Public Choice
https://doi.org/10.1007/s11127-021-00878-x

Contractarianism, constitutionalism, and the status quo

Michael Munger[1] · Georg Vanberg[1]

Received: 7 June 2019 / Accepted: 16 January 2021
© The Author(s), under exclusive licence to Springer Science+Business Media, LLC part of Springer Nature 2021

Abstract

The constitutional political economy (CPE) approach as developed by James Buchanan places emphasis on supermajority rules—in particular, a unanimity requirement for constitutional change. Critics argue that this approach "privileges the status quo" in two problematic ways: (1) alternatives are treated unequally, because the status quo requires a smaller coalition to be "chosen" than any other institutional arrangement selected to replace it; and (2) individuals are treated unequally, because those who happen to support the status quo have excessive power to impose their will on the larger group, implying that a minority illegitimately is privileged to block change. This is a serious and important challenge. At the same time, we argue that critics have conflated two analytically distinct issues in arguing that the CPE paradigm (and constitutionalism more generally) "privilege the status quo". Moreover, we aim to show that in rejecting the "privileged position of the status quo", critics must confront an equally challenging task: Providing a "measuring stick" by which the legitimacy of the status quo, and changes to it, can be judged. It is precisely skepticism regarding the possibility of providing a criterion of legitimacy that is independent of agreement that leads to the peculiar position of the status quo in Buchanan's thought.

Keywords Contractarianism · Constitutions · Rational choice · Social choice

JEL Classifications B25 · B31 · D72

"The status quo is the only solution that cannot be vetoed."
Clark Kerr, president of the University of California
"Status quo, you know, that is Latin for the mess we're in."
Ronald Reagan

✉ Michael Munger
munger@duke.eedu

Georg Vanberg
georg.vanberg@duke.edu

[1] Department of Political Science, Duke University, Durham, USA

Published online: 05 February 2021

1 Introduction

Social contract theory—the idea that the consent of the governed is sufficient to legitimate coercive state power—is a core tradition in Western political thought. The *constitutional political economy* (CPE) tradition associated with Nobel Laureate James M. Buchanan constitutes a reappraisal of that paradigm. Buchanan's central contribution was to derive a consistent, methodologically individualist foundation for a contractarian approach by applying the analogy of voluntary market exchange to collective decision-making.[1] Put differently, the essence of CPE is to view "politics as exchange" (Buchanan and Brennan 2001). Just as the core of market activity consists of the voluntary exchange of private goods among trading partners, for Buchanan, the political order can be viewed as a complex exchange among individuals who jointly commit to a set of rules that will govern collective decision-making, and to accepting the outcomes that result under those rules. Critically, within this paradigm *actual* unanimous consent, or something close to it, constitutes the necessary condition for political authority and legitimate constitutional change.[2]

The notion of a morally binding "social contract" has long been criticized as either impractical (if taken seriously) or illusory (if applied hypothetically). David Hume's (1777/1987) famous attack on (tacit) consent constitutes perhaps the most well-known example. Critics of Buchanan's CPE paradigm have decried the practicality of the unanimity criterion for judging the legitimacy of constitutional change or reform. Unanimity implies that change in the political order requires consent, while the status quo can be maintained by a "blocking coalition"—consisting in the extreme of one person—that does not need to have the same level of support. Importantly, as Vanberg (2004) has pointed out, this line of attack highlights two separate aspects of the status quo in contractarian arguments. First is a purely practical observation: Politics must begin *somewhere*—that is, some baseline policy or rule must serve as the starting point of deliberation. In this regard, the status quo may serve as a "reasonable" baseline simply because of its focal character (Schelling 1960), and because it typically serves as the reversion point if deliberations fail (Rosenthal 1990). However, as Vanberg (2004) notes, there is a second *normative* dimension: One may be forced to recognize the *practical* relevance of the status quo, but it is quite a different matter to claim that the status quo is just, and ethically deserving of being the presumptive outcome.

It is this dual role that leads to the potentially problematic status of the status quo in Buchanan's CPE paradigm. An insistence on actual unanimity for constitutional change

[1] As he put it in his seminal joint work with Gordon Tullock, *The Calculus of Consent*: "I understood our objective to be the logical derivation of collective action or political structure from the rational choice basis that informs economics" (1962/2012, 254).

[2] A central conclusion of the CPE paradigm is that political orders rooted in mutual commitment to rules are likely to feature significant constitutional constraints on collective decision-making. Individuals, anticipating the kinds of collective choices that are likely to emerge under different sets of constitutional rules, will not consent to political orders that fail to provide hurdles to the (ab)use of political power in the form of substantive constraints on the *scope* of collective decision-making as well as procedural constraints on the *process* by which political decisions can be made. In other words, the CPE approach highlights the powerful interest that individuals have in constitutional constraints on majority rule (see Vanberg 2018). On the other hand, it also is perfectly plausible to expect that, in at least some situations, citizens might consent unanimously to be bound by majority rule. In that sense, Vanberg (2018) mirrors Buchanan's two extensions: majority rule is not binding without actual consent, but with consent majority rule outcomes must be accepted even by those who disagree on the particulars.

implies that normatively suspect privileges are inherited by the new regime.[3] As a result, critics argue, the unanimity standard "privileges the status quo" in a manner that makes the problem of moral justification acute: starting at the status quo may be practical, but rules that embody that presumption can protect unjust regimes or arrangements.[4] As Dyson (2021) points out, this challenge has important contemporary implications. For example, how can "conservative" liberal rules, with their inherent procedural presumption in favor of property rights be justified and defended without making the rules a ruse to preserve unjust institutions? This difficulty is among the core problems addressed by the CPE paradigm in the United States and the United Kingdom, and by ordo-liberalism in Europe, especially Germany.

We take up this challenge in this paper. We do not resolve the questions raised by the status of the status quo in the CPE tradition fully. Instead, our aim is more modest: First, we want to clarify the issues at stake in this debate. In our view, critics have conflated two analytically distinct arguments:

1. Unanimity treats *alternatives* unequally because the status quo requires a smaller decisive set than any other institutional arrangement requires to be "chosen" as the outcome.
2. Unanimity treats *individuals* unequally by allowing members of society who are illegitimately privileged under the status quo to block change.

Second, we aim to show that in rejecting the unanimity criterion and the "privileged position of the status quo", critics must confront an equally challenging task: Providing a "measuring stick" by which the legitimacy of constitutional change—and, thus, implicitly, the legitimacy of the status quo—can be judged. As we argue, it is precisely Buchanan's skepticism regarding criteria of legitimacy that are independent of agreement that leads to insistence on unanimity and, by implication, to the privileged position of the status quo. Having traversed that ground, we conclude by offering some suggestions on how the question of constitutional change might be addressed within the CPE approach while sidestepping, or at least mitigating, concerns raised by the unanimity requirement. Our conclusion is that Buchanan should be thought of as a "contractarian at the margin." Rather than a full-fledged contractarianism, his position appears to imply that (a) actual constitutions rarely are fully consented to, and (b) that individuals, if asked, would likely unanimously agree to a rule other than unanimity as the mechanism for amending the status quo.

The paper is organized as follows. We begin with a short overview of the CPE approach, which is critical to developing the subsequent argument. Next, we outline the sense in which CPE privileges the status quo. In the following section, we clarify two issues that, in our view, are conflated in critiques of CPE. Finally, we offer some thoughts on how to resolve the tensions introduced by the status of the status quo.

[3] See, for example, Sobel and Holcombe (2001).

[4] For a review of the relevant literature, see Buchanan and Samuels (1975), Schwartzberg (2014), and Vanberg (2004). Of course, the critique applies not just to unanimity rule, but to any supermajority procedure. See also McGann (2004, p. 54): "(w)ith supermajority voting, the status quo is privileged—if there is no alternative for which a supermajority votes, the status quo is maintained…. [G}iven that the status quo is more desirable to some voters than to others, some voters are effectively privileged." By implication, the critique applies not only to the CPE tradition (with its insistence on unanimity) but to constitutionalism more generally (which typically insists on supermajority requirements for constitutional change). See Vanberg (2018) for a broader discussion.

2 Buchanan's contractarianism

Voluntary exchange of goods or services lies at the heart of market activity—the domain of economics.[5] The beauty of voluntary market exchange lies in the fact that it leaves both parties to the exchange better off in terms of the individuals' own values: It generates a Pareto improvement. Put differently, the process of exchange—because it is voluntary—ensures that each participant in the trade receives something she values more than what she trades away. In an important sense, the world—post exchange—self-evidently must be "a better place" than it was before. The voluntary agreement of the exchanging parties "legitimizes" the change in resource allocation that is brought about by their trade, as long as one accepts the minimal ethical judgment that a change that leaves all parties better off by their own lights *is* legitimate. The core of Buchanan's contractarianism aims to extend the same logic to the realm of collective or political decision-making, that is, to approach collective choice as an enterprise that—like market exchange—can lead to "positively valued prospects for all members of the polity" (Buchanan 1990/1999, p. 386).[6]

Of course, market exchange results in "improvement" only as judged by the parties to the exchange—not in terms of some independently defined criterion or standard of value. The same orientation underpins Buchanan's approach to collective decision-making. For Buchanan, "individuals are the only sources of value" (Buchanan 1985/2001, p. 271); no external value scales, independent of the values of the individuals concerned, exist. As a consequence, 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). Rather, the purpose of collective decision-making—like the purpose of the market—is to allow individuals to advance their own interests as they see them.

Given that "normative individualist" position, what criterion can—like voluntary exchange in the market—ensure that collective decisions result in improvement, i.e., that collective decisions are legitimate in the sense that they "make the world a better place"? The immediate answer is *agreement*. If all individuals voluntarily agree to a collective decision, then the decision must improve the situation for all individuals, at least in terms of their own standards of value. Put differently, to extend the logic of market exchange and the emphasis on mutual gain to collective decision-making implies a focus on *unanimity*, which "provides the *only* criterion through which improvements … can, in fact, be judged without the introduction of an explicit value scale" (Buchanan 1966/2001, p. 257):

> 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. (Buchanan 1986/1999, p. 463)[7]

[5] Because of the centrality of exchange to economic activity, Buchanan (like F.A. Hayek and Ludwig von Mises) favored the term "catallaxy" over economics.

[6] Note that we focus exclusively on the two trading partners and assume away potential complications introduced by negative externalities for third parties—a simplification that is acceptable in the current context because Buchanan's "politics as exchange" paradigm extends the exchange metaphor to the entire political community, i.e., all individuals in the relevant situation. Thus, in that setting, no "third parties" exist who might suffer negative externalities but are not part of the agreement.

[7] While choices at the constitutional level are governed by the unanimity rule, it is critical to stress that the rule does not imply that *all* collective choices will proceed by requiring consent. Indeed, a critical conclusion of *The Calculus of Consent* (Buchanan and Tullock 1962/2012) is that requiring unanimity—or even

Of course, insistence on unanimity in collective decision-making raises an immediate difficulty: Can a group of individuals find unanimous agreement on collective choices? To address that challenge, Buchanan introduces a distinction between "sub-constitutional" (or post-constitutional) and "constitutional" levels of choice. Consider the analogy of a game. At one level, players and coaches make choices about how to play the game *within* an existing structure of rules. That is the sub-constitutional level of choice. At that level, the interests of players may often clash and be in conflict. At the same time, at least in principle, players and coaches could—collectively—choose *the rules themselves* (or agree on changes to the rules). What is most important at that level, individuals are likely to have *common* interests in the sense that some rules (and changes to the rules) will generate a better game from the perspective of everyone involved, including spectators.[8]

For Buchanan, "politics as exchange" occurs at this constitutional level: Individuals can commit jointly to *establishing* a set of rules—and, what is more important, as we argue below, *reforms* of rules—for making collective decisions that will generate—at least in expectation—an improvement to each individual. This means that agreement to rules offers the prospect of being able to pursue the individual's values more effectively than would be possible in their absence of those rules. Just as we exchange goods in the market, and thereby improve the positions of all parties to the trade, so we can exchange acceptance of a "constitution" (perhaps with a small "c" that will govern our collective choices in ways that create a "political game" that offers better prospects to all. It is in such collective agreement that individuals can find "the public interest" (rather in substantive agreement on specific political aims):

> It is necessary to distinguish sharply between day-to-day political decision making, where the struggle often does reduce simply to that among conflicting individual-group interests, and "constitutional" decision making, where individuals may be thought of as participating in choices on the set of rules under which subsequent day-to-day decisions are to be made. This second set of decisions, of choices, which may be called the "constitutional," is the important one, and, at this stage, it becomes possible to reconcile separate individual interests with something that could, with some legitimacy, be called the "public interest". (Buchanan 1966/200, p. 255)

3 The problem of the status quo

Much of the social contract tradition focuses on the original establishment of political order by agreement *ex nihilo*—think of Hobbes's or Locke's "state of nature." Put differently, the aim is to legitimize particular political arrangements on the basis of actual or hypothetical consent. Some of Buchanan's own work—most notably, *The Calculus of Consent*

Footnote 7 (continued)

something close to unanimity—for many collective choices will be prohibitively costly, both in terms of the effort and resources required to reach agreement, as well as in the opportunity costs of decisions that are blocked. As a result, individuals typically will *unanimously agree to less than unanimity rules* for subsequent collective choices. See Vanberg (2018) for a detailed discussion.

[8] As Buchanan (1990/1999, p. 386) put it with respect to the political analog: "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.".

(Buchanan and Tullock 1962/2012)—has that flavor. There, Buchanan and Tullock imagine individuals in an "original position", engaged in the constitutional calculus behind a veil of uncertainty or insignificance that removes contextual knowledge that may bias evaluations of collective decision-making procedures.[9] Out of that original position, a political order—defined by a set of rules and institutions for collective decision-making—emerges by unanimous agreement. This political order is justified by consent and thus legitimate.

But of course in the "real world" individuals do not—ex nihilo—adopt a political system behind a veil of uncertainty (typically, at least, not a veil sufficiently thick to obscure knowledge of the position individuals are likely to occupy going forward).[10] In the real world, "we start from here", as Buchanan insisted: a status quo that is itself the product of a complex history, much (most?) of which does not involve meaningful consent. As Buchanan (1972/1999, p. 430) acknowledges,

> 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 how have come behind. We cannot start anew. We can either accept the political universe, or we can try to change it. The question reduces to one of determining the criteria for change.

Note the important pivot implied in the last two sentences of that quotation. Recognizing that existing political arrangements—the status quo—typically can *not* be defended as reflecting agreement or consent, Buchanan shifts the focus of the contractarian logic to the question of *reform* or *change* in existing political arrangements. In an important sense, then, Buchanan is not a "wholesale contractarian", but a "contractarian at the margin". The logic of the CPE paradigm generally can *not* establish the legitimacy of a particular political order; all it can do is to legitimize *changes* in the present order. *The focus of analysis is to investigate prospects for legitimate constitutional reform.*[11]

[9] As Buchanan and Tullock (1962/2012, p. 78) put it, "Essential to the analysis is the presumption that the individual is *uncertain* as to what his own precise role will be in any one of the whole chain of later collective choices that will actually have to be made. For this reason, he is considered not to have a particular and distinguishable interest separate and apart from his fellows … 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." Obviously, that approach has much in common with John Rawls's (1972) approach to the problem of justice.

[10] Though it is important to point out that Buchanan and Tullock's "veil" is not nearly as thick as that of Rawls and, as a result, Buchanan believed that real world situations can approximate a behind-the-veil setting, especially if rules are expected to be long-lasting. As Buchanan (1986/1999, p. 464) explained in his Nobel Prize address, "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.".

[11] In his joint work with Geoffrey Brennan, Buchanan raises an interesting and important distinction between working to *change* rules and choosing to *break* rules, arguing that even for rules that have not been consented to, individuals may have an obligation to conform to them while retaining the right to work towards their reform (Brennan and Buchanan 1985/2000, p. 115f.) That is a difficult and fascinating issue we do not take up here, though an alternative useful source is Shepsle (2017). We thank an anonymous reviewer for clarifying our thinking on this matter.

What can legitimize constitutional reforms under the contractarian paradigm? Given a normative individualist position, the answer must, once again, lie in *unanimous agreement*:

> At the constitutional level of discourse, unanimity or consensus becomes important, not because there is something sacrosanct about unanimity per se, but for the simple reason that it provides the *only* criterion through which improvements in rules and institutions can, in fact, be judged without the introduction of an explicit value scale. (Buchanan 1966/2001, p. 257)

In other words, the unanimity criterion emerges from the confluence of two considerations. First, *if* unanimous agreement on a change can be secured, such change would seem to be self-evidently legitimate: It leaves all individuals better off by their own lights. Second, any alternative criterion requires the introduction of a value scale that is not rooted in respect for the individuals' own values—a position inconsistent with normative individualism.

The consequence of insistence on unanimity for reform is immediate and seemingly problematic: It entrenches the status quo—a status quo that typically is *not* the product of agreement or consent and whose (contractarian) legitimacy typically cannot be established. It is path-dependent, and the product of past choices that may appear ethically questionable and possibly inexcusably unjust. As critics of the CPE paradigm argue forcefully, to insist on unanimity in such a context often means protecting illegitimate privileges. Warren Samuels argued the point in an exchange with Buchanan in the following way: "[Your approach] allows the privileged in the status quo to hold out and perpetuate themselves by being able to withhold their consent. As attractive as the consent (unanimity) rule is, it places too much power in the hands of the already privileged, indeed cementing their mortgage upon the future…" (Buchanan and Samuels 1975, p. 30).[12] It is a powerful challenge, and one that Buchanan (1966/2001, p. 258) acknowledged: "By saying that agreement or unanimity is the only meaningful criterion in the individualistic context, I of course stand accused of building into the model a defense of the *status quo*."

4 An attempt at apology

In this section, we take up the challenge and explore potential "Buchananite" responses. It is useful to begin by drawing a distinction between two alternative interpretations of the "status quo critique":

Critique 1: Privileging an alternative.
One interpretation departs from the observation that the requirement for unanimous agreement (or any other type of supermajority requirement) for constitutional reform advantages the status quo vis-à-vis any alternative institutional arrangement in a simple "counting sense". Consider the size of the coalition that is required to transition from the status quo (SQ) at t_1 to some other institutional arrangement (Y) at t_2. Under any supermajority rule, that coalition (which, under the unanimity rule must be comprise all individuals) is larger than the coalition that can ensure a continuation of SQ from t_1 to t_2. The two alternatives

[12] Note that the critique is closely related to another—though somewhat different—point, namely the charge that contractarianism in general is untenable as a plausible theory of political legitimacy because real-world political regimes are in all but the most unusual circumstances not based on consent. That argument originated with Hume, of course. For a detailed discussion, see Vanberg and Vanberg (2017).

are treated "unequally" in the sense that less support is required (in a counting sense) to "choose" the status quo than it is to choose any other arrangement.

Put differently, under the interpretation at hand, the point of attack for the critique is that the unanimity requirement treats the *alternatives* unequally. That interpretation is closely related to May's Theorem (May 1952).[13] Loosely speaking, the theorem states that the only voting method that treats all alternatives *neutrally*—i.e., does not privilege any alternative—is simple majority voting. Supermajority voting methods violate that condition and privilege the status quo—and the unanimity rule does so most egregiously. As a deductive result, the power of May's Theorem depends on accepting the normative bite of neutrality: The requirement that the rule treat any two alternatives equally in the sense that given a profile of voter preferences over alternatives A and B that results in a choice of alternative A, reversal of every voter's preference over A and B will result in B as the chosen alternative.[14]

The critical question thus becomes whether treating alternatives equally in a "counting" sense should be an overriding normative concern. It is not obviously so—especially given that the neutrality requirement is silent regarding the intrinsic characteristics of the alternatives under consideration (other than the size of the coalition required to choose an alternative). It seems plausible that characteristics of the alternatives other than the sizes of coalitions needed to choose each option are of potential importance to individuals. If that is the case, tradeoffs between neutrality and other values must be considered. Two obvious and important values in the context at hand are stability and predictability: In a dynamic setting, in which individuals face intertemporal tradeoffs and must make decisions that have long-run consequences, significant value exists in stabilizing expectations about the prevailing rules. Predictability is an important ingredient in allowing individuals to formulate long-run plans. Put differently, all else being equal (a point we turn to next), a concern for stability and predictability may well justify "privileging the status quo".[15] That is, of course, an argument familiar in another context: judicial decision-making. Therein, the principle of *stare decisis* (that lower courts should follow the opinions of higher courts and later courts should apply earlier decisions to like cases) is not rooted in the presumption that earlier decisions necessarily are "right" in some deeper sense. It is rooted in the desire to instill predictability into the law.[16]

[13] May's result states that the only voting method for choosing between two alternatives that is neutral (that is, treats alternatives equally), anonymous (that is, treats every voter equally), and is positively responsive (that is, if two alternatives tie, then an increase in voter preference for one of the alternatives breaks the tie in favor of the alternative with more support) is simple majority rule.

[14] To see that supermajority rules violate the requirement, imagine a choice between the status quo SQ and an alternative A under a two-thirds majority rule. Assume five voters, two of whom rank SQ > A and three of whom rank A > SQ. Given that profile, and the two-thirds rule, the SQ remains in force. Neutrality thus requires that if we reverse all voters' preferences, alternative A is chosen. But, of course, it is not: if two voters rank A > SQ and three voters rank SQ > A, the status quo remains intact.

[15] Brennan and Buchanan (1985/2000, p. 13): "If rules are viewed as providing information to enable the players to predict each other's actions, it follows that any change in the rules *destroys* information.… In order to function, rules require stability. If rules are continually subject to change, the information they provide becomes negligible.".

[16] Consider Justice O'Connor's opinion in *Planned Parenthood vs. Casey*, a decision that upheld *Roe v. Wade* despite significant misgivings among many justices about *Roe*. O'Connor justified the decision explicitly with respect to the importance of precedent's imparting of stability to law, and in the ability of individuals to plan: "The sum of the precedential inquiry to this point shows *Roe*'s underpinnings unweakened in any way affecting its central holding. While it has engendered disapproval, it has not been unworkable. An entire generation has come of age free to assume *Roe*'s concept of liberty in defining the capacity of women to act in society, and to make reproductive decisions.…".

The foregoing argument suggests significant limits to critiques of "privileging the status quo" that focus on the fact that supermajority rules for constitutional change treat the *alternatives* among which individuals choose unequally. Treated purely as an issue of the sizes of coalitions required to bring about change, a critique of "privileging the status quo" loses much of its force once put into the context of broader considerations, such as the values of predictability and stability. Of course, recognition of such tradeoffs does not imply that a supermajority requirement (including unanimity) necessarily is desirable. But it highlights that supermajority rules are not *per se* problematic because they "treat alternatives unequally" in the sense of requiring coalitions of different sizes for bringing about particular outcomes.

Critique 2: Privileging particular individuals.
A second, more persuasive, interpretation of the critique that the unanimity requirement privileges the status quo focuses on the fact that insistence on consensus implies that the process of constitutional reform treats *individuals* unequally. As we have pointed out already, Buchanan acknowledges that the status quo typically is not the product of a process of consensual choice. Moreover, it often embodies privileges for particular (groups of) people that appear to many individuals to be normatively suspect (Buchanan and Samuels 1975, p. 30). Historical experience suggests that in many constitution-making episodes, certain "rules of the game" have been—at least in part—established with a view towards increasing the relative influences and power of particular interests. For example, Elster (1995) has shown that constitutional structures chosen in Eastern European countries in the aftermath of the Soviet Union's fall were shaped significantly by the interests of dominant factions in the constituent assemblies. Similarly, it is not difficult to find examples of constitutions that establish privileged positions for particular individuals or groups, such as the constitution of Afghanistan (which places restrictions on the holding of political office by non-Muslims), the Swiss constitution prior to 1971 (which excluded women from voting rights), or the American constitution in its original form (with its protection of slavery).

The fact that some (groups of) individuals enjoy normatively suspect advantages under the status quo raises two intertwined problems. First, the unanimity requirement provides a veto to those who enjoy the advantages, making change from the status quo more difficult to achieve. Overcoming such opposition may require a compensation scheme that induces those individuals to support constitutional change despite their privileged position under the status quo. Of course, in the CPE paradigm, such side payments are *not* required because individuals are normatively entitled to their positions, but because side payments are necessary to secure agreement, and only agreement can ensure that a proposed change constitutes an improvement. As Buchanan (1959/1999, p. 197) puts it,

> Full compensation is essential, not in order to maintain any initial distribution on ethical grounds, but in order to decide which one from among the many possible social policy changes does, in fact, satisfy the genuine Pareto rule.[17]

[17] An important side issue arises here. Unlike under a Kaldor–Hicks approach, in which it is merely necessary that side payments *could* result in a Pareto improvement, for Buchanan, side payments actually must be paid and unanimous consent must be secured. Only then can we be certain that institutional reforms constitute Pareto-superior moves. There are two reasons for Buchanan's insistence on actual compensation. One is ontological. For Buchanan, it is only in the process of choice that preferences emerge. As he puts it (1991/1999, p. 286), "(m)y own ontological presuppositions do not allow any conceptual separation or distinction between an individual's choice behavior and his or her utility function", implying directly that actual compensation must be paid because it is only in the process of choosing whether to agree that an

That line of reasoning leads directly to the second issue: Side-payments imply that the privileged positions of some individuals "live on"; they just have been converted into another form. Put more crudely, advantaged individuals will "profit" from the presence of their arguably illegitimate privileges under the status quo. Buchanan acknowledges that that fact poses an obstacle to constitutional reform and is at the heart of critiques of his approach: "This distribution of entitlements may not be acceptable to many persons as the appropriate starting point from which genuine constitutional reform is to be made" (Brennan and Buchanan 1985/2000, p. 157).

A powerful critique! How can one defend unanimity as the relevant criterion for the legitimacy of reforms to a status quo that may embody privileges that themselves have no claim to legitimacy under a contractarian logic? How to approach that challenge and whether it is possible to do so convincingly within the CPE framework are open questions. Before offering preliminary thoughts on potential "avenues of escape", we highlight two challenges that critics who raise the argument against the insistence on unanimity must confront.

4.1 Problem 1: it isn't just supermajority rule

We begin with a less serious issue, but one that deserves to be made clear because it highlights that the critique is broader than the critics likely intend. The argument that the unanimity requirement treats individuals unequally by protecting normatively suspect privileges is not just an argument against supermajority procedures (including unanimity rule) and in favor of "democratic" decision-making under majority rule. To see that point, note that the core of the objection is not the *size* of blocking coalitions per se (as under Critique 1), but the fact that the status quo is normatively suspect. The problem is that individuals who enjoy illegitimate benefits under the status quo are given the power to protect their privileges by blocking change.

Of course, as the size of the required coalition that can initiate constitutional change increases, the size of blocking coalitions falls—culminating eventually in any one individual under the unanimity rule. As a consequence, the blocking coalitions under a more stringent decision rule are a superset of the blocking coalitions under a less stringent rule. But note a critical fact: Under simple majority rule, coalitions that comprise at least 50% of the group can block change. Thus, simple majority rule *also* protects an illegitimate status quo, provided that the status quo is advantageous to at least half the group. While supermajority rules allow smaller coalitions to maintain an illegitimate status quo than does majority rule, it is a matter of degree, not of kind.

Footnote 17 (continued)

individual's preferences are realized. The second reason is epistemological. Even if preferences exist independent of the process of choice, Buchanan denies that outside "experts" can know what these preferences are. They may have beliefs (or a hypothesis) about what compensation will ensure that an individual is better off. But ultimately only an individual knows her own preferences, and therefore an outside observer's hypothesis must be tested by securing actual agreement: "But, quite clearly, if the political economist is presumed to be ignorant of individual preference fields, his predictions (as embodied in suggested social policy changes) can only be supported or refuted if full compensation is, in fact, paid" (Buchanan 1959/1999, p.197).

A natural response to the foregoing argument is that while majority rule also can maintain an illegitimate status quo, it *minimizes* that risk, since the blocking coalitions under majority rule are a strict subset of the blocking coalitions under any supermajority rule. The difficulty with the response is that at least for certain types of collective decisions, counting rules *less* than majority rule are available (and arguably appropriate). One salient example is the US Supreme Court's "rule of four" under which any four of the nine justices (i.e., a minority) can grant writs of certiorari, thereby placing cases on the court's docket. One easily can imagine analogous rules that might govern the provision of government services or public goods (or any type of affirmative collective decision to be taken).[18] Importantly, our argument is not that such rules are desirable. It merely is that they are *possible* and contain fewer blocking coalitions than majority rule. As a result, it is inaccurate to say that majority rule minimizes protection of an illegitimate status quo or that majority rule is different from supermajority rules *in kind* when it comes to the maintenance of illegitimate existing entitlements. All counting rules lie on a continuum, and to the extent that the issue at stake is preservation of an illegitimate status quo, it is not obvious that singling out majority rule as particularly desirable is justified.[19]

4.2 Problem 2: Who decides, and how?

What we call "Buchanan's challenge" constitutes a second—arguably more important—difficulty. We began this section with the *assumption* that the status quo is illegitimate because it provides unjust privileges for some individuals. That scenario potentially is problematic because reforms that constitute improvements may be blocked by individuals out to protect their (illegitimate) position. The critique has intuitive appeal. But it raises deep ontological and epistemological issues.

As argued above, a central appeal—indeed, the foundation—of Buchanan's approach to "politics as exchange" is that unanimous agreement provides direct evidence that an agreed-upon constitutional reform constitutes a genuine (Pareto) improvement. Once the criterion of unanimity—and the evidentiary basis that it provides for the claim that a proposed reform is desirable—is abandoned, what will be the standard by which the desirability of proposed reforms can be judged, and how can we be sure that they constitute genuine improvements? Put crudely, *Who is to decide whether a proposed reform constitutes an improvement, and by what criterion?*

The same challenge is amplified by the fact that whatever criterion is proposed must be—by definition—one that will be applied even if the criterion itself cannot secure unanimous consent. In other words, the answer to Buchanan's challenge cannot be that it is possible to find agreement on some value scale for assessing proposed reforms that *all* individuals would accept on reflection and deliberation. If that were possible, the unanimity criterion would not stand in the way; such a criterion would fully be compatible with the

[18] In fact, Buchanan and Tullock (1962/2012, p. 65) discuss the logic of such rules in *The Calculus of Consent*.

[19] The argument is reminiscent, of course, of Buchanan and Tullock's (1962/2012, p. 81) analysis of counting rules in terms of the tradeoff between external and decision-making costs in chapter 6 of *The Calculus of Consent*. The key conclusion of that analysis is that "there seems to be nothing to distinguish sharply any one rule from any other. The rational choice will depend, in every case, on the individual's own assessment of expected costs. Moreover, on a priori grounds, there is nothing in the analysis that points to any uniqueness in the rule that requires a simple majority to be decisive.".

CPE approach. Thus, the challenge is not only to specify a standard for assessing the normative status of the status quo, but also to justify the imposition of the standard on unwilling individuals in the face of disagreement about the desirability of a proposed reform. For Buchanan (1988/2001, p. 258) —as a normative individualist—that is the crux of the matter:

> By saying that agreement or unanimity is the only meaningful criterion in the individualistic context, I of course stand accused of building into the model a defense of the *status quo*…. [I]t should be noted that no statement at all is made or implied about what is or is not "right," "just," or "correct."… Each and every one of us who looks at the existing political structure might prefer the world to be different from what it is now; but, until and unless general agreement can be reached on making changes, any modification of what exists must involve coercion of some person by others. And this means that some choice be made as to which individuals or groups are to be allowed to coerce others, a choice that simply cannot be made without the introduction of external value scales.[20]

Put in starker terms, Buchanan suggests that in rejecting his normative individualist position and agreement as the relevant criterion for evaluating the legitimacy of proposed reforms, his critics must both supply an exogenous value scale *and* justify coercion in its application. As he argued in an interview with Geoffrey Brennan (Buchanan and Brennan 2001, part 1, at 14:10),

> unless you can bring in some transcendental purpose, how can you justify coercion? Unless God's rules, or "right reason," or [some a priori doctrine] justifies force, you can't have coercion. If you say, "No, values start with us," start with the individuals, then how can one individual legitimately coerce another?[21]

Of course, that position is not dispositive. But Buchanan's challenge highlights that rejection of the contractarian position raises the justificatory bar: Once one abandons the "self-justificatory" standard of unanimous agreement, one must confront the problem of providing both an exogenous criterion for evaluating whether proposed reforms constitute an improvement, and a normative justification for the imposition of that value scale on those who disagree.[22] That is not a trivial task and it raises—just like the status of the status quo in the CPE paradigm—difficult normative questions.

[20] In his exchange with Samuels, Buchanan (Buchanan and Samuels 1975, p. 27) was less diplomatic on this point: "But my defense of the status quo stems from my unwillingness…to discuss changes other than those that are contractual in nature. I can, of course, lay down my own notions and think about how God might listen to me and impose these changes and me, you, and on everyone else. This seems to me what most social scientists do all of the time…." Further (1975, 33): "But who are you and I to impose our private values as criteria for social change? Each man's values are to count as any others, at least in my conception, and what I am looking for are the implications of this genuinely `democratic' position for what we can, as social scientists, say about social change.".

[21] This does not imply, of course, that within the CPE paradigm, coercion is never justified. Indeed, coercion may play a critical role in social organization. Individuals may well have reason to consent to rules that will coerce them to live up to contractual agreements, for example.

[22] It is possible to read a less absolute position into Buchanan's writings. Rather than asserting that non-unanimous constitutional change always is illegitimate, it is possible to read him to say that unanimous agreement is merely a sufficient but not a necessary condition for legitimate change. For Buchanan, economics is the science of exchange and in that sense suited to analyzing the potential for unanimous agreement on constitutional change ("politics as exchange"). Other modes of change are, in the same sense, simply beyond the scope of the CPE paradigm.

5 Sketching alternative paths

So far, we have offered only a negative defense of the unanimity standard—acknowledging that it privileges the status quo but pointing to the challenges involved in dismissing it as the relevant criterion for assessing constitutional reforms. We now turn to sketching some potential paths forward that may help to preserve the attractive features of the unanimity criterion while mitigating concerns raised by the status of the status quo.

5.1 Unanimity: Among whom?

The unanimity criterion provides each member of the voting group with a veto. But how is the relevant voting group defined? *Who counts as a member with a veto right?* The answer to that question obviously has significant ramifications: Unanimity may constitute a hurdle to potential reform under one definition of group membership, but not under others. Put another way, defining the boundaries of the relevant political group (an issue we, and Buchanan, have left implicit) is critical, and—potentially—just as important as the nature of the voting rule itself in determining how privileged the status quo is.

Consider an example. In a seminal article, Mancur Olson (1993) argued that political order initially is established by a "roving bandit" who settles down and becomes "stationary" —a violent entrepreneur who monopolizes force in a given area and extracts resources from his subjects by coercion. The order that is established obviously affords significant privileges to the bandit, privileges that are derived from the bandit's coercive imposition of "his" order. What should be the boundaries of the relevant political community when considering potential reforms? Should it include the bandit? Or does the bandit, by virtue of the fact that his position is derived from, and maintained by, coercion that is not rooted in agreement remain outside the relevant community? The "problem of the status quo" obviously is far more likely to appear troubling in one case than the other.

To note the importance of defining the boundaries of the political community does not, of course, answer the question of *how* it might be done. Thorny issues are involved, some of which once again raise the question of exogenous value scales: To what extent can membership in the relevant political group be defined without resort to an external criterion? While a comprehensive answer is beyond the scope of the current paper, we note two immediate considerations:

The first is rooted in prudence. While one can approach the question of group membership from a normative perspective (with all the potential difficulties it brings, including the delineation of the criterion by which membership will be defined), reasons of prudence may sometimes suggest that veto rights should be extended to individuals whose positions in the current order may be normatively suspect to many. Particularly compelling reasons for doing so can be found if those individuals have de facto veto power, that is, if they are in a position—if need be by force—to resist or undermine any efforts at reform that do not take account of their interests.[23]

[23] As Barry Weingast (2016, p. 267) has pointed out, "Some limits on the government are universal in the sense that all individuals and groups value them—such as freedom of assembly. Others, however, take on a potentially more inimical, counter-majoritarian role in that they are means to bias decisions in favor of certain groups. Limits of this type often arise in pacts as part of the means of obtaining agreement of important groups to the pact. Other groups who bear costs from these provisions often agree to counter-majoritarian provisions for pragmatic reasons: for example, when failing to agree ruins the chances for initiating or maintaining democracy.".

The Chilean transition to democracy following the Pinochet dictatorship offers an instructive example: Given the military's de facto power to prevent a successful and peaceful democratic transition, providing "side payments" that would ensure the military's agreement (or at least acquiescence) to the new rules of the game enabled reforms that might not have been viable otherwise (for a review, see Navia 2012). Put differently, broad definitions of the relevant political group often may be the result of pragmatic considerations that require a "deal with the devil". That example, of course, highlights an enduring challenge of significant contemporary relevance, particularly in the context of transitions from authoritarianism to democracy, or constitutional reforms, whether in the shadow of the Arab Spring or the collapse of the Soviet Empire: To what extent must one grant standing to the claims of former autocrats or beneficiaries of illegitimate regimes, and can that be done without endorsing the distribution of power and historical injustices that the status quo typically embodies?

5.2 Do I stay or do I go?

A second consideration derives from the fact that the relevant political community may, under certain conditions, emerge endogenously from decentralized individual choice. In particular, consider the contrast between situations in which individuals can exit from a jurisdiction at either low cost or at high cost. When individuals relatively easily can leave a political community, and have reasonably attractive alternatives, concerns over the use of unanimity rule are diminished for two (related) reasons. First, if a unanimity requirement prevents institutional reforms that appear desirable to some individuals, they can easily extract themselves. Second—and what is more important—the possibility that others will exit from a jurisdiction may incentivize privileged individuals to moderate their behavior. That line of argument obviously has close connections to the literature on the advantages of competitive federalism (Tiebout 1956) as well as Buchanan's (1965) own "theory of clubs". A significant literature on the role of exit in politics already exists (Hirshman 1970; Munger 2018; Avdan 2020; Somin 2020).[24]

5.3 Unanimous agreement on non-unanimity?

One final point can be made: Despite Buchanan's personal commitment to unanimity, it is not clear that the logic of the CPE approach necessarily implies unanimous agreement as the required decision rule for constitutional change. To see that, once again consider Buchanan's distinction between *constitutional* and *sub-constitutional* choices. For Buchanan, the constitutional level of choice concerns the adoption of rules and institutions that govern collective decision-making, and it is at that level that the unanimity rule operates. We can supplement Buchanan's scheme by introducing an explicit distinction between two different *types* of constitutional rules: Those that govern collective decision-making *directly*, and those that *govern changes in rules that govern collective decision-making*. In

[24] Of course, the availability of easy exit not only obviates concerns about unanimity rule, but in general mitigates concerns over *any* collective decision-making rule: Just like I need to be less concerned about the potential downsides of unanimity if I can move easily to another jurisdiction, so I need to be less concerned about the disadvantages of majority rule, for example.

other words, we can introduce a "meta-constitutional level" at which individuals choose how to adapt or change constitutional rules going forward.

Behind a veil of uncertainty, in the "original position", what kinds of meta-constitutional rules would individuals choose? The kind of analysis that Buchanan and Tullock famously applied to ordinary constitutional choices can be employed here. Rules that tend towards unanimity, and make subsequent changes in constitutional rules more difficult, offer more protection to the individual against changes in constitutional structure that the individual opposes (in the language of *The Calculus of Consent*, more inclusive rules lower the external costs of subsequent constitutional change). On the other hand, such rules also impose costs: they make reaching agreement on any proposed constitutional change much more difficult. Furthermore, such changes now may prevent future amendments that the individual actually would favor, because more inclusive rules raise decision-making costs. We would not expect that tradeoff to result in a corner-solution: Buchanan and Tullock argue that individuals typically will not choose unanimity as the decision rule for "ordinary", sub-constitutional policymaking. Similarly, behind a veil of uncertainty, it would be surprising if individuals were to choose unanimity as the decision rule for the adoption of changes to the constitutional structure. That conclusion is not merely speculative: In real-world contexts in which individuals choose meta-constitutional rules by unanimity, they typically adopt supermajority rules, but do not require unanimous consent for subsequent constitutional change. The amendment procedures for homeowners' association bylaws provides an obvious example: those institutions are chosen unanimously (every homeowner must explicitly buy in) and they usually feature amendment procedures for the covenants and bylaws that are short of unanimity, although the rules may endow the owners of more expensive properties with more than one vote.

Put differently, just as Buchanan and Tullock argue that individuals will agree unanimously to less-than-unanimous decision rules to select everyday policy choices, it seems likely that individuals would agree unanimously to accept less-than-unanimous consensus even at the stage of adopting a procedure to enable constitutional change. That conclusion provides strong reason to depart from Buchanan's strict insistence on agreement for legitimate constitutional change; the CPE approach would appear to be compatible with legitimate constitutional change brought about by less than unanimous agreement.

For Buchanan (1972/1999, p. 432) himself, that argument is not persuasive; speculation regarding what individuals *might* agree to cannot, in his view, replace genuine agreement as a sign of Pareto improvement. As he put it with respect to identifying improvements in ordinary constitutional rules (i.e., not meta-constitutional rules):

> It is one thing to say that, conceptually, men in some genuinely constitutional stage of deliberation, operating behind the veil of ignorance, might have agreed to rules something akin to those that we actually observe, but it is quite another thing to say that men, in the here and now, should be forced to abide by specific rules that we imagine by transporting ourselves into some mental-moral equivalent of an original contract setting.

The conclusion is, of course, strictly consistent with Buchanan's insistence that actual agreement is the only sign of genuine "improvement" that does not rely on an external value scale. Paradoxically, however, it also leaves him in a position that appears clearly at odds with the underlying thrust of the CPE paradigm. Speculation about which meta-constitutional rules individuals might agree to behind a veil of uncertainty may not provide legitimacy for any *specific* rule for governing constitutional change. But retreat to unanimity similarly imposes a rule for constitutional change on individuals that the CPE approach

suggests—and real-world experience confirms—individuals would *reject unanimously* if given the opportunity to do so. Interestingly, then, it appears that Buchanan's "contractarian at the margin" views ultimately drive his conception of constitutions: The shift to the "constitutional" level in Buchanan is a means of securing consensus, because contractors lack the specific information they would need to use their particular interests to evaluate rules. But that means that the status quo has less grip, becoming less of an obstacle to change, at least based on protection of illegitimate specific conditions of current policy or wealth distribution. It is for just that reason, of course, that those privileged in the status quo may want to veto such an abstracting process.[25]

We are not, as of yet, in a position to offer a concrete solution to the paradox. How to navigate between the Scylla of imposing constitutional changes without the legitimizing power of consent and the Charybdis of requiring such agreement despite the near-certainty that individuals would unanimously reject it as the relevant decision rule, is difficult But we would argue that is one of the central puzzles for future work. We have argued that a variety of intriguing possibilities for new work in CPE exist, including an explicit consideration of the criteria and mechanisms that define the relevant political community, and a more systematic analysis of the implications of low exit costs, as well as institutional mechanisms for lowering these costs systematically.

References

Avdan, N. (2020). *Visas and walls: Border Security in the age of terrorism*. Philadelphia: University of Pennsylvania Press.

Brennan, G., & Buchanan, J. M. (1985/2000). *The reason of rules: Constitutional political economy*. Indianapolis: Liberty Fund.

Buchanan, J. M. (1959/1999). Economics, welfare, and political economy. In *The logical foundations of constitutional liberty. The collected works of James Buchanan*. (Vol. 1, pp. 191–209). Indianapolis: Liberty Fund.

Buchanan, J. M. (1965). An economic theory of clubs. *Economica, 32,* 1–14.

Buchanan, J. M. (1966/2001). An individualistic theory of political process. In *Moral science and moral order*. *The collected works of James Buchanan* (Vol. 17). Indianapolis: Liberty Fund.

Buchanan, J. M. (1972/1999). Before public choice. In *The logical foundations of constitutional liberty. The collected works of James Buchanan* (Vol. 1, pp. 429–441). Indianapolis: Liberty Fund.

Buchanan, J. M. (1985/2001). Constitutional democracy, individual liberty, and political equality. In *Moral science and moral order*. *The collected works of James Buchanan, Volume 17*. Indianapolis: Liberty Fund.

Buchanan, J. M. (1986/1999). The constitution of economic policy. In *The logical foundations of constitutional liberty. The collected works of James Buchanan* (Vol. 1, pp. 455–470). Indianapolis: Liberty Fund.

Buchanan, J. M. (1990/1999). The domain of constitutional economics. In *The logical foundations of constitutional liberty. The collected works of James Buchanan* (Vol. 1, pp. 377–395). Indianapolis: Liberty Fund.

Buchanan, J. M. (1991/1999). The foundations of normative individualism. In *The logical foundations of constitutional liberty. The collected works of James Buchanan* (Vol. 1, pp. 281–291). Indianapolis: Liberty Fund.

Buchanan, J. M., & Brennan, G. (2001). *A conversation with James M. Buchanan*. Indianapolis: Liberty Fund.

Buchanan, J. M., & Samuels, W. (1975). On some fundamental issues in political economy: An exchange of correspondence. *Journal of Economic Issues, 9,* 15–38.

[25] We are grateful to an anonymous reviewer for clarifying our thinking on this point.

Buchanan, J. M., & Tullock, G. (1962/2012). *The calculus of consent: Logical foundations of constitutional democracy*. Ann Arbor: University of Michigan Press.

Dyson, K. (2021). *Conservative liberalism, ordo-liberalism, and the state: Disciplining democracy and the market*. New York: Oxford University Press.

Elster, J. (1995). Forces and mechanisms in the constitution-making process. *Duke Law Journal, 45,* 364–396.

Hirschman, A. (1970). *Exit, voice, and loyalty*. Cambridge: Harvard University Press.

Hume, D. (1777/1987). Of the original contract. In Miller, E. F. (ed.), *Essays, moral, political, and literary* (pp. 465–487). Library of Economics and Liberty. http://www.econlib.org/library/LFBooks/Hume/hmMPL.html.

May, K. (1952). A set of independent necessary and sufficient conditions for simple majority decisions. *Econometrica, 20,* 680–684.

McGann, A. J. (2004). The tyranny of the supermajority: How majority rule protects minorities. *Journal of Theoretical Politics, 16,* 53–77.

Munger, M. C. (2018). 30 years after the Nobel: James Buchanan's political philosophy. *Review of Austrian Economics., 31*(2), 151–167.

Navia, P. (2012). From limited access to open access order in Chile, take two. In D. North, J. Wallis, S. Webb, & B. Weingast (Eds.), *In the shadow of violence: Politics, Economics, and the problems of development* (pp. 261–292). New York: Cambridge University Press.

Olson, M. (1993). Dictatorship, democracy, and development. *American Political Science Review*, 87(3), 567–576.

Rawls, J. (1972). *A theory of justice*. Cambridge: Harvard University Press.

Rosenthal, H. (1990). The setter model. In J. Enelow & M. Hinich (Eds.), *Advances in the spatial theory of voting*. New York: Cambridge University Press.

Schelling, T. C. (1960). *The strategy of conflict* (1st ed.). Cambridge: Harvard University Press.

Schwartzberg, M. (2014). *Counting the many: The origins and limits of supermajority rule*. New York: Cambridge University Press.

Shepsle, K. A. (2017). *Rule breaking and political imagination*. Chicago: University of Chicago Press.

Sobel, R. S., & Holcombe, R. G. (2001). The unanimous voting rule is not the political equivalent to market exchange. *Public Choice, 106,* 233–242.

Somin, I. (2020). *Free to move: Foot voting, migration, and political freedom*. Oxford: Oxford University Press.

Tiebout, C. M. (1956). A pure theory of local expenditures. *Journal of Political Economy, 64,* 416–424.

Vanberg, G. (2018). Constitutional political economy, democratic theory, and institutional design. *Public Choice, 177,* 199–216.

Vanberg, G., & Vanberg, V. J. (2017). Contractarian perspectives in law and economics. In F. Parisi (Ed.), *Oxford handbook of law and economics*. Oxford: Oxford University Press.

Vanberg, V. J. (2004). The status quo in contractarian constitutionalist perspective. *Constitutional Political Economy, 15*(2004), 153–170.

Weingast, B. (2016). Capitalism, democracy, and counter-majoritarian institutions. *Supreme Court Economic Review., 23,* 255–277.

Publisher's Note Springer Nature remains neutral with regard to jurisdictional claims in published maps and institutional affiliations.