

# Constitutional political economy, democratic theory and institutional design

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## Abstract

Democracy and constitutionalism are both central to the Western political tradition. And yet, constitutional restrictions are often perceived to be in tension with democratic commitments. I argue that the *constitutional political economy* approach developed by Nobel Laureate James Buchanan resolves the tension between constitutionalism and the values of democratic governance by shifting the analysis from a *system-attributes* perspective that focuses on the particular institutional properties of a political order to a *system-legitimacy* perspective that focuses on the manner in which political institutions gain democratic legitimacy. In so doing, the approach reveals that constitutionalism can be understood as a natural expression of democratic values.

**Keywords** Constitutional political economy · Democratic theory · Constitutionalism · Judicial review

*...I remain, in basic values, an individualist, a constitutionalist, a contractarian, a democrat – terms that mean essentially the same thing to me.*

*James M. Buchanan (1975/2000, p. 11).*

## 1 Introduction

Democracy and constitutionalism are both central to the Western political tradition. Over the past 50 years or so, the ideal of *constitutional democracy* has become more or less the “only game in town.” Virtually every advanced industrial polity contains both features to varying degrees, and political reforms around the globe typically aim at promoting such

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regimes.<sup>1</sup> And yet, in practical politics and academic discourse, democracy and constitutionalism often coexist uneasily. Politicians, frustrated in their endeavors by constitutional constraints (typically as interpreted by courts) decry the allegedly undemocratic nature of such limits on their power.<sup>2</sup> Scholars, too, express reservations about the compatibility of constitutionalism with democratic commitments—at least with respect to particular constitutional arrangements. Consider Sanford Levinson, among the most respected scholars of the US Constitution, who writes that he has “become ever more despondent about many structural provisions of the Constitution that place almost insurmountable barriers in the way of any acceptable notion of democracy” (Levinson 2006, p. 6; see also Dahl 2001).

Perhaps the most salient example of the perceived tension between democracy and constitutionalism is the voluminous literature on the “countermajoritarian difficulty” that has blossomed among legal scholars. Originally coined by Alexander Bickel in his seminal *The Least Dangerous Branch*, the “difficulty” refers to the problem of providing a normative justification for the exercise of constitutional review over the policy choices of democratically elected and accountable policymakers. As Bickel (1962, p. 16f.) put it,

The root difficulty is that judicial review is a counter-majoritarian force in our system...when the Supreme Court declares unconstitutional a legislative act or the action of an elected executive, it thwarts the will of representatives of the actual people of the here and now; it exercises control, not in behalf of the prevailing majority, but against it. That, without mystic overtones, is what actually happens. It is an altogether different kettle of fish, and it is the reason why the charge can be made that judicial review is undemocratic.

Wrestling with Bickel’s challenge has been a central theme of American constitutional discourse, occupying some of the nation’s foremost legal scholars (e.g., Ely 1980; Ackerman 1998). As Barry Friedman (2002) has put it, the countermajoritarian difficulty has become an “academic obsession.”

The debate surrounding the compatibility of constitutionalism and democracy has recently been reinvigorated by a focus on the *constitutional political economy* (CPE) research tradition, most closely associated with the work of Nobel Laureate James M. Buchanan. Sparked by a new book, a number of scholars argue that this tradition, which emphasizes the need for constitutional limits on governmental action, stands not only in tension with democratic values, but is fundamentally—and self-consciously—anti-democratic.<sup>3</sup> These scholars argue that Buchanan’s research program emerged from a deliberate effort to place “democracy in chains” (MacLean 2017), and to substitute rule by an unrepresentative (largely white, male and wealthy) elite for popular control over government. In other words, the CPE paradigm, it is claimed, is fundamentally hostile to, and incompatible with, a commitment to democracy.

<sup>1</sup> This was, of course, part of Francis Fukuyama’s claim regarding the “end of history” (Fukuyama 1992).

<sup>2</sup> Consider President Obama’s comments in anticipation of the Supreme Court’s decision on the Affordable Care Act, arguing that the Court would be taking “an unprecedented, extraordinary step of overturning a law that was passed by a strong majority of a democratically elected Congress. And I’d just remind conservative commentators that for years what we’ve heard is, the biggest problem on the bench was judicial activism or a lack of judicial restraint—that an unelected group of people would somehow overturn a duly constituted and passed law” ([https://www.washingtonpost.com/blogs/right-turn/post/obama-goes-after-the-supreme-court/2012/04/02/gIQAjcZprS\\_blog.html?utm\\_term=.90874f9b0cad](https://www.washingtonpost.com/blogs/right-turn/post/obama-goes-after-the-supreme-court/2012/04/02/gIQAjcZprS_blog.html?utm_term=.90874f9b0cad)).

<sup>3</sup> For an example, see [https://www.washingtonpost.com/news/monkey-cage/wp/2017/07/25/the-beliefs-of-economist-james-buchanan-conflict-with-basic-democratic-norms-heres-why/?utm\\_term=.b8f8d0ada8d3](https://www.washingtonpost.com/news/monkey-cage/wp/2017/07/25/the-beliefs-of-economist-james-buchanan-conflict-with-basic-democratic-norms-heres-why/?utm_term=.b8f8d0ada8d3).

My purpose in this paper is to use these critiques as a lynchpin for exploring the relationship between constitutionalism and democracy. The central argument I develop is that rather than being anti-democratic, Buchanan's CPE paradigm is not only compatible with democratic commitments, but provides a unique vantage point for reconciling democracy and constitutionalism. Building on the contributions of other scholars (Vanberg 2011b), I argue that the CPE approach resolves the tension between constitutionalism and the values of democratic governance by shifting the focus of analysis from a *system-attributes* perspective that focuses on the particular institutional properties of a political order to a *system-legitimacy* perspective that focuses on the manner in which political institutions gain democratic legitimacy. In so doing, the approach reveals that constitutionalism can be understood as a natural expression of democratic values. In the final part of the paper, I discuss the implications of this argument for questions of institutional design and reform.

## 2 Democracy and democratic theory

The normative literature in democratic theory is vast, and a comprehensive treatment is beyond the scope of this paper. Here, I concentrate on an overarching feature of that literature that is central to the problem at hand. At the most general level, democracy is typically understood as “a method of group decision-making characterized by a kind of equality among the participants at an essential stage of the collective decision making” (Christiano 2015, p. 2). This broad—and vague—definition, of course, leaves considerable room for different conceptions of the specific institutional forms that democracy takes—from Elster's (1988, pp. 1–2) understanding of “(d)emocracy...as simple majority rule, based on the principle ‘one person one vote,’” to conceptions that—in light of the practical difficulties of instantiating direct majority rule in large societies—place primary emphasis on free and competitive elections to representative bodies.<sup>4</sup> As Christiano (2015, p. 2) puts it,

“Democracy” may refer to any of these political arrangements. It may involve direct participation of the members of a society in deciding on the laws and policies of the society or it may involve the participation of those members in selecting representatives to make the decisions.

Christiano's view expresses what I refer to as a system-attributes perspective. From that perspective, the democratic credentials of political outcomes derive from two potential sources:

- They are the result of direct citizen participation in a (majoritarian) collective choice process, or
- They are the product of the policy choices of (a majority of) popularly elected representatives.

<sup>4</sup> For the classic statement, see Schumpeter (1942/2008, p. 269): “And we define: The democratic method is that institutional arrangement for arriving at political decisions in which individuals acquire the power to decide by means of a competitive struggle for the people's vote.” As we will see below, this is precisely one of the points of attack for Buchanan, whose approach suggests that minimally democratic institutions including free elections and a broad suffrage can be a key feature of democratic governance, but are not themselves sufficient to ensure responsiveness of the political system to the preferences of citizens, properly understood.

As a result, political outcomes that appear to run contrary to clear citizen preferences as might be expressed by direct citizen participation or frustrate the desires of legislative majorities in freely elected legislative assemblies, are democratically suspect. Put differently, under this view, democracy demands that the political process—the institutional structure within which day-to-day political decisions are taken—be characterized by institutional attributes (direct citizen participation, or policy control by democratically elected representatives) that are considered essential to “democracy.”<sup>5</sup>

Viewed from such a system-attributes perspective, constitutionalism can conflict with democratic commitments in at least two ways. First, constitutional limits can restrict the *domain* of issues subject to collective decision-making. For example, rights provisions may place some issues beyond democratic control. For democratic theorists, this raises the question of why particular domains should not be subject to democratic control. Second (and typically more prominently), constitutional limits can impose *process* restrictions that create collective decision procedures that prevent majoritarian decision-making, either by citizens directly, or their elected representatives. On the system-attributes view, such restrictions conflict with the definitional requirements laid out by Christiano: they violate the requirement that policy be subject to direct citizen control, or the control of elected representatives. Concerns about the “countermajoritarian difficulty” clearly derive from this perspective: the “problem” of judicial review is that the judgements of unelected, democratically unaccountable judges can negate the policy choices of legislator or citizen majorities.

### 3 The constitutional political economy paradigm

In contrast to the approach just outlined, the constitutional political economy (CPE) tradition offers a different paradigm for assessing the democratic nature of political orders. This perspective does not focus on whether collective decision procedures possess particular institutional attributes that are considered intrinsically necessary for a democratic order. Rather, it focuses on the criteria that legitimize a collective choice procedure as democratic. A central implication of this approach is that a political order can be democratically legitimate *even if it lacks institutional features considered essential on the system-attributes view*.

Before presenting this *system-legitimacy* perspective, it is useful to start with some context. The CPE paradigm is most closely associated with the work of Nobel Laureate James Buchanan. Its origins typically are identified with his joint work with Gordon Tullock in *The Calculus of Consent* (1962), but Buchanan continued to develop the research program over the following decades. Of course, the paradigm encompasses scholars beyond Buchanan, and while common foundations can be located in work within this tradition, important differences emerge among particular approaches. For purposes of the current paper, I focus primarily on an interpretation that integrates various strands of Buchanan’s thought.

<sup>5</sup> This system-attributes approach also is reflected in positive, descriptive research, which tends to place heavy emphasis on the presence of free and competitive elections as a central indicator of democratic quality. See, for example, the widely used Polity IV measures (<http://www.systemicpeace.org/polity/polity4.htm>).

Buchanan's approach is built on a twin foundation—a normative commitment and an analytical distinction. The normative principle is the conviction that “individuals are the only sources of value” (Buchanan 1985/2001, p. 271), and that individual values are realized or expressed only through individuals' choice behavior (see Vanberg and Vanberg 2017).<sup>6</sup> An immediate consequence of this position is that politics is *not* about “some common search for the good, the true, and the beautiful, with these ideals being defined independently of the values of the participants” (Buchanan 1986/1999, p. 460). Instead, politics is a process by which individuals pursue their values. In other words, individuals engage in politics because some ends can be pursued more effectively (or exclusively) through collective rather than individual action. For Buchanan, the fact that values derive from individuals, and find expression in individual choice behavior, also implies a commitment to individual autonomy. It is the judgements of individuals—expressed in their choices—that count in determining whether particular choices, outcomes, or institutional arrangements promote the interests and values of the individuals involved.<sup>7</sup>

The second foundational element in Buchanan's approach is an analytical distinction. Social interactions—particularly in larger groups and groups of any complexity—take place within frameworks of rules or institutions. Aggregate social outcomes are the result of the choices that individuals make *within* these rules. Consider the analogy of a game. The rules of the game define the permissible actions and constraints facing the players. The manner in which the game unfolds—and its outcome—are the result of the myriad choices that players and coaches make within those rules. Of course, the rules of the game—and more generally the institutions that structure social interactions—are “humanly devised” (North 1990), and subject to collective choice and subsequent reform.

Against this background, Buchanan argues, it is critical to distinguish between two different types of choices confronting individuals. On the one hand, confronted with a set of rules that define the “game” they “play,” individuals choose actions and strategies in order to pursue their aims within these constraints. Choices at this “level of actions” or “sub-constitutional level” take the existing rules as given. On the other hand, at least analytically, the rules or constraints within which individuals choose at the sub-constitutional level are not immutable. Economic, social, and political institutions are subject to human choice and reform. As a result, we can speak meaningfully of individuals choosing—at a higher level—*among* rules. That is, at the “constitutional level,” we can conceive of individuals choosing the set of rules that will govern their interactions.<sup>8</sup>

The distinction between these two levels of choice—choice *within* rules and choice *of* rules—is critical for several reasons. One is that individuals typically do not have the same interests at the two levels—that is, we can distinguish between individual *rule interests*

<sup>6</sup> Buchanan (1991/1999, p. 286): “My own ontological presuppositions do not allow any conceptual separation or distinction between an individual's choice behavior and his or her utility function. My position is sometimes classified to be one of strict *subjectivism*.”

<sup>7</sup> This *normative individualism* in Buchanan's thought should be distinguished from *methodological individualism*. The latter (to which Buchanan also subscribed) is a methodological principle that imposes a requirement on the properties of social scientific explanations of collective action. The former is a normative principle that provides the grounding for claims regarding the legitimacy of political orders.

<sup>8</sup> Of course, at the constitutional level, individual preferences over the set of rules will be shaped by expectations of how alternative rules will shape sub-constitutional play. As Buchanan (1981/2001, p. 49) noted, “the choice or selection among different processes or procedures must remain empty unless it is somehow informed by predictions of outcome or end-state patterns that will be generated under alternative rules. To judge a set of procedural rules to be desirable it is necessary to establish at least some proof, within reasonable tolerance, that such rules will ‘work,’ that is, will produce end-states that are valued in themselves.”

and *action interests*. This is true in two senses: At the sub-constitutional level, individuals may have an interest in pursuing an action allowed by a rule, even if—at the constitutional level—they might *not* favor that particular rule *precisely because* it allows that action. (For example, a soccer coach may exploit the off-sides trap to gain an advantage over the other team, even if she would prefer to abolish the off-sides rule. Or a legislator may steer “pork barrel” projects to her district even if she would prefer a general rule prohibiting such projects.) Second, individuals may favor a particular rule at the constitutional level, even though they know that instances are likely in which they would prefer *not* to be bound by that rule at the sub-constitutional level. (For example, our legislator may prefer a general restriction on pork barrel—and still be tempted to secure geographically targeted benefits for her district).

The distinction between the two levels of choice also matters because the levels differ with respect to the potential for conflict among individuals. Within a game, players typically have (at least partially) conflicting interests. But the same is not necessarily true at the constitutional level. To the extent that some sets of rules are likely to create a “better game” from the perspective of all players, it is entirely conceivable that despite opposing interests at the sub-constitutional level, individuals can have a common interest in a particular set of rules (or changes in the rules) that constitute an improvement for *all*. For example, a set of players or coaches might debate the rules of their sport *prior* to the selection of teams, or the commencement of play, and find agreement on desirable rule changes. Applied to the problem of collective decision-making, this implies that at the constitutional level, politics may be a far more cooperative venture than day-to-day politics appear to be. As Buchanan (1990/1999, p. 386) put it:

As it operates and as we observe it to operate, ordinary politics may remain conflictual...while participation in the inclusive political game that defines the rules for ordinary politics may embody positively valued prospects for all members of the polity.

### 3.1 The democratic foundation of CPE

We can now turn to the central question: the connection between Buchanan’s constitutional economics and a commitment to democratic values. As just outlined, in the CPE paradigm, collective decision-making—politics—is understood as a realm that individuals enter because there exist goals and values that the individual can only secure, or at least pursue more effectively, through collective action. But how can this be done? At its core, this is a problem of political organization. What should be the domain of collective decision-making? And what should be the collective choice procedures by which political decisions are made within that domain?<sup>9</sup> Note that these questions involve *the choice of rules* at the *constitutional level*.

The distinctive feature of the CPE paradigm as articulated by Buchanan is that the answer to these questions ultimately should derive from the judgements of the individuals who are subject to a political order. Put differently, Buchanan’s position is that to be

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<sup>9</sup> One critical implication of the analysis in the *Calculus of Consent* is that the answers to these two questions are interdependent. As Buchanan and Tullock (1962, p. 83f.) put it, “much state action, which could be rationally supported under *some* decision-making rules, cannot be rationally supported under *all* decision-making rules...[there is an] essential interdependence between the choice of rules and the choice as to the location of activity in the public or the private sector.”

legitimate, constitutional frameworks (that define the domain of government action, and the procedures by which collective decisions can be taken within that domain) should to be chosen by the individuals who are its citizens (Buchanan 1991/1999, p. 288; emphasis in original):

The justificatory foundation for a liberal social order lies, in my understanding, in the normative premise that individuals are the ultimate *sovereigns* in matters of social organization, that individuals are the beings who are entitled to choose the organizational-institutional structures under which they will live.

This commitment to *citizen sovereignty* is a direct consequence of Buchanan's normative individualism. Recall that, for Buchanan, politics is a process for advancing the separate aims of individuals, and not a process for realizing an exogenously given common good. Whether a particular set of political arrangements is conducive to promoting those aims must therefore be left to the judgements of individuals themselves. The legitimacy of a political order derives from the fact that it serves to promote the interests of its citizens *as the citizens see them*.<sup>10</sup> Moreover, normative individualism implies a fundamental political equality in making such judgements—a commitment that Buchanan (1990/1991, p. 392; emphasis in original) expressly identifies as democratic:

All individuals must be presumed capable to make rational choices among alternatives in accordance with individually autonomous value scales. And this generalization does not allow derivation of collective action, whether or not directed toward choices among constraints, from individual evaluations on anything other than an *equal weighting*.... In this sense the whole constitutional economics program rests squarely on a *democratic* foundation.

Imagine a set of individuals who come together to engage in deliberations to establish the political order under which they will live. A commitment to *democratic citizen sovereignty* as just defined leads naturally to *unanimity rule* as the relevant decision procedure at this constitutional stage. Unanimous agreement ensures that the well-being of *all* individuals is improved (at least in expectation) under the set of rules that are agreed to. Moreover, the unanimity criterion achieves this through a purely procedural mechanism, without requiring an exogenous value scale, or detailed information about the values individuals hold. In the realm of constitutional choice, unanimity thus functions as the analog to voluntary exchange in the market setting. Buchanan (1966/2001, p. 257) puts it this way:

At the constitutional level of discourse, unanimity...provides the *only* criterion through which improvements in rules and institutions can, in fact, be judged without the introduction of an explicit value scale.<sup>11</sup>

Because of its commitment to unanimity as the legitimizing criterion at the constitutional stage, the CPE paradigm often is described as approaching “politics as exchange.”

<sup>10</sup> It is critical to emphasize here that this does not imply that the goals or values that individuals seek to pursue through collective decision-making are necessarily narrow, or self-interested. These goals may include collective ends, or normative conceptions of the common good. Rather, the key issue is that it is the *individuals'* views of what these goods are that is critical, not an exogenously given value scale.

<sup>11</sup> See also Buchanan (1986/1991, p. 463): “The political analogue to decentralized trading among individuals must be that feature common to all exchanges, which is *agreement* among the individuals who participate. The unanimity rule for collective choice is the political analogue to freedom of exchange of partitionable goods in markets.”

Analogous to market exchange, constitutional choice involves individuals “trading” mutual acceptance of a set of rules that will govern collective decision-making. It is in this sense that Buchanan’s approach is contractarian (see Vanberg and Vanberg 2017).<sup>12</sup>

More importantly for present purposes, this discussion also highlights that the approach is fundamentally *democratic* in an important sense. The bedrock commitment of the CPE paradigm—summarized in the concept of citizen sovereignty—is that political orders should be responsive to their peoples, that they should allow citizens to advance their values as they see them, and that it is the voluntary agreement of citizens to a political order that serves as the legitimating device that ensures that the order lives up to these criteria. Moreover, in this process of constitutional choice, individuals are treated as radically equal, and the constitutional choice process—because it employs the unanimity criterion—exhibits respect for the autonomy of all individuals on the basis of equal weight. *Prima facie*, a political order established on those principles would appear to deserve the label “democratic.”

Critically for the argument, note that so far, *nothing* has been said about the substantive content or the institutional properties of the political order that might emerge from this process of constitutional choice. In particular, and in marked contrast to the system-attributes perspective, it is an open question whether the collective choice procedures that individuals might agree to will necessarily possess the attributes that would render them democratic under the system-attributes approach.

Put differently, the CPE paradigm suggests that there are at least two radically different ways to approach thinking about the democratic nature of a political order. A system-attributes approach, dominant in democratic theory and positive social science, places emphasis on the presence of institutional features defined *ex ante* as necessary for a democratic order. In contrast, the CPE paradigm shifts the issue of democratic legitimacy from a requirement that collective choice mechanisms incorporate particular pre-defined attributes to the level of constitutional choice. From the CPE vantage point, the critical question is not whether a political order possesses specific characteristics. Rather, the key issue is whether the political order itself is democratic in the sense that it advances the interests of its citizens as they themselves see them and could command their consent. As Buchanan (1986/1999, p. 467) put it, “Could the observed rules that constrain the activity of ordinary politics have emerged from agreement in constitutional contract?”

As I argue in the next section, this approach leads to a startling conclusion: Political orders that are *democratic* from the system-legitimacy perspective of CPE may well

<sup>12</sup> Philip Pettit, in work that is in some ways consistent with the CPE approach, appears to be confused on this key point in his critique of Buchanan (Pettit 2008, p. 50). Pettit suggests that Buchanan’s view is that “participants in the electoral polity divide into consumers and producers, and interact in the determination of policies. The producers stand for office in groupings of parties, advertising certain policies and policy-programs, and the consumers go to the polls to register their preferences—presumptively, their consumerist, self-oriented preferences—among the parties and programs on offer. Thus, with nothing more than the collaboration required for parties to form, members of an electorate act in concert to shape the policies that prevail in government. And they allegedly do so, as the model of the competitive market suggests, in such a way that the policies ought to track the trend in preferences expressed by voters.” What Pettit misses, of course, is that Buchanan’s conception of “politics as exchange” is concerned with mutual agreement among citizens on a set of constitutional rules for collective decision-making—a view that is close, in many respects, to Pettit’s own “condominium model” of democratic control. Moreover, much of Buchanan’s work was focused on offering powerful critiques of the “market model” of politics as outlined by Pettit by demonstrating that majoritarian politics can often lead to sub-optimal results from the (constitutional) perspective of all voters.

possess features that are *undemocratic* in the system-attributes sense. Political orders that are democratic in this fundamental sense may well place domain and process restrictions on citizen and legislator majorities, and produce political outcomes in which there is no direct correspondence between policy choices and “what citizens want” (as reflected, say, in majority public opinion).

### 3.2 Democratic institutions

What kind of political order is likely to emerge from a constitutional choice process under unanimity rule? At one level, Buchanan was reluctant to speculate on the precise nature of the rules to which individuals might consent.<sup>13</sup> At the same time, he did provide some analysis of the “calculus of consent,” and offered conjectures on broad principles that would characterize political orders that can be agreed to unanimously.

The starting point for such analysis is the presumption that constitutional rules will be long-lasting and stable. Under such circumstances, deliberation at the constitutional stage takes place behind a “veil of uncertainty” that leaves individuals unsure about how precisely they will be affected by specific rules over time. A long time horizon in a changing world simply makes it difficult to forecast accurately how one’s particular interests are likely to fare under different rules. By suppressing the salience of particular interests, such uncertainty focuses individuals’ attention on the general properties of rules. As Buchanan explained in his Nobel Prize Address (Buchanan 1986/1999, p. 464):

To the extent that the individual reckons that a constitutional rule will remain applicable over a long sequence of periods, with many in-period choices to be made, he is necessarily placed behind a partial “veil of uncertainty” concerning the effects of any rule on his own predicted interests. Choice among rules will, therefore, tend to be based on generalizable criteria of fairness, making agreement more likely to occur than when separable interests are more easily identifiable.<sup>14</sup>

There may, of course, be differences of opinion among individuals, but “these differences will be based, not so much on differences in identifiable self-interest, but on differences in characterizing value judgments concerning the working properties of alternative rules, that is to say, concerning the frequency distribution of predicted outcomes” (Buchanan 1966/2001, p. 257). Such differences are more likely to be amenable to debate

<sup>13</sup> Buchanan was critical of John Rawls on precisely those grounds. Methodologically, Buchanan saw great similarity between his approach, and Rawls’s attempts to derive principles of justices from unanimous agreement behind a veil of ignorance. However, Buchanan disagreed with Rawls’s attempt to derive specific implications of what these principles would be. As he put it (Buchanan 1975/2000, p. 221), “Unfortunately, in my view, Rawls went further than this and attempted to identify those precepts that might be predicted to emerge.... [P]redictably, it is this aspect of his work that is drawing attention away from his more basic contribution, which is the relationship of justice to the outcome of the contractual *process* itself.”

<sup>14</sup> See also *The Calculus of Consent*: “[T]he individual will not find it advantageous to vote for rules that may promote sectional, class, or group interests because, by presupposition, he is unable to predict the role that he will be playing in the actual collective decision-making process at any particular time in the future” (Buchanan and Tullock 1962, p. 78). Instead, individuals will favor rules that “are generally advantageous to all individuals and to all groups” (*ibid*). Obviously, this approach, as Buchanan himself noted, has “considerable affinity with that of John Rawls, who has attempted to derive general principles of justice in a similar manner” (Buchanan 1975/2000, p. 91, n. 18). Note, however, that Rawls’s veil of ignorance is considerably “thicker” than Buchanan and Tullock’s veil of uncertainty and removes far more knowledge from individuals.

and compromise, and therefore, unanimous agreement on rules behind the veil becomes possible.<sup>15</sup>

As individuals engage in the “calculus of consent” concerning the collective choice rules they will agree to, they confront the following problem: Rules that make it easier to take collective decisions lower the costs involved in reaching decisions. They also make it less likely that decisions the individual favors can be blocked by those with opposing views. On the other hand, such rules raise the risk that others will be in a position to take decisions with which the individual disagrees. Rules that make it more difficult to take political action (e.g., supermajority requirements) have the opposite effects. In short, rule choice involves a tradeoff: More restrictive rules offer an individual more protection against undesirable political action, but they also make the political process more cumbersome, and make it more difficult to secure collective decisions the individual favors.

A number of implications follow from this approach. First, Buchanan argues that faced with this tradeoff, as individuals deliberate about the decision procedures that are to govern day-to-day collective decision-making, individuals generally will *not* choose unanimity rule for such sub-constitutional decisions—unanimity is simply too cumbersome and impractical. Put differently, at the constitutional stage, individuals will *unanimously reject unanimity rule* for post-constitutional politics.

Second, the requirement for unanimous agreement imposes constraints on the political order that can emerge from constitutional choice. There are some political orders that cannot secure unanimous consent. In particular, political institutions are likely to embody some features typically associated with democratic governance in mainstream democratic theory. For example, political institutions that “deny some persons or groups *ex ante* access to the political process” are unlikely to be agreed to unanimously (Buchanan 1986/2001, p. 219). As a result, Buchanan concludes, “political arrangements must be characterized by political equality of all those who are included in the polity’s membership, at least in some ultimate *ex ante* sense.... What is required here is that all persons possess equal access to political influence over a whole pattern or sequence of collective choices. In practical terms, this means that the franchise be open to all, that political agents be rotated on some regular basis, and that gross bundling of collective choices be avoided” (Buchanan 1986/2001, p. 222). The political order that emerges may also be “democratic” in the sense that it includes majority rule procedures for a wide range of collective decisions.

Note, however, two critical caveats that are introduced by the CPE perspective. The first is that unlike in much contemporary democratic theory (including what I have called the system-attributes perspective), political orders that exhibit these characteristics are not democratic *because* they have these features. That is, their democratic bona fides are not a matter of the presence of particular institutional characteristics. Rather, their legitimacy derives from the constitutional choice process from which they emerge. Put differently, it is the constitutional choice process that imbues a political order with democratic legitimacy, and it is the nature of this process that it is likely to generate orders that have more immediately “democratic” features.

The second—and for our purposes more important—caveat is that in addition to some features typically associated with democratic institutions, unanimous agreement at the constitutional stage may *also* lead to the adoption of institutions that would *not* qualify as

<sup>15</sup> Buchanan (1966/2001, p. 257): “But it seems that genuine compromise, genuine consensus, is much more likely to result in this sort of situation than at the stage where, by necessity and invention, individual positions come to be directly opposed, one to the other.”

democratic under the system-attributes approach. Individuals may conclude that for some decisions and issues, straightforward majoritarian procedures are most desirable. But individuals also are likely to conclude that for other issues—namely those in which they fear becoming the potential victims of majority tyranny—some restrictions on majority rule are desirable. Most obviously, this is almost surely the case for issues for which the external costs of unfavorable decisions are particularly likely to be high. As Buchanan and Tullock (1962, p. 82) observed in *The Calculus of Consent*: “The individual will anticipate greater possible damage from collective action the more closely this action amounts to the creation and confiscation of human and property rights. He will, therefore, tend to choose somewhat more restrictive rules for social choice-making in such areas of potential political activity.”<sup>16</sup>

Put in very concrete terms, it is entirely plausible that at the constitutional stage, individuals will unanimously prefer a set of political institutions that includes both *domain restrictions*, i.e., removes some issues from collective decision-making altogether, and *procedural restrictions*, i.e., requires collective decision-making procedures that raise hurdles to simple majority rule, at least in some domains. Anyone who has joined a homeowners’ association can readily follow this logic. Few who are members of such political communities would be comfortable with a collective choice mechanism that did not carve out certain aspects of homeownership from collective control (e.g., interior decorating), or that subjected all decisions to a simple majority vote of the membership. Similarly, for politics *writ large*, it is entirely conceivable that individuals behind a veil of uncertainty might (unanimously) choose to create a political order that includes supermajority requirements, guarantees particular individual rights, or delegates decision-making powers to unelected “agents” (including the power of constitutional review). As Buchanan (1991/1999, p. 288) observed, democracy in the sense of citizen sovereignty does not require direct citizen involvement in the ultimate policy process: “The central premise of *individuals as sovereigns* does allow for delegation of decision-making authority to agents, so long as it remains understood that individuals remain as *principals*.”<sup>17</sup>

In short, the central contribution of the CPE paradigm is to move the question of democratic legitimacy from the (essentially definitional) question of whether a political order contains particular predefined attributes to the constitutional level of choosing among alternative political frameworks. Democratic citizen sovereignty is reflected in the fact that individuals choose the political arrangements under which they will live. Critically, there is little reason to expect that—at the constitutional level—citizens will agree on purely majoritarian decision procedures for sub-constitutional politics. Democratic choice of constitutions likely will imply that at least some collective choice institutions at the

<sup>16</sup> “[F]or many collective decisions, a supermajority or qualified majority, short of unanimity but more inclusive than a simple majority, might be preferred” (Buchanan 1997/1999, p. 421).

<sup>17</sup> The Duchy of Liechtenstein provides a suggestive example. Lichtenstein’s hereditary monarch exercises considerable political power, including veto over parliamentary legislation. This feature has “often been subjected to criticism from a parliamentary-democratic perspective” (Nigg 2017, p. 88). At the same time, the Liechtenstein Constitution claims to establish a “hereditary monarchy on a democratic and parliamentary basis” (Art. 2), and roots the powers of the monarch in the consent of the governed. Moreover, Article 113 of the constitution provides that a petition signed by 1500 citizens triggers a referendum on the abolition of the monarchy. If this referendum passes, parliament is obligated to draft a new, republican constitution, and to submit it to a referendum. This procedure was invoked in 2012. The initial referendum to eliminate the “undemocratic” institution of a hereditary monarch was rejected by a citizen vote of 76–24%, with a turnout of roughly 83%.

sub-constitutional level are “undemocratic” in the sense of running counter to majoritarian control by citizens or their elected representatives. If so, this is the case because citizens—unanimously—prefer such arrangements when deliberating on a constitutional framework.

From the vantage point of the CPE paradigm, the alleged tension between constitutional limits and democracy therefore vanishes. The perceived tension between these concepts “arises from a naïve commitment to democracy, without any underlying examination of what this term means. Implicitly, democracy as a political, governmental form of decision making is equated with majoritarianism...” (Buchanan 1984/1999, p. 361).<sup>18</sup> Instead, an “examination of what this term means” suggests that citizens—at the constitutional level—will *unanimously* choose political systems with some constitutional limits on majoritarian procedures. There may, of course, be disagreements about the precise nature of those constraints. But the presence of limits on majority rule itself is entirely consistent with democracy as citizen sovereignty. As Buchanan (1984/2001, p. 362)—somewhat smugly—observed:

...any simplistic majoritarian position founders on the shoals of limits. ...If constitutional protections for both electoral-majoritarian institutions and basic human rights are acknowledged to be necessary and legitimate, what is there left in the standard majoritarian opposition to constitutional dialogue, other than possibly pragmatic disagreement concerning the location of the constitutionally protected margins?

In short, what the CPE perspective demonstrates is that to deny that constitutional limits are compatible with democratic order requires rejection of citizen sovereignty. Such a rejection would require an exogenous standard or value scale that justifies overriding a citizen consensus on their preferred constitutional forms.<sup>19</sup> What could such a standard be? How could it be justified? This seems a difficult position for a democratic theorist to take—especially because what any such standard *cannot* itself be justified on the basis of a citizen consensus.<sup>20</sup>

#### 4 Implications for institutional design and reform

The CPE paradigm roots democratic legitimacy in citizen sovereignty, that is, the ability of individuals to choose the political order under which they live. Conceptually, unanimous agreement behind a veil of uncertainty thus becomes the relevant criterion for evaluating a political order, or changes in such an order. Of course, the contractarian position must confront a fundamental challenge, already articulated by David Hume (1777/1985): Existing political structures typically are not derived from contract or consent. Buchanan

<sup>18</sup> Hayek (1979, p. 128) makes a closely related point when he notes that “the endeavour to contain the powers of government was almost inadvertently abandoned when it came to be mistakenly believed that democratic control of the exercise of power provided a sufficient safeguard against its excessive growth.”

<sup>19</sup> Exogenous in the sense that the principle that leads to the rejection of citizen sovereignty cannot itself be capable of securing the consent of all citizens. If it could, the conflict at issue would vanish.

<sup>20</sup> Hayek (1960, p. 81) makes a similar point: “Only a demagogue can represent as ‘antidemocratic’ the limitations which long-term decisions and the general principles held by the people impose upon the power of the temporary majorities. These limitations are conceived to protect the people against those to whom they must give power, and they are the only means by which the people can determine the general character of the order under which they will live.”

(1972/1999, p. 430) readily acknowledged that fact, including the inter-generational nature of political order:

We know that, factually and historically, the “social contract” is mythological, at least in many of its particulars. Individuals did not come together in some original position and mutually agree on the rules of social intercourse. And even had they done so at some time in history, their decisions could hardly be considered to be contractually binding on all of us who have come behind.

How can the CPE paradigm be reconciled with reality? Buchanan’s work suggests two related approaches. The first is a critical distinction between the *descriptive* question whether an existing order derives from actual consent, and the *conceptual* question whether we can provide reasoned arguments that an existing order is plausibly consistent with the consent of the individuals who live under it. Put differently, in evaluating the legitimacy of a political order, the CPE paradigm disciplines the analyst (and citizens) into a mode of analysis that focuses on the interests of citizens, as citizens see them, rather than on some external value scale the analyst brings to the table:

We do not, of course, observe the process of reaching agreement on constitutional rules, and the origins of the rules that are in existence at any particular time and in any particular polity cannot satisfactorily be explained by the contractarian model. The purpose of the contractarian exercise is not explanatory in this sense. It is, by contrast, justificatory in that it offers a basis for normative evaluation. Could the observed rules that constrain the activity of ordinary politics have emerged from agreement in constitutional contract? To the extent that this question can be affirmatively answered we have established a legitimating linkage between the individual and the state. To the extent that the question prompts a negative response, we have a basis for normative criticism of the existing order, and a criterion for advancing proposals for constitutional reform (Buchanan 1986/1991, p. 466f).

The bite of the CPE approach thus comes from the fact that it directs—by its nature—discussions of the legitimacy of a political order away from references to an external value scale (whether the protection of natural rights, the pursuit of justice, republican virtue, and so on) and toward an analysis that takes seriously the preferences and desires of the individuals who live under it. The focus of analysis must be the question whether a political order advances the interests of citizens as these citizens see them.

At the same time, for Buchanan, such an inquiry cannot be dispositive—that is, it cannot establish the legitimacy of a political order. The conclusions reached by outside analysts or experts who inquire about the potential for an order to secure the consent of the governed is always conjectural. It can inform public debates and provide the basis for, as Buchanan put it, “advancing proposals for constitutional reform,” but expert judgement that an order is consent-worthy cannot directly legitimize it. The role of the expert is in offering arguments; it is not to substitute expert judgment for the choices of individuals. The ultimate question must always be whether such arguments are persuasive to citizens as sovereigns.<sup>21</sup>

<sup>21</sup> Buchanan (1991/1999): “If individuals are considered the ultimate sovereigns, it follows directly that they are the *addresses* of all proposals and arguments concerning constitutional-institutional issues. Arguments that involve reliance on experts in certain areas of choice must be addressed to individuals, as sovereigns, and it is individuals’ choice in deferring to expert-agents that legitimizes the potential role of the latter, not some external assessment of epistemic competence as such.”

But this conclusion returns us directly to Hume's fundamental challenge: Real world political orders are not unanimously chosen by citizens—nor could they be, given the challenge of generational change. The second avenue of response flows from this fact and is institutional. Hume's (1777/198, p. 475) attack focuses on the concept of tacit consent, which holds that citizens who continue to live under a political order, even if they did not explicitly consent to it, have thereby implicitly consented:

We may as well assert, that a man, by remaining on a vessel, freely consents to the dominion of the master; though he was carried on board while asleep, and must leap into the ocean, and perish, the moment he leaves her.

The rhetorical brilliance of Hume's attack lies in framing the question of consent in a particularly stark fashion: If the alternative is drowning, few would regard the sailor's failure to jump ship as a meaningful sign of consent to the captain's rule. But Hume's position is overdrawn: There is considerable variation in the hurdles that citizens must clear to exercise their "exit" and "voice" options (Hirschman 1970).<sup>22</sup> This fact suggests that it is more useful to conceive of tacit consent as a continuous concept: As conditions make it easier to exercise the exit and voice options, it becomes more reasonable to interpret the decision of citizens to remain in a jurisdiction, or the absence of systematic expressions of citizen discontent with a political order, as reliable signs that they regard the order in which they live as broadly consistent with their values and goals. The larger exit costs become, or the costlier the voice option, the less meaningful these signs are.

Importantly, how significant the costs of exit and voice are is itself, to a significant degree, a function of constitutional choice and design. Constitutional arrangements that lower exit costs by making it easier for citizens to choose and move among competing jurisdictions generate more meaningful opportunities for consent (see Vanberg and Kerber 1994). For example, federalism and decentralization can work to provide a "menu" of options for citizens and lower the costs of moving between jurisdictions. This theory has been developed most explicitly in terms of the provision of bundles of public goods and taxes (e.g., Tiebout 1956; Buchanan 1965). But in principle, jurisdictional competition provides incentives to provide more general features of a political order that are attractive to potential citizens. An interesting development in this context is the potential for constitutional designs that decouple geographic location from jurisdictional choice. The need to move in physical space often is a significant source of exit costs confronting citizens. At least in some areas, constitutional design can enable jurisdictional competition while eliminating the need to relocate physically. Frey and Eichenberger's (1999) functional, overlapping, competing jurisdictions (FOCJ) framework provides an example. Under that model, services typically delivered by unitary governments (e.g., education and policing) are provided by competing organizations that potentially cover the same geographic area.<sup>23</sup>

<sup>22</sup> Note that "exit" and "voice" differ fundamentally in that (in contrast to exit), voice does not provide an immediate avenue for political change at the individual level, i.e., it allows individuals to express discontent and may contribute to political change, but it does not directly allow an individual to alter her political circumstances in the way that exit does.

<sup>23</sup> In exploring the potential for such constitutional designs, scholars must confront a number of potential challenges. One concerns the identity of the "consumers" for whom jurisdictions compete (see Vanberg 2000 for a detailed treatment): In the case of FOCJs, what is the nature of the service they provide? Does a service require geographically connected provision or does it have significant network properties? Such services may require that entire local units choose the same provider, implying that competition among FOCJs is for local governments. Services without the same properties may be able to compete directly for individual citizens.

In short, rather than posing the issue of consent as a binary, all-or-nothing proposition, the CPE paradigm suggests that it may be more useful—and relevant—to consider the meaningfulness of (tacit) consent as a continuous concept. From this perspective, institutional details that shape exit and voice costs become primary features of interest, and institutional reforms that help to lower these costs become desirable. Analyses that explore the potential for such reforms constitute an exciting field of inquiry within the CPE tradition.

Further theoretical development also is necessary in confronting potential challenges. One is that exit costs may differ significantly across different types of citizens, making jurisdictional competition more effective in generating responsiveness to the values and preferences of some citizens than to others—a feature that threatens an underlying commitment to citizen equality. Another challenge concerns, paradoxically, a tension between the ability to exit, and the purpose of constitutionalism. One (though not the only) reason why individuals have an interest in imposing constitutional limits on collective decision-making derives from the familiar logic of the Prisoner’s Dilemma: Potentially, there are issue areas in which individuals may want to impose long-term restrictions on their conduct in order to achieve outcomes that cannot be achieved if all individuals are free to make decisions on the “spot.” For example, it is conceivable that individuals might—behind a veil of uncertainty—agree on the provision of (limited) wealth transfers in order to protect economically vulnerable populations. But such a scheme might be threatened (ex post) by the ability of net contributors to exit the jurisdiction. Such a situation would constitute a specific illustration of the potential divergence between action interests and rule interests already alluded to above. Thinking through how such challenges might be confronted within the CPE paradigm constitutes an important and fruitful avenue for further theoretical development.

## 5 Conclusion

An alleged tension between constitutionalism and democracy has long been a characteristic feature of the scholarly literature in democratic theory, particularly with respect to the institution of judicial review. A recent book (MacLean 2017) argues especially vociferously that the constitutional political economy paradigm associated with Noble Laureate James M. Buchanan is not only inconsistent with, but fundamentally opposed to, basic democratic commitments. My aim in this paper has been to show that this attack, as well as the general perception of a tension between democracy and constitutionalism, rest ultimately on a particular, and arguably narrow, notion of democracy. If democracy is understood to require—by definition—that the political process is characterized by particular institutional features, such as direct citizen involvement in the policy process, or a policy process that is dominated by the choices of elected representatives, then naturally, constitutional limits are “undemocratic.” A central contribution of Buchanan’s CPE paradigm is that it suggests an alternative to such a system-attributes approach.

Starting from a commitment to normative individualism, and the ultimate sovereignty of individuals to “choose the political order under which they will live,” the CPE paradigm moves the question of democratic legitimacy beyond a definitional matter (“Does a collective choice mechanism possess particular attributes?”). Instead, that paradigm focuses attention on the more fundamental question whether a political order is consistent with a constitution-making process that treats citizens as equals, and generates an order that promotes the interests of citizens as they themselves see them. A

contractarian approach that roots democratic legitimacy in the ability of a political order to generate unanimous consent by individuals behind a veil of uncertainty satisfies those criteria.

Introspection suggests that faced with the task of choosing one's political system behind a veil of uncertainty, individuals will prefer political orders that place (some) constraints on majoritarian decision-making by temporary popular majorities or subsets of elected representatives. The potential risks posed to individuals and their interests by pure majoritarian procedures are so significant that individuals *unanimously* prefer some protections, at least for interests that are at the core of their beings. Put differently, for day-to-day policy-making, "pure democracy" is unlikely to be chosen in a constitution-making process that respects citizen sovereignty. Democracy as citizen sovereignty likely implies that the political order will include features that frustrate direct control of policy making by citizen or representative majorities. Constitutionalism and democracy are two sides of the same coin. Buchanan (1985/2001, p. 266) makes precisely this point in stressing that "the term 'constitutional' *must* be prefixed to the term 'democracy' if the latter is to be sustainable in an internally consistent normative argument." It is in this sense that Buchanan (1975/2000, p. 11) can claim to be "an individualist, a constitutionalist, a contractarian, a democrat—terms that mean essentially the same thing to me."

In closing, two caveats are worth brief mention. The first is that the argument of this paper is not that making distinctions on the basis of the attributes of political orders is uninteresting or unimportant. It is useful to have terminology that identifies political orders with immediately democratic attributes (like citizen involvement in the policy process, or majoritarian decision-making by elected representatives), and distinguishes such orders from collective decision-making processes that place limits on majoritarian decision-making. Scholars can attach the term "democracy" to the former as a purely definitional matter. Rather, the argument is that one should be careful not to conflate the presence of such attributes with democratic legitimacy in a more fundamental sense.

The second caveat concerns the evaluation of particular constitutional orders. The argument of this paper does not exempt constitutional restrictions from critical scrutiny. Indeed, many may be undemocratic in the sense that they could not secure unanimous agreement (behind a veil of uncertainty) by citizens. However, it is critical to recognize that what undermines the democratic legitimacy of such provisions is *not* the fact that they place restrictions on majoritarian decision-making. What undermines their legitimacy is the inability to secure citizen consent. Applied to the countermajoritarian difficulty that opened the paper, the CPE paradigm thus suggests that the relevant issue in thinking about the compatibility of judicial review and democracy is *not* whether judicial review (sometimes) frustrates the desires of popular majorities or elected representatives. The question is whether citizens—engaged in constitutional choice behind a veil of uncertainty—would find it in their interest to make provisions for such an institution. Conceptually, could the institution of judicial review, exercised by judges with limited or no electoral accountability, secure unanimous consent at the level of constitutional choice? Viewed in that light, it is far from obvious that the answer to this question is "no," especially depending on how precisely the judiciary is organized, and how it is embedded in the broader political system (see also Vanberg 2011a).

To think through such questions, and to offer proposals for constitutional reforms that have the potential for improving the "political game" from the point of view of all citizens is an on-going task. The role of constitutional economics is precisely to inform such democratic, constitutional deliberation. As Buchanan (1986/1999, p. 467f.) put it in closing his Nobel Prize acceptance speech:

Normatively, the task for the political economist is to assist individuals, as citizens who ultimately control their own social order, in their continuing search for those rules of the political game that will best serve their purposes, whatever these might be...helping to resolve the continuing question of social order: How can we live together in peace, prosperity, and harmony, while retaining our liberties as autonomous individuals who can, and must, create our own values?

This is a vision that places CPE firmly in the democratic tradition, and also suggests that it should not be viewed as a “dismal science,” but as an optimistic project.

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