosenblum (1998: 102) advances this objection when she argues, "the critical dilemma for liberal democracy in the United States today is not exclusion from restricted membership groups but isolation." If we give associations too many rights, and romanticize their role in preserving a free society against the state, then "freedom of association threatens to balkanize public life" (Rosenblum (1998: 46). There are legitimate worries about isolated associations, especially groups that advocate hatred and bigotry (Chambers and Kopstein, 2001: 839). And there is evidence that institutions that isolate themselves and their members undermine social trust; as Pamela Paxton (2007: 47) notes, "having more isolated associations decreases trust."

The public reason liberal must show that the social order apart from the state legal order can solve the threats posted by isolated associations. In many cases, the groups are sufficiently isolated that they will have little to no effect on a publicly justified polity, in which case their rights to association should be left unrestricted. But in cases where associations garner enough power and influence to undermine the effective functioning of political and economic institutions, we must appeal to law and legislation. As I have argued, the moral order—the order of moral rules—has priority, and so we should attempt to restrain the influence and power of isolated associations through ostracism and criticism. But if those mechanisms are unsuccessful, then we may appeal to law and legislation to restrain these organizations, starting with the least coercive restraints available. I cannot say how often legal intervention will be justified, but it is fair to say that, given that legal options are on the table, we need not worry about excessive balkanization created by isolated associations. When isolated associations start to undermine publicly recognized and justified moral rules that apply to all, there are plenty of social mechanisms that can legitimately prevent them from doing so.

Feminism and the Discrimination Objection

I turn now to concerns that my account of freedom of association allows for too much private discrimination, including against women. I formulate the objection as follows:

> The *Discrimination* objection: without more limits on freedom of association, associations will discriminate against marginalized non-members.

The Discrimination objection holds that freedom of association unjustifiably allows groups to exclude members on morally unacceptable bases, such as race, gender, religion, and the like, or to decline to provide services to groups with particular characteristics. And doesn't my defense of freedom of association commit me to endorsing a right to discriminate? Before I answer, note that discrimination frequently involves a preparedness either to use coercion or to insist that the police use coercion on the discriminator's

behalf. Jim Crow laws were coercive and the coercion was obviously undercut or overridden by the reasons of Black Americans.

Furthermore, if moral rules disadvantage the oppressed group, and the practice of the commercial organizations reinforces that norm, then the institution is contributing to a moral rule that cannot be publicly justified to the oppressed group. If Reba lives in a racist society, then if she wishes to prevent racial minorities from coming into her barbershop, then her right of freedom of association does not apply. But if Reba wanted to prevent hipsters from entering her barbershop, then due to the lack of bigotry against hipsters, Reba has the right to discriminate. A commercial institution might also be entitled to discriminate if her services are non-essential and if marginalized groups have lots of alternative options.[11]

Many feminists may still think that I have provided too few resources for women to defend themselves against discrimination and control by men. For this reason, I would like to address Clare Chambers's (2008: 21) challenge to political liberal views on the grounds that they make a fetish of choice, and that feminist values suffer if what people freely choose is treated as a "normative transformer," making relations of domination seem morally permissible. Chambers stresses throughout her work that social norms can be oppressive and so a feminist state should use the law to end those norms, even if the women subject to those norms freely accept some of them (Chambers, 2008: 78–79):

> … formal freedom of exit is insufficient to excuse a culture or religious group's imposition of unequal norms. Just as the state properly intervenes in discriminatory employment practices, so too it ought to intervene in discriminatory cultural or religious norms, even where those norms are not enshrined in state law, and even where members are "free" to leave groups. (Chambers, 2008: 140)

Unless the state interferes in this way, "the autonomy and fair equality of opportunity that liberals prize cannot be realized" (Chambers, 2008: 157). The reason for this is that preferences are often "socially formed" such that protecting autonomy will require that states interfere with private practices because free choice under such conditions is not really free because of the influence of social norms (Chambers, 2008: 171). Chambers envisions an "equality tribunal" that would review cases of social unfreedom and domination into social norms, and try to make sense of when intervention is appropriate.

In reply, I agree with recent work by Lori Watson and Christie Hartley (2018: chapter 8) that public reason liberals can accommodate many of Chambers's complaints. Public reasoning will address complaints about a loss of autonomy or the reduction of equality of opportunity and help determine which laws and policies are publicly justified. I think this is even true on the heterodox convergence approach to public justification (Gaus, 2011; Vallier, 2014; Vallier, 2019) since, as I have noted, there is a place for law to interfere even with voluntarily chosen social norms if some persons have sufficient reason to reject the authority of these norms. For they may comply simply from social pressure, and not because they accept and have internalized the norm based on their own reasoning.

We can now anticipate several further objections. First, Chambers thus far lacks an account of social norms along the lines provided by Cristina Bicchieri (2006) and others. With such an account in hand, we can see fairly easily how social norms, and changes in social norms, can liberate women when conjoined with a requirement of public justification. When social norms are publicly justified, they treat all with respect and sustain trust

among reflective persons. Thus, religious social norms can permissibly assign leadership positions to men alone if they are publicly justified for the women in subordinate positions; in fact, because these norms are publicly justified, they may even count as an extension of the freedom of these women of faith. However, if the norms are not so justified, and so illicitly restrict the freedom of women, there is reason for the law to intervene.

That said, I think Chambers is too quick to embrace legal solutions to problems raised by sexist moral orders. Legal systems can intervene in the wrong ways and can threaten feminist values if sexist politicians control the state. Insofar as Chambers wants a legal body, like an equality tribunal, to interfere with freedom of association, she puts feminist associations at special risk. Without the freedom afforded to universities, for instance, they could not have served as incubators for feminist ideas. Yes, the tribunal might successful establish equality within, say, religious organizations, but religious organizations will not trust their government to treat them fairly and will feel politically emboldened to capture the governmental organizations that interfere with them to serve their own sectarian ends. Chambers's work thus pays too little attention to the possibility of government failure in promoting feminist aims. Second, legal systems often simply cannot stop oppressive norms that are deeply entrenched (Barrett and Gaus, 2018). Oppressive norms can become entrenched if the empirical and normative expectations that constitute a social norm are in place. So, in some cases, legal interference can backfire.

Readers are bound to object to my argument as follows. Modern democratic states have tended to protect women from oppression and discrimination in the private sphere, and so democratic citizens should want states to protect women from private organizations. We can't simply throw up our hands after claiming that states sometimes make mistakes. We must instead look at the record of democratic states in protecting women's rights over the past 50 years. It is not a record of disaster. In fact, many feminists are bound to say that things have gone fairly well on balance.

But notice that, on my view, if it is obvious that the democratic state has tended to protect women from oppression and discrimination, this will be clear to idealized members of the public. In that case, my model of public justification will permit, if not require, that democratic states act to defend women's interests. As long as members of the public at the right level of idealization can see that the state is better for women, then that will yield defeaters for strong associational norms, and permit the state to use policy to limit the rights of associations. The nice feature of pluralist *contractarianism* as opposed to more familiar pluralistic views, is that the ideal of public justification is central, and the ideal of public justification gives both the theorist and the activist more resources to legitimately pursue protections for women. The Discrimination objection therefore does not undermine my defense of freedom of association.

Who Resolves Jurisdictional Disputes?

Some readers will want to know *who decides* whether certain conditions for associational justification have been met. Who decides to whom jurisdictional rules must be justified? Who decides whether a social norm is adequately performing its social function? And who decides whether a public justification for moral or legal rules has been achieved? In my diverse and pluralistic account of public justification, associations contest jurisdictional boundaries with the state and with each other; there is no single sovereign to settle jurisdictional questions. In light of reasonable pluralism, contestation will be the normal state of affairs, which can lead to social strife and conflict if no one institution is supreme.

In fact, boundary controversies *have* led to these disputes, as we can see with controversies over how to draw the boundaries between the jurisdictions of universities and churches vis-à-vis the modern democratic state. One might be tempted to follow Knight, Johnson, and Laborde by claiming that democratic states must be ultimately sovereign in settling these conflicts. Again, perhaps only a single, overarching sovereign institution can effectively resolve these disputes.

To further illustrate the problem, consider that the boundary between members of an association and non-members is often porous. For instance, universities have several types of members—faculty, staff, and students. Faculty and staff are core members of the institution, but students often, though not always, seem to be something in between members and non-members. They have no formal decision-making power within the university besides largely toothless student governments, and they are typically not employed or paid by the university. Who, then, has jurisdiction over students? How do we determine if university norms are treating them in a reasonable way? Who decides when a university is no longer competent to address and discourage certain kinds of behavior, and when the state should intervene?

Answering these questions is difficult. In practice, conflicts will often be settled by whomever has the most social and political power. In decades past, in US states where the Catholic Church was politically influential, Catholic leaders had more discretion in determining how to discipline priests for a variety of behaviors. But today, with the waning influence of the Catholic Church, states now have the social power to intervene. From the perspective of public reason, settling these issues through power dynamics is worrisome, since it looks like the conflicts will be settled as a *modus vivendi* rather than by the group normatively empowered by the ideal of public justification.

However, one difference between the conception of public justification I appeal to and mainstream public reason views is that pluralist contractarians appeal to forms of idealization and conceptions of justificatory reasons that allow for multiple moral and legal rules to be publicly justified.[12] Pluralist contractarianism then allows for path-dependent, non-rational factors like evolutionary forces to help people coordinate on a particular rule drawn from a set of justifiable rules. This makes the theory somewhat more flexible in achieving public justification in non-ideal conditions where fierce norm contestation is common, since there are potentially many justified equilibria that can resolve disputes in a justified fashion. Thus, a plausible pluralist complaint about public reason views, namely, that public reason liberalism unrealistically prohibits power relations in determining the conditions of civic peace, has less bite against the approach to public justification I adopt in this essay.

Another way to resolve jurisdictional disputes is through deliberation and debate in the public sphere. Debates about, say, how universities define and promote diversity on campus are a perennial hot topic in the American public square. Perhaps it is naïve to hope that public deliberation will help us arrive at publicly justified decisions, but deliberation may stand a better chance of achieving public justification than simple social and political conquest. At the very least, deliberation can improve upon mere evolutionary forces.

Perhaps the reader finds these answers unsatisfactory. If so, consider that jurisdictional disputes are not unique to pluralistic contractarianism; they arise for any position that draws a boundary between states and associations. Even Knight, Johnson, and Laborde must have someone determine whether the democratic state has intervened appropriately. And, in their case, the democratic state is so much more powerful than associations that we should want non-state actors to help resolve jurisdictional disputes; for powerful

states often resolve disputes in self-interested ways. What is more, as Jean Hampton (1986: 189–207) pointed out decades ago, even Hobbesian states face jurisdictional dilemmas, since even Hobbes acknowledges that sovereigns cannot command subjects to kill themselves, and so, in the end, subjects and sovereigns have jurisdictional disputes. Again, as long as we think the state should face some limits in interfering with individuals and nonstate organizations, we must answer questions about who decides how to resolve disputes and who gets to make that determination.

Finally, I think pluralistic contractarianism provides a more attractive answer to jurisdictional controversies than more centralist and monistic views. Pluralistic contractarianism allows for the formation of multiple, competing sources of power, rather than deferring to a powerful central state. The resulting process of contestation may well yield more publicly justified moral and legal rules than a more centralized resolution mechanism. It is not obvious that living with constant contestation is worse than acquiescing in more absolutist arrangements.

Pluralist Contractarianism

My account of association and public justification blurs the contrast between Levy's rationalist and pluralist liberalisms, yielding a pluralist contractarianism that has some of the attractive features of both rationalist and pluralist positions. Having placed associations at the heart of the moral order, I can now draw some general lessons about how to reconceive the contractarian project in light of the centrality of associational life, and how to resolve a central tension in the liberal tradition.

Rationalist liberalism tends to be suspicious of associations because they are potential centers of private tyranny.[13] According to Levy, rationalist liberals understand associations as mere appendages to the contrast between the individual and government. Even Locke's conception of society "functions in his argument to choose a government, and, if needed, to reclaim the authority to do so. It is unitary and political. It is not pluralistic and extra-political, as we today think of civil society as being" (Levy, 2015: 19). For the social contract liberal, associations are annoying barriers to answering important philosophical questions about the relationship between the individual and government. Pluralist liberalism, on the other hand, sees associations as sources of freedom, for on the pluralist view, associations function as "intermediate" institutions that usefully sit between the interaction between the individual and the state. Levy thinks that pluralist liberals have three general insights:

1. Social orders can emerge and survive pluralistically, making effective use of localized knowledge to evolve local norms that are locally functional (Levy, 2015: 39).
2. Law can emerge pluralistically, whether as the internal norms of such groups or as the norms that regulate relations among them.
3. Such orders are normatively attractive: perhaps they are absolutely attractive, because they are the sites for our pursuits of ethical conceptions of the good and substantive life plans thicker than the formal rules of justice, perhaps they are attractive relative to the [moral] or legal orders enacted by deliberate state planning.

One may be tempted, as Levy is, to think that the social contract tradition cannot take on these insights comfortably. But I think my version of public reason liberalism can accommodate these insights within what might otherwise appear to be a rationalist liberal

framework. I acknowledge that social orders can emerge and survive pluralistically by making use of local knowledge and social evolution. In this way, I draw on the evolutionary contractarianism of FA Hayek (1978: 15, 24, 28–29), Loren Lomasky (1987: 79–83), Brian Skyrms (1996), and Gaus (2011: 409–446).[14] I also allow that law can emerge not merely from the state and its legislature, but from common law institutions outside of the state. And third, I have argued that these orders are normatively attractive from a contractarian perspective. Muñiz-Fraticelli emphasizes that pluralism acknowledges that groups have authority over their members that "imposes an external … limit to the authority of the state" (Muñiz-Fraticelli, 2014: 178). My view takes on this insight as well.

Levy (2015: 3) claims that "there is no systematic way to combine all of the virtues and none of the vices of the two [rationalist and pluralist] mindsets, and no secure middle way that would allow us to know for sure which are virtues and which are vices." And again, "a fully liberal theory of freedom cannot do without the insights of either rationalism or pluralism, and yet these are probably impossible to fully reconcile" (Levy, 2015: 253). I do not claim that we can combine all the insights of rationalist and pluralism liberalisms in one theory, nor do I claim that we can always know when the pluralist or the rationalist is correct in criticizing overreach by states or by associations. But we can go a long way toward integrating rationalist and pluralist insights into a new kind of social contract theory: pluralist contractarianism. And pluralist contractarianism can save the social contract tradition, and even the liberal tradition itself, from a powerful challenge.

Funding

The author(s) received no financial support for the research, authorship, and/or publication of this article.

Notes

1. Two other differences bear mentioning. The approach to public justification that I deploy also differs in the *subject* of public justification and the *currency* of public justification. First, mainstream public reason liberals say that the subjects of justification are heavily idealized citizens, or entirely hypothetical members of a well-ordered society; here I assume that we publicly justify to moderately idealized versions of real people. Second, mainstream public reason liberals say that we must only appeal to public reasons in order to achieve public justification, where public reasons are understood as shared, shareable, or accessible reasons; I allow private, comprehensive reasons to figure into public justifications. See Vallier (2014: chapters 4 and 5).
2. I will use the terms "moral rules" and "social norms" interchangeably, following Vallier (2019: 35).
3. One might object that pluralist contractarianism is quite different from traditional social contract theory because it appeals to public justification rather than consent, and it justifies moral rules and norms rather than nation-states. However, one can make a historical case that public reason liberalism is a variant of the social contract theory. The prime reason for this is that the idea of public justification is a way of refining various conceptions of consent—express, tacit, and hypothetical. As is well known, social contract theorists appeal to forms of consent other than express consent, and by the time we reach Rousseau, appealing to hypothetical consent becomes more common. But hypothetical consent is merely hypothetical, as many have said, and so it is unclear how much normative weight non-actual consent achieves. The idea of public justification explains the normativity of hypothetical consent; it is the normativity of each person's internal accessible practical reasons, the considerations that she can see, on reflection, as favoring allegiance to political arrangements. Second, some recent work makes the case that the great social contract theorists have accounts of public reason, an interpretation I follow, but cannot defend here. See Turner and Gaus (2018).
4. I use the term "legal rules" interchangeably with "law" which can be understood in an informal sense for our purposes, as long as the private law of associations is distinguished from state legislation.
5. Though some disagree; Cordelli (2017).
6. Unless imposing these restrictions is the only way or the best way for the state to ensure that those functions are performed for everyone.

7. Lawyers would therefore be concerned with resolving legal disputes among private parties according to associational, private law.
8. Blevins (1995) argues that this is not a plausible model of the motives of the historical American Medical Association (AMA).
9. I suspect in many cases, the only decision rules that can be justified to association members are democratic in nature.
10. I do not think Mill ignored the value of local associations, just that he clearly articulated the "rationalist" worry about private tyranny. Levy defends this position later in the chapter.
11. Importantly, this is not the legal default for businesses, which are presumed to be obligated to serve all customers, if they are members of a protected class.
12. See note 6.
13. Levy excludes commercial organizations from his understanding of associations.
14. See Sugden (1993) for an analysis of Hayek as an evolutionary contractarian.

ORCID iD

Kevin Vallier https://orcid.org/0000-0001-9407-6716

References

Baier K (1958) *The Moral Point of View: A Rational Basis of Ethics*. Ithaca, NY: Cornell University Press.
Baier K (1995) *The Rational and the Moral Order: The Social Roots of Reason and Morality*. Peru, Illinois: Open Court Publishing Company.
Barrett J and Gaus G (2018) *Laws, Norms, and Public Justification: The Limits of Law as an Instrument of Social Reform*. Tucson, AZ: Philosophy, University of Arizona.
Bicchieri C (2006) *The Grammar of Society*. New York: Cambridge University Press.
Blevins S (1995) The Medical Monopoly: Protecting Consumers or Limiting Competition? *Policy Analysis* 246: 1–36.
Chambers C (2008) *Sex, Culture, and Justice: The Limits of Choice*. University Park, PA: The Pennsylvania State University Press.
Chambers S and Kopstein J (2001) Bad Civil Society. *Political Theory* 29(6): 837–865.
Chambers S and Kopstein J (2006) Civil Society and the State. In: Dryzek J, Honig B and Phillips A (eds) *The Oxford Handbook of Political Theory*. New York: Oxford University Press, pp.363–381.
Cole GDH (1920) *Social Theory*. New York: Frederick A. Stokes.
Cordelli C (2017) Democratizing Organized Religion. *Journal of Politics* 79(2): 576–590.
Fuller L (1969) Two Principles of Association. In: Chapman J and Pennock JR (eds) *Nomos XI: Voluntary Associations*. New York: Atherton Press, pp. 3–23.
Gaus G (2011) *The Order of Public Reason*. New York: Cambridge University Press.
Gauthier D (1986) *Morals by Agreement*. New York: Oxford University Press.
Hampton J (1986) *Hobbes and the Social Contract*. New York: Cambridge University Press.
Hayek FA (1978) *Law, Legislation, and Liberty, Vol. 2: the Mirage of Social Justice*. Chicago, IL: University of Chicago Press.
Hirst P (1997) *From Statism to Pluralism*. London: UCL Press.
Knight J and Johnson J (2011) *The Priority of Democracy: Political Consequences of Pragmatism*. Princeton, NJ: Princeton University Press.
Kukathas C (2007) *The Liberal Archipelago*. New York: Oxford University Press.
Laborde C (2017) *Liberalism's Religion*. Cambridge, MA: Harvard University Press.
Levy J (2015) *Rationalism, Pluralism, and Freedom*. New York: Oxford University Press.
Lomasky L (1987) *Persons, Rights, and the Moral Community*. New York: Oxford University Press.
Mill JS (1963) *Collected Works of John Stuart Mill* (ed. JM Robson), Vol. 21. Toronto, ON, Canada: University of Toronto Press.
Muñiz-Fraticelli V (2014) *The Structure of Pluralism*. New York: Oxford University Press.
Nelson J (2013) Conscience, Incorporated. *Michigan State Law Review* 5: 1565–1620.
Nelson J (2015) The Freedom of Business Association. *Columbia Law Review* 115(2): 461–513.
Paxton P (2007) Association Memberships and Generalized Trust: A Multilevel Model across 31 Countries. *Social Forces* 86(1): 47–76.
Rawls J (1971) *A Theory of Justice*. New York: Oxford University Press.
Rawls J (2005) *Political Liberalism*. New York, Columbia University Press.

Raz J (2009) *The Authority of Law: Essays on Law and Morality*. New York: Oxford University Press.
Rosenblum N (1998) *Membership and Morals*. Princeton, NJ: Princeton University Press.
Shiffrin S (2005) What is Really Wrong with Compelled Association? *Northwestern University Law Review* 99(2): 839–888.
Skyrms B (1996) *Evolution of the Social Contract*. Cambridge: Cambridge University Press.
Strawson PF (1974) *Freedom and Resentment and Other Essays*. New York: Routledge.
Sugden R (1993) Normative Judgments and Spontaneous Order: The Contractarian Element in Hayek's Thought. *Constitutional Political Economy* 4(3): 393–424.
Tamir Y (1998) Revisiting the Civic Sphere. In: Gutmann A (ed.) *Freedom of Association*. Princeton, NJ: Princeton University Press, pp.214–238.
Tomasi J (2012) *Free-market Fairness*. Princeton, NJ: Princeton University Press.
Turner P and Gaus G (2018) *Public Reason in Political Philosophy: Classic Sources and Contemporary Controversies*. New York: Routledge.
Vallier K (2014) *Liberal Politics and Public Faith: Beyond Separation*. New York: Routledge.
Vallier K (2018) Public Reason in the Open Society. *Cosmos and Taxis* 5(2): 38–46.
Vallier K (2019) *Must Politics Be War?restoring Our Trust in the Open Society*. New York: Oxford University Press.
Warren M (2001) *Democracy and Association*. Princeton, NJ: Princeton University Press.
Watson L and Hartley C (2018) *Equal Citizenship and Public Reason: A Feminist Political Liberalism*. New York: Oxford University Press.
White S (1998) Trade Unionism in a Liberal State. In: Gutmann A (ed.) *Freedom of Association*. Princeton, NJ: Princeton University Press, pp.330–356.

Author Biography

Kevin Vallier is an associate professor of Philosophy at Bowling Green State University. He received his BA in philosophy from Washington University in St. Louis in 2004 and his PhD from the University of Arizona in 2011. His interests lie within political philosophy, political economy, normative ethics, and philosophy of religion. His books include *Liberal Politics and Public Faith: Beyond Separation* (Routledge 2014) and *Must Politics Be War? Restoring Our Trust in the Open Society* (Oxford UP 2019).