

STRUCTURAL ISSUES

A Square Peg in a Round Hole: Democracy, Constitutionalism, and Citizen Sovereignty

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ABSTRACT

A prominent view in popular conception and academic debate holds that constitutionalism and democracy are fundamentally at odds. At best, constitutional constraints on popularly elected, representative policy-makers (constraints that are often enforced by unelected, unrepresentative institutions such as independent courts) represent undemocratic, if necessary, limits on democracy; at worst, they are illegitimate obstacles to the “will of the people.” In this paper, I argue that this perception is fundamentally flawed and that the constitutional political economy paradigm developed by James Buchanan provides a powerful corrective.

This paradigm shifts conceptions of democracy away from definitional approaches that equate democracy with the presence of a particular set of institutional features to a focus on the underlying normative criterion that can legitimize a political order as democratic: citizen sovereignty. I demonstrate that viewed from this vantage point, democracy is not only consistent, but synonymous with constitutionalism: Placed in a constitutional moment, and choosing the political system under which they wish to live, citizens are likely to arrive at unanimous agreement on constitutional safeguards that impose restrictions on majoritarian politics.

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A commitment to long-term principles, in fact, gives the people more control over the general nature of the political order than they would possess if its character were determined solely by successive decision of particular issues
(Hayek, 1960: 269).

I. INTRODUCTION

Constitutionalism and democracy appear to be strange bedfellows. On the one hand, they typically “go together”: most polities that claim the mantle of being democratic are constitutional democracies, featuring rights guarantees, independent courts with the power of judicial review, independent central banks, as well as other institutional features that constrain the political maneuvering of elected representatives and majoritarian politics. On the other hand, the two concepts are often perceived to be in tension. Citizens and elected politicians complain about “undemocratic” institutions that thwart the “will of the people,” criticisms that are not confined to electoral politics but extend to the (supposedly) more level-headed debates among scholars and analysts. Robert Dahl, among the most prominent social scientists of the last century, provocatively titled one of his last books *How Democratic is the U.S. Constitution?*, concluding that the answer is “not very.”¹ Among legal scholars, an entire cottage industry has sprung up around the counter-majoritarian difficulty of reconciling the exercise of judicial review by unelected judges with the (imagined) requirements of democratic governance.²

In this essay, I argue that the perceived tension between democracy and constitutionalism rests on a particular—and contestable—conception of democracy. Building on my prior work,³ I show that the constitutional political economy

1. ROBERT DAHL, *HOW DEMOCRATIC IS THE U.S. CONSTITUTION?* (2001). Similarly, distinguished legal scholar Sanford Levinson concludes 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.” SANFORD LEVINSON, *OUR UNDEMOCRATIC CONSTITUTION* (2006).

2. See, e.g., JOHN HART ELY, *DEMOCRACY AND DISTRUST* (1980); BRUCE ACKERMAN, *I WE, THE PEOPLE: FOUNDATIONS* (1998); Barry Friedman, *The Birth of an Academic Obsession: The History of the Counter-majoritarian Difficulty, Part Five*, 112 *YALE L. J.* 153 (2002). The counter-majoritarian problem was brought to the fore by Alexander Bickel who stated it this way: “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.” ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH* (1962). In this literature, a prominent defense of judicial review—inspired, in part, by the jurisprudence of the US Supreme Court—has argued that resolving this tension depends on a particular use of the judicial power: Judges should exercise judicial review only to protect and expand the democratic process, for example by ensuring equal representation. ELY, *supra*.

3. See Georg Vanberg, *Constitutional Political Economy, Democratic Theory, and Institutional Design*, 177 *PUB. CHOICE* 199 (2018).

(CPE) paradigm developed by Nobel laureate James Buchanan provides an alternative approach that resolves this tension. Democracy and constitutionalism should not be seen as strange bedfellows, but as expressions of a common underlying normative foundation. They are essentially synonymous. I conclude by considering a number of institutional implications that follow from this argument and that can inform potential institutional reforms.

It is important to stress at the outset that I lay no claim to originality. In synthesizing Buchanan's arguments, my aim is to demonstrate that the CPE paradigm provides a coherent, sophisticated approach that highlights that there is no inherent tension between constitutionalism and democracy. Doing so is not only of academic interest. In an era in which populist leaders across the world regularly appeal to notions of "empowering the people" to justify circumventing or eliminating constitutional constraints on their power, it is ever more important, for the preservation of democratic governance, to demonstrate that constitutionalism, properly understood, is not only compatible with democracy but also an expression of democratic values.

II. PRELIMINARIES: NORMATIVE FOUNDATIONS

Arguments that view constitutionalism in tension with democracy typically define democracy in ways that equate democratic governance with a particular set of institutions or decision-making procedures. At the most basic level, this often means thinking of "democracy . . . as simple majority rule, based on the principle 'One person one vote.'"⁴ Of course, direct democracy in this sense becomes infeasible in societies of sufficient size, leading to a shift in emphasis on representative democracy, characterized by free and fair elections in which citizens elect policymakers.⁵ Central to either notion is the idea that democracy implies a majoritarian policy process in which citizens, either directly or through elected representatives, participate in decision-making on an equal footing. Given such a definition, it is clear that constitutionalism, which typically imposes constraints that interfere with majoritarian processes or limit the power of elected policymakers, must be in tension with democracy. Put differently, if democracy is – by definition – equivalent to a (representative) majoritarian policy process, constitutionalism necessarily reduces the democratic character of a political order.⁶

4. Jon Elster, *Introduction*, in CONSTITUTIONALISM AND DEMOCRACY (Jon Elster ed. 1988); DAHL, *supra* note 1.

5. As Christiano puts it, "(d)emocracy' . . . 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." Tom Christiano, *Democracy*, in STANFORD ENCYCLOPEDIA PHIL. (Edward N. Zalta ed. 2015). For the classic statement, see JOSEPH SCHUMPETER, CAPITALISM, SOCIALISM, AND DEMOCRACY 269 (3d. ed. 2008) ("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.").

6. Most empirical measures similarly focus on the presence of free and competitive elections as a central indicator of democratic quality. *See, e.g.*, the widely used Polity IV measures. *Polity IV*

But there are alternatives to such a definitional approach. Here, I build on the constitutional political economy paradigm most thoroughly developed in James Buchanan's research program. The starting point for this approach is a rejection of a "truth" conception of politics. 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."⁷ Rather, for Buchanan, "individuals are the only sources of value,"⁸ and these values are realized or expressed only through individual behavior.

If there is no truth in politics, and "values start with us," a central challenge arises: by what normative criterion can political arrangements and choices be judged? The central thrust of the Buchanan paradigm is to confront this challenge by viewing "politics as exchange." Consider ordinary market settings. The market process has no goals that are defined independently of the goals of market participants. Put differently, the purpose of a market is to allow individuals to pursue their specific interests as they see them. Moreover, if market exchanges are voluntary, they must be beneficial from the point of view of all parties to the exchange. In this sense, voluntary market exchange "makes the world a better place." It generates Pareto improvements—a conclusion that can be drawn without recourse to any exogenous normative value scale (other than the values of the participants to the exchange). The aim of Buchanan's political theory is to extend this exchange logic to the political realm—that is, to view the political process as a means by which individuals seek to advance their separate individual interests and values by engaging in "political exchange" with others.

To serve as an escape hatch from the necessity of relying on an external value scale, "politics as exchange"—with the associated prospect for Pareto improvements—requires the political analog to voluntary market exchange: a procedural criterion that ensures that only exchanges in the interests of all participants can be consummated. This procedural requirement is the requirement for unanimous agreement:

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.⁹

Individual Country Regime Trends, 1946-2013, POLITY IV PROJECT, <http://www.systemicpeace.org/polity/polity4.htm> [<https://perma.cc/C653-954G>].

7. James M. Buchanan, *The Constitution of Economic Policy*, in 1 THE LOGICAL FOUNDATIONS OF CONSTITUTIONAL LIBERTY: THE COLLECTED WORKS OF JAMES BUCHANAN 460 (1999).

8. James M. Buchanan, *Democracy Within Constitutional Limits*, reprinted in 16 CHOICE, CONTRACT, AND CONSTITUTIONS: THE COLLECTED WORKS OF JAMES BUCHANAN 271 (2001); Georg Vanberg & Viktor Vanberg, *Contractarian Perspectives in Law and Economics*, in OXFORD HANDBOOK OF LAW AND ECONOMICS (Francesco Parisi ed., 2017).

9. James M. Buchanan *The Constitution of Economic Policy*, reprinted in 1 THE LOGICAL FOUNDATIONS OF CONSTITUTIONAL LIBERTY: THE COLLECTED WORKS OF JAMES BUCHANAN 463 (1999); James M. Buchanan, *An Individualistic Theory of Political Process*, reprinted in 17 MORAL SCIENCE

III. TWO LEVELS OF CHOICE

The obvious difficulty introduced by an insistence on unanimity as the relevant normative criterion is that a unanimous agreement in politics is typically a chimaera. It is in this context that a fundamental distinction of the CPE paradigm becomes critical: a distinction among two different levels of choice confronted by individuals in politics (or other social interactions). At one level (the “sub-constitutional level”), individuals choose actions and strategies within a set of existing rules and institutions that govern their interactions with others. But these institutions themselves must be created, and they are subject to choice and reform. As a result, we can conceive of choice at a higher level: at the “constitutional level,” individuals choose the rules that will govern their (sub-constitutional) interactions. Importantly, the potential for conflict among individuals differs substantially across the two levels. When pursuing their goals within a given set of rules, individual interest may often clash. At this level, unanimous agreement is all but impossible. But the same is not true at the constitutional level. To the extent that some rules create a “better game” for all players, individuals have a common interest in a set of rules (or changes in the rules) that constitute an improvement for all. In other words, at the constitutional level, politics can typically be a positive-sum rather than a zero-sum affair.¹⁰ Consider the analogy of an ordinary game. Before play starts, participants can have a productive conversation about the rules under which they will play, even if all know that they will have conflicting interests once play begins.

In short, the lens of politics as exchange becomes particularly fruitful when we consider constitutional choices. If politics is not about pursuing an exogenously given common good, but a means by which individuals advance their separate aims, then the institutional framework within which collective decision-making unfolds becomes critical. Does this framework promote the ability of individuals to pursue their ends, and to do so in ways that are compatible with other individuals’ pursuit of their ends? Just like some games have better rules, some institutional frameworks for collective decision-making create better politics, with the only criterion of “betterness” being the agreement of individuals on the rules. In other words, Buchanan’s paradigm pushes towards a contractarian approach in which political legitimacy derives from individuals’ agreement to the political order under which they live. As Buchanan explains:

and Moral Order: The Collected Works of James Buchanan 257 (2001) (“[U]nanimity . . . provides the *only* criterion through which improvements in rules and institutions can, in fact, be judged without the introduction of an explicit value scale.”).

10. James M. Buchanan, *The Domain of Constitutional Economics*, reprinted in 1 THE LOGICAL FOUNDATIONS OF CONSTITUTIONAL LIBERTY: THE COLLECTED WORKS OF JAMES BUCHANAN 386 (1999) (“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.”).

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.

The relevance of this commitment to citizen sovereignty for thinking about conceptions of democracy is not difficult to see. The constitutional choice process envisioned by the CPE paradigm makes citizen agreement the only criterion of legitimacy and thus, treats individuals as radically equal. At first impression, a political order established on these principles, chosen by the individuals who must live under it by unanimous consent, would appear to deserve the label “democratic.” After all, such an order clearly reflects the people’s will in some fundamental sense.¹¹ However, note that nothing has been said about the institutional details that might emerge from a process of constitutional choice under the unanimity rule. Specifically, whether individuals would opt for a political order that conforms to the criteria laid out by definitional approaches that equate democracy with a (representative) majoritarian policy process is an open question.

IV. AGREE TO WHAT?

The CPE paradigm suggests that in assessing whether or not a given political order is democratic, the critical issue is not whether it possesses specific characteristics (such as a policymaking process that is dominated by directly elected legislators). Instead, what matters is whether the political order is democratic in the sense that it advances the interests of citizens as they see them, and whether the order could—because it does so—command their (unanimous) consent. As Buchanan put it, “[c]ould the observed rules that constrain the activity of ordinary politics have emerged from agreement in constitutional contract?”¹²

In some settings, of course, it is hard to imagine unanimous agreement being reached at the constitutional stage. If individuals or groups hold strong beliefs about the constitutional rules that advantage them personally, and these interests run counter to those of other individuals, then the unanimity requirement may preclude agreement. But the same is not true if individuals must choose behind a veil of uncertainty, that is, in the presence of some (sufficiently high) uncertainty about how particular rules will affect the individual. Behind such a veil (which bears some resemblance to Rawls’ veil of ignorance):

11. At this point, it is appropriate to flag a complication that has received some scholarly attention: The problem posed by the status quo. A full discussion of how to think about this issue within the CPE paradigm is beyond the scope of the current paper, but for more on the topic see Viktor Vanberg, *The Status Quo in Contractarian-Constitutionalist Perspective*, 15 CONST. POL. ECON’Y 153 (2004); Michael Munger & Georg Vanberg, *Contractarianism, Constitutionalism, and the Status Quo*, (manuscript) (on file with author) (2019).

12. James M. Buchanan, *The Constitution of Economic Policy*, reprinted in 1 THE LOGICAL FOUNDATIONS OF CONSTITUTIONAL: THE COLLECTED WORKS OF JAMES BUCHANAN (1999).

the 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.¹³

By suppressing the salience of particular interests, uncertainty focuses attention on the general properties of rules. While individuals may disagree about the merits of specific institutions, “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.”¹⁴ Such differences are more likely to be amenable to debate and compromise, and therefore, unanimous agreement on rules becomes possible.

One important condition that induces the kind of uncertainty that places individuals behind a veil of uncertainty is the fact that constitutional rules are typically chosen with the expectation that they will be applied for an extended, possibly open-ended, period of time. To the extent that individuals confront significant uncertainty about their interests in (distant) future periods, and about the way in which specific rules might affect their interests, they are effectively choosing constitutional rules as if they had not specific personal interests at stake.¹⁵ As Buchanan put it:

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.¹⁶

The key trade-off confronting individuals in choosing constitutional rules in such a setting was the central focus of Buchanan and Tullock’s seminal *The Calculus of Consent*.¹⁷ On the one hand, institutions that place fewer hurdles in the path of collective decisionmaking decrease the costs of reaching decisions and make it less likely that decisions the individual favors can be blocked by

13. JAMES M. BUCHANAN & GORDON TULLOCK, *THE CALCULUS OF CONSENT* (1962).

14. James M. Buchanan, *Contractarianism and Democracy*, reprinted in 16 CHOICE, CONTRACT, AND CONSTITUTIONS: THE COLLECTED WORKS OF JAMES BUCHANAN 257 (2001).

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16. *Id.*

17. BUCHANAN & TULLOCK, *supra* note 13.

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 have the opposite effects. In short, the central trade-off is intuitive: more restrictive rules offer protection against undesirable political action, but also make the political process more cumbersome and make it more difficult to secure collective decisions the individual favors.

What are individuals likely to agree on in such a setting? Ultimately, of course, this is an empirical question that can only be answered in an actual decision process. But it is possible to offer a number of conjectures. The first is that while the process of constitutional choice is conducted under the unanimity rule, thus ensuring that all participants are left better off, it is difficult to imagine that individuals would choose the unanimity rule as a decision rule for subsequent, sub-constitutional decision-making. The unanimity rule is too cumbersome and impractical. *Put differently, at the constitutional stage, individuals are likely unanimously to reject the unanimity rule for post-constitutional politics.*

It also seems likely that some types of political orders (or features of political orders) are incompatible with the need for unanimous agreement. For example, Buchanan argues, political institutions that “deny some persons or groups *ex ante* access to the political process” are unlikely to be agreed to unanimously.¹⁸ In other words, individuals—not knowing their precise place in the subsequent decision process—will not consent to arrangements that deny political equality to some members. In practice, this is likely to lead to arrangements that provide for the possibility of turnover in power, and guarantee an electoral process that is characterized by rough equality.¹⁹ In other words, the kind of political order that emerges is likely to be democratic in the sense that it will include a number of institutional features commonly associated with democratic politics, including free and fair elections of policymakers who rotate in office. It is also conceivable that individuals would agree on the use of majority rule procedures for a wide range of collective decisions. Critically, however, these institutional features are not *ipso facto* constitutive of democracy; rather, their democratic bona fides derive from the constitutional choice process from which they emerge.

There is one final—and for current purposes most important—implication. In addition to features typically associated with democratic institutions, unanimous agreement at the constitutional stage is also likely to lead to the adoption of institutional features that are viewed as being in tension with democratic governance on the traditional view. Individuals will anticipate the possibility of finding

18. Buchanan, *supra* note 14, at 219.

19. As 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.” *Id.* at 222.

themselves on the losing side of collective decisions. They have an interest in some protections against the (potentially disastrous) consequences that may result. This implies that individuals are likely to prefer institutional safeguards that place obstacles in the path of majoritarian policymaking by elected representatives, at least with respect to some types of collective decisions. Such safeguards may seem undemocratic in the sense that they constrain the power of elected representatives (or of “the people” directly). Nevertheless, such features are deeply democratic in the sense that they can emerge from unanimous agreement among individuals at the constitutional stage. In short, there are institutional limits to majoritarian policymaking that *all* individuals are likely to prefer to their absence.²⁰

Put in concrete terms, 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,” such as an independent judiciary armed with the power of judicial review, or an independent central bank to oversee monetary policy. In other words, as Buchanan pointed out, the CPE conception of democratic governance does not

directly yield implications about the structure of political arrangements and hence about democracy’ in the everyday usage of this term. We must acknowledge that in terms of ordinary language usage, ‘non-democratic’ political institutions may be analytically derived from fully consistent contractarian premises.²¹

In extreme cases, it may even be possible that features that seem completely inconsistent with conventional understandings of democracy can gain the kind of democratic legitimacy that the CPE approach suggests. Consider the Duchy of Liechtenstein as an example. Liechtenstein’s hereditary monarch exercises considerable political power (including a veto over parliamentary legislation), and the country is regularly scolded for being among the least democratic in Europe.²² At

20. As Buchanan and Tullock observed: “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.” BUCHANAN & TULLOCK, *supra* note 13, at 82. See also James M. Buchanan *Generality as a Constitutional Constraint*, reprinted in 1 THE LOGICAL FOUNDATIONS OF CONSTITUTIONAL LIBERTY: THE COLLECTED WORKS OF JAMES BUCHANAN 421 (1999) (“[F]or many collective decisions, a supermajority or qualified majority, short of unanimity but more inclusive than a simple majority, might be preferred.”).

21. BUCHANAN, *supra* note 14, at 215. See also, James M. Buchanan, *The Foundations of Normative Individualism*, reprinted in 1 THE LOGICAL FOUNDATIONS OF CONSTITUTIONAL LIBERTY: THE COLLECTED WORKS OF JAMES BUCHANAN 288 (1999) (“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*.”).

22. See Wouter Veenendaal, *Ohne Fuerst Sind Wir Nichts: Smallness, Monarchy, and Political Legitimacy in the Principality of Liechtenstein*, ECPR JOINT SESSIONS 2 (2014).

the same time, the Liechtenstein constitution provides that the hereditary monarchy can be replaced with a representative republic through a popular referendum. In 2012, the powers of the monarchy were challenged in such a referendum organized by pro-democracy activists. Citizens resoundingly endorsed the “undemocratic” features of Liechtenstein’s constitution by a large margin.²³ What are we to make of such a scenario? Rather than condemn Liechtenstein’s political order as undemocratic by definition because it lacks a particular set of institutional features, the CPE approach suggests that one should entertain the possibility that the order is consistent with the consent of its citizens and preferred by them to a more “democratic” system. Paradoxically, even a hereditary monarchy may be eminently democratic in this more fundamental sense.

Putting the same point differently, Buchanan’s CPE paradigm approaches the concept of democracy by moving beyond the (definitional) question of whether a political order contains particular predefined attributes to the more fundamental question whether a political order is consistent with citizen sovereignty. While “democratic” choice of constitutions by unanimous agreement behind a veil of uncertainty likely implies political institutions that secure citizen input and a certain level of political equality, it is also likely that such a choice process will lead to the adoption of at least some collective choice institutions that 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.

The critical conclusion that emerges from this perspective is that the perceived tension between constitutionalism and democracy is a mirage. As Buchanan argued, the idea that constitutionalism and democracy are incompatible “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”²⁴ In contrast, closer examination suggests that at the constitutional level, citizens are likely unanimously to choose political systems with some constitutional limits on majoritarian procedures.²⁵ There may, of course, be disagreements about the precise nature of these

23. The proposal to limit the “undemocratic” powers of the prince was rejected 76% to 24%, with a turnout of roughly 83%. See Tony Paterson, *Prince Secures Landslide Victory in Referendum to Check Royal Powers*, INDEPENDENT (Jul. 1, 2012), <https://www.independent.co.uk/news/world/europe/prince-secures-landslide-victory-in-referendum-to-check-royal-powers-7902948.html> [https://perma.cc/ADS9-55RW].

24. James M. Buchanan, *Sources of Opposition to Constitutional Reform*, reprinted in 16 CHOICE, CONTRACT, AND CONSTITUTIONS: THE COLLECTED WORKS OF JAMES BUCHANAN 356 (2001).

25. Hayek 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.” FRIEDRICH A. HAYEK, *THE CONSTITUTION OF LIBERTY* 81 (1960).

constraints. But the presence of limits on majority rule is entirely consistent with—and likely implied by—democracy understood as citizen sovereignty.²⁶

V. IMPLICATIONS FOR INSTITUTIONAL DESIGN

Of course, such a contractarian approach must confront an obvious and significant challenge, pointedly raised by David Hume, and readily acknowledged by Buchanan: existing political orders rarely, if ever, are founded on explicit consent.²⁷ Without downplaying this issue, I want to suggest that focusing on this descriptive question (“Is the existing political order rooted in consent?”) misses the larger conceptual contribution of the CPE paradigm. This contribution consists of the disciplining effect of a contractarian perspective on assessing the legitimacy of a political order. By its nature, the contractarian lens directs analysis away from references to exogenous normative criteria (such as natural rights, the pursuit of justice, republican virtue, etc.), and instead disciplines the analyst to take seriously the preferences and desires of the individuals who live under it. In evaluating the legitimacy of a political order, analysis must focus on the interests of citizens, as citizens see them, rather than on independently defined values an analyst brings to the table. The critical issue is not whether a political order is historically grounded in consent; the question is whether it can hold up to the measuring rod of citizen interests:

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.²⁸

26. Buchanan highlights this point as follows: “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?” James M. Buchanan, *Sources of Opposition to Constitutional Reform*, reprinted in 16 CHOICE, CONTRACT, AND CONSTITUTIONS: THE COLLECTED WORKS OF JAMES BUCHANAN 362 (2001).

27. “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.” James M. Buchanan, *Before Public Choice*, reprinted in 1 THE LOGICAL FOUNDATIONS OF CONSTITUTIONAL LIBERTY: THE COLLECTED WORKS OF JAMES BUCHANAN 430 (1999).

28. James M. Buchanan, *The Constitution of Economic Policy*, reprinted in 1 THE LOGICAL FOUNDATIONS OF CONSTITUTIONAL LIBERTY: THE COLLECTED WORKS OF JAMES BUCHANAN 466 (1999). Note that 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

As hinted at in the final line of the above quote, a focus on citizen evaluations as the relevant metric for assessing the legitimacy of a political order has practical implications. Citizens who live under an order they regard as inconsistent with their interests or values can make use of at least two potential responses: voice (that is, expressing their discontent) or exit (that is, leaving the jurisdiction).²⁹ The lower the barriers are for citizens to exercise either option, the more confident we can be that citizens who do not engage in voice or exit believe that the political order is worthy of their consent. Put differently, from the CPE perspective, the claim that a political order deserves the label “democratic” in the sense implied by a respect for citizen sovereignty becomes more persuasive as the barriers to voice and exit become lower and lower.

Critically, the significance of the costs of voice and exit are a function of internal and external institutional features of a political system. Consider the costs of exit. Political arrangements that make it easier for citizens to choose among political orders by moving between competing jurisdictions constitute an important means for lowering exist costs. Internally, federal arrangements in which substantial political authority is concentrated at the level of sub-national governments provides the most obvious such arrangement.³⁰ Typically, federalism imagines a geographically-based division of jurisdictions. As Frey and Eichenberger have argued, this is not necessary.³¹ Their theory of functional, overlapping, competing jurisdictions (FOCJ) provides a model for federalism in which competing organizations provide public goods within the same geographic area.³² The key point

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. As Buchanan put it: “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.” James M. Buchanan, *The Foundations of Normative Individualism*, reprinted in 1 THE LOGICAL FOUNDATIONS OF CONSTITUTIONAL LIBERTY: THE COLLECTED WORKS OF JAMES BUCHANAN 288 (1999).

29. ALBERT O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY (1970).

30. See, e.g., Viktor Vanberg & Wolfgang Kerber, *Institutional Competition Among Jurisdictions: An Evolutionary Approach*, 5 CONST. POL. ECON. 193 (1994); ILYA SOMIN, FREE TO MOVE: FOOT VOTING, MIGRATION, AND POLITICAL FREEDOM (2020). This argument has been developed most explicitly in terms of the provision of bundles of public goods and taxes. See, e.g., Charles Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956); James M. Buchanan, *An Economic Theory of Club Goods*, 32 ECONOMICA 1 (1965).

31. BRUNO FREY & REINER EICHENBERGER, THE NEW DEMOCRATIC FEDERALISM FOR EUROPE – FUNCTIONAL, OVERLAPPING, AND COMPETING JURISDICTIONS (1999).

32. 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. For a detailed treatment, see Viktor Vanberg, *Functional Federalism: Communal or Individual Rights?*, 53 KYKLOS 363 (2000). In the case of FOCJ’s, what is the nature of the service provided by an FOCJ? Does this 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

here is that such jurisdictional competition has the beneficial consequences of inducing policy-responsiveness by governments that have typically been the focus of analysis. It can also significantly enhance the democratic legitimacy of sub-national units by making continued choice of residency in a jurisdiction a more meaningful indicator that citizens consent to the jurisdiction's governance.

Perhaps more interestingly, the costs of exit are also affected by the *external* relations of a political system. Exit (and its cost) depends critically on the availability of an outside option. The individual must have some place to go. The easier it is to leave and settle in an alternative jurisdiction, the lower the costs of exit. Federal arrangements can provide such opportunities with respect to sub-national units. But for national governments, the political system cannot provide an outside option itself. Here, the ability to exit depends on the availability of another state to which the individual can move. It is possible to imagine institutional solutions that aim at providing such opportunities. For example, treaty arrangements among states could provide reciprocal immigration rights to citizens of member states.³³ As a real-world prototype, consider the European Union and the guarantee of the free movement of persons across member states. The European Union itself is often accused of suffering from a democratic deficit. And yet, by significantly lowering the costs of exit for citizens through the right to live and work in any member state, the European Union directly enhances the democratic legitimacy of its member states.

Of course, lowering the costs of exit—whether through internal federal arrangements or external migration rights—is no panacea. There are significant and potentially complicated details that must be confronted in designing specific institutional structures for foot voting (e.g., what kinds of claims recent immigrants could establish with respect to social provisions, etc.). And there may also be harms that could potentially arise from the self-selection of individuals into jurisdictions.³⁴ But the conceptual point of the thought experiment is clear: from the CPE perspective, arrangements that lower the costs for individuals to exercise the exit option can be a significant factor in enhancing the democratic legitimacy of a political system.

CONCLUSION

In popular conception and academic debate, democracy is often equated (by definition) with government by executives and legislatures that are selected in free and fair elections. This identification is, perhaps, not surprising: modern democratic polities emerged largely in opposition to the power of monarchs. This emergence was marked by an expansion of the authority of elected legislatures

competition among FOCJs is for local governments. Services without these properties may be able to compete directly for individual citizens.

33. For a detailed treatment of “foot voting,” including international migration, see SOMIN, *supra* note 30.

34. For a discussion, see Ryan Muldoon, *Local Diversity and Polycentric Democracy*, 18 GEORGETOWN J. L. & PUB. POL’Y (forthcoming 2020) in this issue.

along with an expansion of the franchise. Within this tradition, constitutionalism is often perceived as an obstacle. Constitutional constraints—especially if imposed through unelected, unrepresentative institutions, such as independent courts—appear inconsistent with democratic values because they interfere with the policy choices of “the people” as represented by elected policymakers. As a recent (hyperbolic, but nevertheless influential) account charged, constitutionalism is a device that puts “democracy in chains.”³⁵

The CPE paradigm developed by James Buchanan provides a powerful corrective to this perception. The central thrust of Buchanan’s argument is to shift conceptions of democracy away from definitional approaches that equate democracy with the presence of a particular set of institutional features (such as a majoritarian policy process or free and fair elections). Instead, the approach focuses on the underlying normative criterion that can legitimize a political order as democratic: citizen sovereignty. The critical issue is whether a political order is consistent with the consent of the citizens who must live under it. Viewed from this vantage point, it becomes obvious that democracy is not only consistent, but synonymous with constitutionalism: anticipating potential harm that may come to them through adverse collective decisions, citizens will typically not prefer a system of unfettered democracy. Placed in a constitutional moment and choosing the political system under which they wish to live, citizens are likely to arrive at unanimous agreement on constitutional safeguards that impose some restrictions on the political process. In this fundamental sense, constitutionalism does not contradict the democratic expression of the people’s will; it is an expression of it. Buchanan’s succinctly summarizes this position: “I remain, in basic values, an individualist, a constitutionalist, a contractarian, a democrat – terms that mean essentially the same thing to me.”³⁶

Naturally, the argument does not imply that all constitutional constraints found in contemporary democracies are legitimate in the sense implied by a respect for citizen sovereignty. It is precisely for this reason that the constitutional political economy paradigm remains an exciting and relevant research program: We must continue to examine whether existing constitutional orders are plausibly consistent with citizen consent. And where they are found wanting, we must develop proposals for constitutional reforms that can secure citizen buy-in, including institutional innovations that lower the costs of exit and voice.

35. NANCY MACLEAN, *DEMOCRACY IN CHAINS* (2017).

36. James M. Buchanan, *The Limits of Liberty*, reprinted in 7 *THE LIMITS OF LIBERTY: BETWEEN ANARCHY AND LEVIATHAN: THE COLLECTED WORKS OF JAMES BUCHANAN* 11 (2000).