Judicial Review as a Constraint on Tyranny of the Majority

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Abstract: We develop a theoretical model to analyze the role of judicial review. The model identifies conditions under which the optimal court will *not* prevent tyrannies of the majority – and, indeed, even the minority may prefer that the court not block such tyrannies. These results hinge on the timing of two events: the lifting of the veil of ignorance with respect to who gains and who loses from the policy subject to judicial review, and a random shock (i.e., new information) that affects the level of the payoffs generated by that policy. We demonstrate how to interpret the findings of our model within the context of three controversial rulings (*Serrano v. Priest*, *Kelo v. City of New London*, and *In re Marriage Cases*). In so doing, we demonstrate how the implications of our model allow us to distinguish scenarios in which judicial constraints on majority rule are socially beneficial from those in which they are socially harmful. Through this theoretical exercise and discussion of cases, our paper clarifies what conditions must be considered in order to evaluate the proper role of judicial review.

"If a majority be united by a common interest, the rights of the minority will be insecure."

– James Madison, *Federalist 10*

I. Introduction

The potential for democratic majorities to tyrannize minorities has long been recognized. To guard against it, the ancient Greeks posited that even the "will of the people" must be subject to the rule of law.[1] More than 2000 years later, Locke and Montesquieu emphasized the importance of checks and balances, and the *Federalist Papers* famously debated the best means for dealing with the threat posed by divergent interests.[2] In the United States today, a widely held view among legal scholars is that the judiciary is (or at least should be) a critical bulwark against tyrannizing majorities.[3] Recent theoretical work by economists points in the same direction – for example, Maskin and Tirole (2004) model the tradeoff between accountability and independence and conclude

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[1]This is evinced, for example, by Thucydides' account of Pericles' famous oration: "We are free and tolerant in our private lives; but in public affairs we keep to the law. This is because it commands our deep respect. We give our obedience to those whom we put in positions of authority, and we obey the laws themselves, especially those which are for the protection of the oppressed, and those unwritten laws which it is an acknowledged shame to break." See, e.g., Jowett (1881, 117-118).

[2]"It is of great importance . . . to guard one part of the society against the injustice of the other part. Different interests necessarily exist in different classes of citizens" (Madison, *Federalist 10*). The federal structure was promoted on the grounds that the diversity of interests within it would, when combined with various checks and balances, reduce the potential problems arising from tyranny by a majority. Presumably, such a structure was supported by citizens who saw the potential to cycle through being in the tyrannized group.

[3]For example, Kurland (1969, 45) writes that the primary functions of the U.S. Supreme Court are "to protect the individual against the Leviathan of government and to protect minorities against oppression by majorities." See Bickel (1962) and Ely (1980) for classic works. A variety of concurring opinions have been issued by various courts, the most famous of which is Justice Stone's *Carolene Products* (1938) footnote, asserting that courts should step in when "prejudice against discrete and insular minorities . . . tends seriously to curtail operation of those political processes ordinarily relied upon to protect minorities" (see, e.g., Friedman 2002). See Klarman (1996, 1-2) for similar sentiments expressed in other Supreme Court decisions. On the arguments against judicial review, see, e.g., Waldron (2006).

that relying on an independent court "is preferable when the majority's preferences are likely to inflict large negative externalities on the minority" (p. 1050).[4] Indeed, it is not clear how else to constrain a majority within a democratic setting – how can a society establish a decision-making system that relies on majority rule except when the majority is "wrong"? In short, while scholars have questioned the ability of courts to protect tyrannized minorities (e.g., Dahl 1957, 1989; Klarman 1996), or how to square such protection with democratic principles (e.g., Bickel 1962; Ely 1980), the conventional wisdom is that courts are a potentially important mechanism for limiting majority abuses of minority rights.[5]

In this paper, we examine the conditions under which a court that systematically rejects tyrannous policies will make potentially tyrannized minorities better off (or worse off) than would a court that merely followed the will of the majority. Our theoretical analysis starts by characterizing two important roles of the judicial system, then asks what happens when the court serves those two roles jointly. One role is, as discussed above, protecting minorities from majorities. The other is

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[4]La Porta et al. (2004) attribute their empirical finding that economic freedoms are greater where courts are more independent to the fact that courts can check legislative majorities that threaten to infringe upon minority rights. Hanssen (2004) finds evidence that more independent courts are established where competition between rival political parties is tighter, consistent with the hypothesis that independent courts render policy changes more costly. Our paper is also related to the notion that legal and political institutions may serve as commitment devices (e.g., Landes and Posner 1975; North and Weingast 1989; Weingast 1995; Qian and Weingast 1997; Acemoglu and Robinson 2000, 2001; Falaschetti and Miller 2001; Fleck and Hanssen 2006; Anderson and Parker 2008; Falaschetti 2008).

[5]Dahl (1957, 1989), McCloskey (1960), and many others have argued that there are few, if any, instances in which courts have stood firm in the face of fierce public opinion. There is also a vast literature debating how courts should – and to what extent they do – adjust their rulings during times of crisis; Epstein et al. (2005) review the literature and provide the most careful empirical analysis of court behavior during times of crises. As Epstein et al. (2005, 9) conclude, "The justices are, in fact, significantly more likely to curtail rights and liberties during times of war and other international threats," yet interestingly "while the presence of war does affect cases unrelated to the war, there is no evidence that the presence of war affects cases directly related to the war."

acting as an agent of the public when uncovering and evaluating information (which courts regularly do in activities ranging from criminal trials to overseeing the enforcement of economic regulation).[6] Our analysis focuses on information and the timing of two events: When are voters out from behind a veil of ignorance with respect to being among the beneficiaries or among the losers from a prospective policy, and when are shocks that influence the net social benefits of that prospective policy observed?

The order in which those two information-revealing events occur is critical when courts play a dual role (protecting minorities, uncovering and evaluating information). In some cases, the optimal decision rule for the court is simple: overrule majority votes that generate more costs than benefits for society. Yet in other cases, following such a decision rule will be a mistake: When the initial majority rule decisions take place after the veil is lifted, but before the policy's net benefits are revealed, it can be socially desirable for a court *not* to block majority-supported policies that are revealed ex post to be socially harmful. That is, it may be better – for the minority as well as the majority – to have a court that makes decisions solely on the basis of benefits to the majority, or to have no judicial review at all.

Our analysis has practical implications for understanding why the court's role in protecting minority rights will be both complicated and controversial. As the model shows, even under relatively ideal conditions – a court that can commit credibly to future rulings, shocks that (once observed) indicate the exact benefits of policy, and a public that complies with court rulings – judicial efforts to protect minorities from majority-supported inefficient policies may turn out to be

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[6]Researchers have suggested that when courts can uncover (or react to) relevant information more rapidly than can the public, court oversight can be welfare-enhancing (e.g., Maskin and Tirole 2004; Fleck and Hanssen forthcoming).

counter-productive.

Although tyranny of the majority and judicial review have both generated vast literatures, our paper makes a unique contribution. We are the first to model how the judiciary's optimal role in protecting minorities relates to its role in uncovering and evaluating information about policy, and we model this in a way that illuminates how the court's optimal decision rule depends upon when the public observes information. The paper's theoretical findings thus contribute to the branch of the "endogenous institutions" literature that seeks to identify what types of judicial institutions are most valuable in what types of circumstances (e.g., Glaeser, Johnson, and Shleifer 2001; Aghion, Alesina, and Trebbi 2004; Maskin and Tirole 2004). Moreover, as we discuss in Section III, the model's implications can be used to understand key aspects of some famously controversial judicial rulings (e.g., *Serrano v. Priest*, *Kelo v. City of New London*, and *In re Marriage Cases*).

II. Theoretical Model

Assumptions

The model considers events over four time periods. The public makes decisions using majority rule voting, and, except for the court, the public has no mechanism to overcome time inconsistency problems. In each period, when individual members of the public vote, they act in a forward-looking manner and seek policies that maximize their individual expected benefits. Thus, the public will vote to change a policy if and only if the change would bring more than half of the individuals an increase in expected benefits.

Table 1 presents the order of events over the four time periods. In period 1, the public decides whether to pass or reject a given policy, denoted as policy i, and provides instructions to a

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court that will have the power to overturn some public decisions with respect to policy i. To focus

our analysis on the optimal role of the court, we assume that the court will act as the public's perfect

agent in the sense that it will rule in the manner desired by the period 1 majority of the public. If the

public passes policy i in period 1, then in period 2 the public (which in some cases will have more

information than it did in period 1) makes a majority rule decision to retain or revoke policy i. In

period 3, the court can overrule the public's period 2 choice: If the public in period 2 retained policy

i, the court may let policy i stand or overturn policy i, whereas if the public in period 2 revoked

policy i, the court may let the revocation stand or reinstate policy i.[7]

It is worth noting what it means to assume, as we have, that the court will act as the public's

agent. Given a court that follows the instructions it receives from the public in period 1, one may

think of those instructions as akin to a constitution, from which the court will not deviate. And this,

of course, allows the court to serve as a commitment device.[8]

Table 1 also defines a set of scenarios (Cases A, B, C, D, and E) with respect to when the

public and the court observe information. In all cases, the values of all parameters (defined below)

are known from the beginning (i.e., period 1). What differs between cases is (i) when the veil of

ignorance is lifted, meaning when members of the public learn their type, and (ii) when a shock with

respect to the benefits of policy i is observed by the public and the court. In Cases A through D, the

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[7]Note that our model does not include the case when the public rejects policy i in period 1, then passes policy i in period 2. As the reader will see shortly, this case could easily fit the model (e.g., suppose the veil is lifted in period 2 and the majority then seeks to pass a tyrannizing policy i). Adding this case would add little to our analysis because we already consider (in Cases A and B) conditions where reversing a period 1 policy decision (passing policy i) would be favored by a majority of voters in period 2. Also note that we do not allow the court to enact policy i if the voters have never adopted it; in other words, the court can block or reinstate legislation, but it cannot pass new policies.

[8]Our approach thus abstracts from real-world deviations, driven by such things as judicial ideology, or unclear or inapplicable constitutional guidelines.

public makes its period 1 decisions (whether to pass policy i, how to instruct the court) behind the veil; naturally, individuals behind the veil are homogeneous. In Case E, however, the veil is lifted in period 1. In Case A, the shock is observed in period 1, whereas in Case B, the shock is not observed until Period 4, which is after all the public and court decisions are made. For Cases C through E, the shock is observed in period 3 (i.e., in time for the court to make use of the information, but too late to influence the public's majority rule decisions).

Define

For policy i, let v_i represent the net value (per capita) of policy i, where

$$v_i = m_i x_i + (1-m_i)y_i$$
m_i size of majority $(.5 < m_i < 1)$
$1-m_i$ size of minority
x_i per capita net gains to majority
y_i per capita net gains to minority

and x_i and y_i have fixed components ($\underline{x}_i$, $\underline{y}_i$) and a random component (e_i):

$$x_i = \underline{x}_i + e_i$$
$$y_i = \underline{y}_i + e_i$$

where e_i (the shock) is drawn from uniform distribution over $-\underline{e}_i$ to $\underline{e}_i$, with $\underline{e}_i \geq 0$.

Implications

To begin, consider some basic points about what the period 1 public would want the court to do. Recall that each member of the public seeks to maximize his or her own expected benefits. Thus, if the public is behind the veil in period 1 (Cases A through D), the entire period 1 public will desire a court that promotes efficiency (i.e., policy that maximizes Ev_i). By contrast, a public out from behind the veil may be divided in terms of what it wants, and members of the majority will want a court that behaves in a manner that maximizes expected benefits to the majority (Ex_i). Hence,

in Case E (when the veil is lifted in period 1), the period 1 majority will instruct the court to act as an agent of the majority. We will now consider each of the cases in turn.

Cases A and B: Basic tyranny

Cases A and B focus on the basic tyranny of the majority problem. Regardless of whether the shock is observed before the court ruling (Case A) or after the court ruling (Case B), the only valuable role of the court is preventing tyrannies. Because the public is behind the veil in period 1, the public will unanimously favor the following: (i) passing policy i in period 1 if and only if the known net benefits (Case A) or expected net benefits (Case B) are positive and (ii) instructing the court to enforce the period 1 policy decision (i.e., block any period 2 policy changes). In short, there is no way for the public as a whole to do better than to follow a simple rule: pass (and retain) a policy if and only if it yields $v_i > 0$ (in Case A) or $Ev_i > 0$ (in Case B).[9]

Illustrations

To see why the court is valuable, consider the following examples, which we will refer to as policy 1 and policy 2:

Example Policy 1

$$m_1 = .6$$
$$x_1 = -1$$
$$y_1 = 2$$

Example Policy 2

$$m_2 = .6$$
$$\underline{x_2} = -1$$
$$\underline{y_2} = 2$$
$$\underline{e_2} = 2$$

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[9]The mathematical logic is as follows. For Case A, pass policy i if and only if $m_i x_i + (1-m_i)y_i > 0$; for Case B, pass policy i if and only if $m_i \underline{x_i} + (1-m_i)\underline{y_i} > 0$.

Note that policy 1 is exactly what policy 2 would be with an always zero shock.[10] We will use policy 1 to illustrate Case A (where the shock is known in period 1) and policy 2 to illustrate Case B (where the shock remains unknown until period 4). The benefits of policy 1 in Case A are positive ($v_1 = .2$), as are the expected benefits of policy 2 in Case B ($Ev_2 = .2$). Hence, in either set of circumstances, behind-the-veil voters all favor passing the policy. Yet a majority (60%) of the public will favor revoking the policy once the veil is lifted. Thus, the behind-the-veil public will instruct the court to reinstate the policy in period 3 if the public revokes the policy in period 2. Knowing this, the period 2 public will not bother to revoke the policy. The value of the court is thus as a commitment device for the behind-the-veil public.

Case C: Court responds to shocks

Case C focuses on the second role of the court: Responding to new information that takes the form of shocks (e_i). There will be no tyranny of the majority in Case C, because the public remains behind the veil for both periods in which it makes majority rule decisions. Thus, the entire period 1 public (and period 2 public) will want the court to overturn policy i if and only if the shock is sufficiently unfavorable that the social benefits are negative ($v_i < 0$). Because the court can overturn policies in such cases, the public will pass policy i in period 1 if there is any positive probability that v_i will be positive. Of course, the majority of the public in period 4 may dislike the court's ruling: By basing its decision on social benefits (v_i) rather than benefits to the majority (x_i), the court ruling may overturn policy i when $x_i > 0$ or allow policy i to stand when $x_i < 0$.

A simple but important point is that there are two categories of policies for which the court will benefit the public. First, a given policy may usually, but not always, have positive benefits in

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[10]In other words, an equivalent way to define policy 1 is: $m_1 = .6$, $\underline{x}_1 = -1$, $\underline{y}_1 = 2$, $\underline{e}_1 = 0$.

the absence of a court. The public would pass such a policy even if the court did not exist, yet have

a higher expected payoff with a court that prevents outcomes with negative social benefits (i.e.,

prevents $v_i<0$).[11] Second, a given policy may usually, but not always, have negative expected

benefits in the absence of a court. The public would not pass such policies in the absence of a court,

but will in the presence of a court, because the court renders the expected benefits positive.[12]

Illustration

Consider the following:

Example Policy 3

$$m_3 = .6$$
$$\underline{x}_3 = -1$$
$$\underline{y}_3 = 1$$
$$\underline{e}_3 = 2$$

Policy 3 differs from policy 2 only in that it has a lower expected payoff to the minority – sufficiently

lower to generate $Ev_3 = -.2$ for passing policy 3 in the absence of a court. Yet the expected return

of passing policy 3 is .405 if the court always overturns policy 3 when $v_2<0$.[13]

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[11] This is easy to show formally. If $0 < m_i\underline{x}_i + (1-m_i)\underline{y}_i < \underline{e}_i$ and there is no court, then $Ev_i = m_i\underline{x}_i + (1-m_i)\underline{y}_i > 0$, and $0 < P(v_i<0) < P(v_i>0)$. In other words, policy i has positive expected benefits (and hence will be passed in period 1), though in some cases the realized benefits turn out to be negative. By contrast, in the presence of a court that overrules policy i when $v_i<0$, the public is assured of $v_i \geq 0$. Because such a court would turn what would otherwise be outcomes with $v_i<0$ into outcomes with $v_i=0$, yet would not change the distribution of outcomes with $v_i>0$, the court clearly increases expected benefits. Policy 2 illustrates this case: Without the court, the public's expected return is Ev_2, which equals .2; with the court, the public's expected return is $P(v_2>0)E(v_2|v_2>0)$, which equals .605.

[12] Again, this is easy to show formally. If $\underline{e}_i < m_i\underline{x}_i + (1-m_i)\underline{y}_i < 0$ and there is no court, then $Ev_i = m_i\underline{x}_i + (1-m_i)\underline{y}_i < 0$, and $0 < P(v_i>0) < P(v_i<0)$. In other words, policy i has negative expected benefits (and hence will not be passed in period 1), though in some cases the realized benefits would, because of favorable shocks, turn out to be positive. By contrast, in the presence of a court that overrules policy i when $v_i<0$, the public is assured of $v_i \geq 0$.

[13] With the court, the public's expected return is $P(v_3>0)E(v_3|v_3>0)$. This yields: $(1.8/4)(.9) = .405$.

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Case D: Court blocks potential tyrannies and responds to shocks

In Case D, the court plays jointly the two roles illustrated separately by Cases A, B, and C. The sole characteristic that distinguishes Case D from Cases A and B is the period in which the shock is observed: period 3 in Case D, rather than period 1 in Case A or period 4 in Case B. And the sole difference between Case D and Case C is when the veil is lifted: period 2 in Case D instead of period 4 in Case C.

Identifying the optimal role of the court is straightforward because the timing of events allows the first-best outcome to be reached. The court observes the shock in period 3 and, therefore, can base its ruling on a known value of v_i. Because the veil is not lifted until period 2, the period 1 public unanimously desires efficient policy enforced by court rulings. The period 1 public therefore instructs the court to approve (or reinstate) policy i if $v_i > 0$ and overturn policy i if $v_i < 0$. And, of course, the period 1 public will pass policy i if it has any chance of being valuable – that is, if $P(v_i > 0) > 0$. In short, for any given policy, the outcome of Case D will be (i) the same as Case C, because in Case D the court blocks potential tyrannies, and (ii) the same as Case A, because in Case D the court weighs shocks in the same manner that the behind-the-veil public would in Case A.

Case E: Court ignores potential tyrannies yet responds to shocks

Case E has the same set-up as Case D, except that the veil is lifted in period 1. This change has major implications for the role of the court. Because the instructions for the court will be determined by the already-identified period 1 majority, the court will rule on the basis of benefits to the majority. The outcome is similar to that of Case C, where the court's only role is to monitor shocks, except that with Case E, the court will overturn policy i if $x_i < 0$ (i.e., if $e_i < -\underline{x}_i$). A tyranny of the majority will occur anytime $x_i < 0 < v_i$ or $v_i < 0 < x_i$.

<u>Illustrations</u>

Again consider policies 2 and 3. The majority would instruct the court to overturn policy 2 if $e_2<1$ and to overturn policy 3 if $e_3<1$, even though policy 2 would be efficient if $e_2>-.2$ and policy 3 would be efficient if $e_3>.2$. Thus, $-.2<e_2<1$ would lead to a tyranny of the majority, as would $.2<e_3<1$.

Key Implications: The Optimal Court

The policy-relevant implications of the model come from a comparison of the cases just discussed and, in particular, how they relate to the optimal role of the court.[14] When discussing Cases A through E, we followed our model's assumption that a forward-looking period 1 public makes a majority rule decision when instructing the court, which then follows those instructions. In four of those five cases (A, B, C, and D), the optimal court behavior is obvious from the analysis we have already presented, because the timing of the events makes it efficient for the court to rule on the basis of social benefits (v_i or Ev_i). The most interesting – and less obvious – implications relate to the optimal court in Case E.

The key question is this: When facing the possibility of a Case E tyranny, would it be desirable to have a court that, instead of following the majority's instructions, was credibly committed to overturning inefficient policies (i.e., policies that yield $v_i<0$)? To address this issue, we will retain the assumption that the court can (and must) commit credibly to policy.[15] We will also

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[14]Recall that our definition of optimal court behavior is the role that the behind-the-veil public would assign to the court (assuming the court can credibly commit to future behavior).

[15]This eliminates the possibility that court can rule based on $v_i>0$ after successfully convincing the period 1 majority that the court will rule based on $x_i>0$. If the court could mislead the public in this manner, the first-best would be attainable.

assume that drawing the most favorable shock would lead to positive social benefits $(v_i>0)$.[16]

The optimal court in Case E

To identify a general solution for optimal court behavior with respect to a given policy i, it

is useful to define three cutoffs (e_i^{fb}, e_i^{ic}, and e_i^*) such that: $e_i>e_i^{fb}$ indicates the range of e_i where $v_i>0$

(the cutoff for the first-best); $e_i>e_i^{ic}$ indicates the range of e_i where the majority will have a sufficient

incentive to pass policy i (the cutoff imposed by the incentive constraint); $e_i>e_i^*$ indicates the range

of e_i in which a court following optimal instructions (given the incentive constraint) will approve (or

reinstate) policy i. One can identify e_i^{fb} directly from the composition of v_i: $e_i^{fb} = -[m_i\underline{x}_i + (1-m_i)\underline{v}_i]$.

To solve for e_i^{ic}, one must determine a lower-end cutoff for the distribution of e_i such that a uniform

distribution of e_i over the range from e_i^{ic} to $\underline{e}_i$ will yield $Ex_i=0$. This shows: $e_i^{ic} = -2\underline{x}_i - \underline{e}_i$. The

solution for e_i^* is now simple: $e_i^* = \max(e_i^{fb}, e_i^{ic})$. Equivalently, this can be expressed directly in

terms of the parameters: $e_i^* = \max(-[m_i\underline{x}_i + (1-m_i)\underline{v}_i], -2\underline{x}_i - \underline{e}_i)$.[17]

Illustrations

To illustrate the importance of considering whether the incentive constraint places a binding

restriction on e_i^*, once again consider our example policies. In some circumstances (e.g., policy 3),

the sign of the social benefits (v_i) will determine the optimal court criterion, and the first-best

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[16]Mathematically: $[m_i\underline{x}_i + (1-m_i)\underline{v}_i] + \underline{e}_i > 0$. Otherwise, the solution is obvious: It would be optimal for the court always to block the policy.

[17]To see why $e_i^* = \max(e_i^{fb}, e_i^{ic})$, note the following. If $e_i^{ic}<e_i^{fb}$, then $e_i^*=e_i^{fb}$, because that will lead to the first-best outcome. If $e_i^{fb}<e_i^{ic}$, then $e_i^*=e_i^{ic}$, because any cutoff below e_i^{ic} would lead to zero benefits (because the majority would not pass policy i), while any higher cutoff would block policy i for shocks in some range above e_i^{ic}, even though $e_i^{fb}<e_i^{ic}$ guarantees that all shocks above e_i^{ic} generate positive social benefits.

outcome will be obtained with $e^*=e_i^{fb}$.[18] Yet in other cases (e.g., policy 2), the first-best cannot be

obtained, and the optimal court criterion will be determined by the location of the incentive

constraint: $e^*=e_i^{ic}$. In these cases, a court that sought always to prevent tyrannies of the majority

(i.e., using e_i^{fb} as its cutoff) would not be doing what the public would want behind the veil.[19]

Moreover, even the minority may be better off with a court that acts based on the interests

of the majority (deciding to overturn policy if and only if $x_i<0$) rather than on the first-best criterion

(deciding to overturn policy if and only if $v_i<0$). With policy 2, for example, not only would a

behind-the-veil public unanimously prefer a court that ruled based on x_2 to a court that ruled based

on v_2, but *lifting the veil would not change that unanimous preference*.[20] Put another way, the

expected gains to the minority, as well as the majority, can be higher when the court ignores the

minority's benefits.

<u>Can judicial review based on a first-best criterion be worse than no judicial review?</u>

We will now discuss a simple extension of the model. In the preceding analysis, we showed

why it may be desirable (from the perspective of the minority and majority) to have a court that

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[18]For policy 3, recall that $e_3 \geq .2$ is the cutoff for efficiency. When faced with a court that uses $e_3<.2$ as the criterion for overturning policies, passing policy 3 will yield expected gains of .045 for members of majority. In these circumstances, the period 1 majority will pass policy 3. (To find the expected return: $P(v_3>0)E(x_3|v_3>0) = (1.8/4)(.1) = .045$.) With policy 3 passed and the court ensuring $v_3 \geq 0$, the first-best policy is obtained – as voters behind the veil would want.

[19]With policy 2, a court that uses a first-best cutoff for overturning policy will yield an expected outcome worse than what is attainable. The reason is that such a court would overturn policies with $e_2<-.2$ (and not otherwise), and this would yield an expected return of -.055 for members of the majority. (To find the expected return: $P(v_2>0)E(x_2|v_2>0) = (2.2/4)(-.1) = -.055$.) Hence, in the presence of such a court, the majority would not pass policy 2, leaving both majority and minority with benefits of 0.

[20]If the court rules based on the majority's preferences, the expected return to members of the minority is $P(x_2>0)E(y_2|x_2>0) = (.25)(3.5) = .875$. If the court rules based on social benefits being positive ($v_2>0$), the return to members of the minority will be zero (because the majority will not pass policy 2).

monitors shocks in a manner that allows some majority-supported inefficient outcomes. Note that those findings required a court that responds to shocks. An additional question to consider is whether the absence of judicial review might be better than a court that blocks inefficient policies using a first-best criterion (i.e., $e^*=e_i^{fb}$). The answer is yes, if we relax one of our model's assumptions.

Recall that our basic model has shocks affecting the minority and majority in the same manner. In reality, of course, some shocks will be good news for one group and bad news for another. To account for heterogeneous effects of shocks, we can redefine y_i as follows: $y_i = \underline{y}_i + \lambda_i e_i$, where λ_i is an exogenous parameter. Returning to Case E, with $\lambda_i<0$ it is easy to see the potential value of ignoring shocks. The logic is similar to what we showed earlier: A court that approves (or reinstates) policy i on the basis of v_i may cause the majority to refrain from passing policy i. When a given shock's effect on the majority is in the opposite direction of its effect on the minority (i.e., when $\lambda_i<0$), court decisions based on the sign of v_i may tend to approve policy when the majority wants it overturned, and overturn policy when the majority wants it approved. And this can be the case even if a policy would, in the absence of a court altogether, generate positive expected benefits for both the minority and the majority.[21] Thus, there are conditions in which the majority and minority, when facing a court that weighs the benefits of policy to the entire public, would expect to gain from eliminating the judicial review process.

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[21] To see why, consider Case E with policy 4 defined as follows: $m_4=.6$, $\underline{x}_4=.4$, $\underline{y}_4=9.4$, $\underline{e}_4=6$, $\lambda_4=-4$. This yields $v_4 = 4 - e_4$ and, therefore, $e_4^{fb}=4$, with e_4^{fb} now defined such that policy is *overturned* for $e_4^{fb}<e_4$. This would lead to policy 4 being approved over the range $-6<e_4<4$, which is equivalent to $-5.6<x_4<4.4$. Hence, the majority would not pass policy 4 in the presence of a court that ruled based on e_4^{fb}. If instead there were no court, the majority would pass policy 4, because doing so would yield positive expected benefits for the majority (i.e., $Ex_4=.4$). And the absence of the court would also yield positive expected benefits for the minority (i.e., $Ey_4=9.4$).

III. Discussion

This section illustrates how the model applies to real policy issues. As a starting point, we will discuss how Cases A and B correspond to basic tyranny of the majority problems encountered by courts – that is, when the court's role is protecting minorities from majorities. We will also discuss briefly how Case C corresponds to common types of monitoring roles played by the court – that is, when the court's role is to serve as the public's agent for uncovering and evaluating information. Then we will turn to the most innovative parts of our model, in which courts play a dual role (protecting minorities, monitoring), to show why understanding the difference between Case D and Case E can illuminate dilemmas faced by courts.

Judicial Protection from Basic Tyrannies (Cases A and B)

The quintessential example of tyranny of the majority is the targeting of easily identifiable minorities for harsh treatment. As an illustration, suppose that policy i is a prohibition on enslaving or imprisoning people because of a characteristic such as race or religion. In this case, it seems quite safe to assert that policy i would be desired behind the veil. Hence, a society may seek to employ some non-majoritarian mechanism, such as a judicially-enforced constitutional provision, to enforce policy i. Yet the adoption of such provisions will depend on the degree to which the laws are written behind the veil. Consider, for example, the U.S. Constitution. In its modern form, it has broad provisions to protect citizens from slavery and arbitrary imprisonment. Arguably these provide, along the lines of Cases A and B, some measure of protection for all citizens – each of whom belongs, for example, to a protected minority group in terms of religious affiliation (or non-affiliation). Of course, the original U.S. Constitution protected a narrower class of people and, most flagrantly, allowed slavery. The individuals who designed the Constitution were not behind the veil

with respect to their own race (and other circumstances) and, hence, wrote laws that protected

themselves while allowing an already identified subset of the population to remain enslaved.[22]

Another important example arises when majority rule decisions have the potential to make

policy reforms time-inconsistent. Suppose policy i is an efficiency-enhancing measure that would

generate large social gains concentrated among an ex ante unidentified minority of the population

– perhaps the new entrepreneurs who succeed as a result of the deregulation or privatization of

industries. In this case, the majority of the public may favor reversing the policy once the winners

and losers are identified. And that may, in turn, leave voters unable to commit credibly to

maintaining, and thus unable to reap the benefits from, efficiency-promoting reforms (e.g.,

Fernandez and Rodrik 1991; Fleck 2000; Falaschetti 2008). Under such circumstances, if a court

can block a majority rule decision to revoke policy i (as in Cases A and B), it can provide a way

around the commitment problem arising from time-inconsistent majority rule decisions (e.g.,

Hanssen 2004).

Judicial Monitoring in the Absence of Potential Tyrannies (Case C)

In contrast to the cases just discussed, at times the entire (or nearly entire) public has aligned

objectives but cannot easily observe the way a law is implemented. Perhaps the most obvious

example is that of a potentially valuable, but potentially harmful, power delegated to politicians. To

see how this fits Case C, let policy i represent the delegation of, say, spending authority and police

powers to elected politicians. When politicians use public funds and/or police powers for personal

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[22]Of course, the issue of protecting minorities did not disappear with the end of slavery, and Constitutional protections of minority rights have not been uniformly respected by the courts. One particularly notorious example is the internment of Japanese Americans following Pearl Harbor. A vast literature examines the role of courts during times of crisis, including recent cases related to the War on Terror; see, e.g., Epstein et al. (2005).

gain (analogous to a negative shock from the general public's perspective), virtually all of the public would prefer those powers to be revoked or narrowed in scope (perhaps just temporarily). Thus, if courts can uncover (and/or react to) relevant information more rapidly than can the public, court oversight can be welfare-enhancing while creating few, if any, losers among the public.[23]

Shocks and Tyrannies: A Dual Role for Courts (Cases D and E)

The main point here is that the optimal decision rules for real world courts depend on the degree to which the veil has been lifted when voters (or their elected representatives) set policy. That is, do the circumstances correspond more closely to Case D, in which the court reviews policies for which the initial decisions (i.e., those made by the public in period 1) were made when voters were still behind the veil, or do the circumstances correspond more closely to Case E, in which the initial decisions were made after the likely winners and losers were identified. The real world of judicial review is, of course, sufficiently complex that one cannot classify rulings cleanly into those two categories. Nevertheless, one can gain substantial insight by applying the basic logic of Cases D and E to actual court rulings. To demonstrate this, we will consider examples related to equality in the provision of education, the taking of property, and same-sex marriage.

Equality in public education: *Serrano v. Priest*

In *Serrano v. Priest*, the California Supreme Court mandated an equalization of per capita school expenditures across districts in the state.[24] In arriving at its decision, the Court emphasized

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[23]On the way that the court's ability to react quickly to new information helps determine its optimal role, see Maskin and Tirole (2004) and Fleck and Hanssen (forthcoming).

[24]The *Serrano* decision was delivered in three parts (in 1971, 1976, and 1977). The 1976 decision (*Serrano v. Priest*, 135 Cal. Rptr. 345, 1976) had the greatest effect, specifying that no district could differ from another by more than $100 per student. See, e.g., Fischel (1989, 1996). Although the *Serrano* decision is the most famous of its kind, courts in other states have issued similar rulings. As Husted and Kenny (2002,

equal protection under the 14th Amendment of the United States Constitution, which it took to be "substantially equivalent" to clauses in the California state constitution.[25] In order to frame this ruling in the context of our model, the critical question is what policies were at stake; that is, what policies did the Court strike down, and what new policies were implemented as a result? Our model suggests two possible interpretations, and comparing them helps to explain why the *Serrano* decision has been so controversial.

One possible interpretation is that the Court enforced a behind-the-veil law (i.e., equal protection) that unequal school spending violated, and that by doing so it moved policy toward what a behind-the-veil public would want. To see this, suppose that the behind-the-veil allocation of education services – given the "shock" that made the returns to education large in the modern era – would be high quality and egalitarian, yet the ex post majority would divide the budget unequally, yielding high quality education for the majority, and low quality for the minority.[26] To illustrate this

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567) report, "A third of the states' education finance systems now have been ruled unconstitutional."

[25]Although it is not central to our argument, one might ask why the *Serrano* decision came when it did, rather than earlier (especially given that the Equal Protection Clause was not new). One contributing factor is that the value of homes skyrocketed in a large number of neighborhoods, increasing differences in levels of funding across districts. Fischel (1996, 625) writes, "California housing prices exploded – there is no better word for it – during the 1970s. . . . No mainland state had such an enormous increase in single family home values during the 1970s." Fischel states that the value of single family homes in California rose from 27 percent and 35 percent higher than in the rest of the U.S. in 1960 and 1970, to 70 percent higher in 1980. In the context of our model, the court may have been, in essence, reacting to a shock (to home prices) that increased the behind-the-veil value of mandating the redistribution of property tax revenue between districts for the purpose of equalizing school funding.

[26]Note that the "shock" related to the returns to education pertains to new information revealed subsequent to the incorporation of equal protection into the Constitution. This matters for applying our model because, if the timing of events corresponded to Case A (i.e., the value of education in the future is known when a constitution is written), the public would simply write a behind-the-veil law specifying uniformly high education quality, and instruct the court to overturn any deviation from that provision. What the rising importance of education as a public policy issue means for modern courts is that they must interpret a constitution that was written before public school budgets became a major policy issue – large scale public funding of education did not come until the 19th century. On the reasons for the rise of public funding in the

more formally, let policy *j* represent unequal shares of a *fixed budget*, so that a court rejection of policy *j* would lead to an equal division of that fixed budget. If this describes what was at stake in *Serrano*, then the optimal court would have based its ruling on a first-best criterion (as in Case D) and, hence, disallowed unequal shares – essentially what the court did.

But now consider that, in reality, the education budget is not fixed and, furthermore, that equal protection does not allow a court to set specific levels of spending. These factors point to another possible interpretation of the *Serrano* decision. Let policy *k* represent a high level of spending for majority students and a low level of spending for minority students. If this describes what is at stake in *Serrano*-style applications of equal protection, then rulings based on first-best criteria may be sub-optimal (as in Case E). The key point is that, without assuming a fixed budget, it is not clear that rejecting policy *k* (even though it reflects a tyranny) will improve the outcome for the minority. Put another way, even if courts can rely on equal protection (which can be viewed reasonably as a behind-the-veil law) to guarantee relatively equal budget shares, voters will set (or choose politicians who set) the level of the budget after the veil is lifted. Thus, if the majority knows that anything with unequal funding (such as policy *k*) will be overturned as a violation of equal protection, it may pass instead a policy with a small, equally divided budget.

In view of these two contrasting interpretations of *Serrano*, what does the evidence say? The economics literature suggests that *Serrano* did indeed harm the group that the court sought to help (children from poorer families), because it caused an overall decline in education funding (e.g., Fischel 1989, 1996, 2008; Downes 1992; Silva and Sonstelie 1995). The argument fits our Case E: Because the majority of the electorate responded rationally to its knowledge of how the court would

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19th century, see Stoddard (2009).

rule, the education budget fell relative to what it otherwise would have been, and so did the overall

(minority as well as majority) quality of K-12 education in California.[27]

Judicial constraints on takings: *Kelo v. City of New London*

The taking of a minority's property is a standard example of tyranny of the majority, and it

is thus easy to see why a behind-the-veil public would seek to constrain such actions. This is, of

course, an important reason why the U.S. Constitution allows the use of eminent domain only when

property is taken for a "public use" and "just compensation" is paid.[28] Yet despite these

constitutional limitations, there has always been controversy over the use of eminent domain.[29] The

debate (and widespread furor) over the most recent major ruling – *Kelo v. City of New London* –

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[27]Hamilton (1975) shows that, given Tiebout sorting (Tiebout 1956), local property taxes and local zoning ensure the provision of the optimal amount of congestable government-provided goods, such as schools. In other words, property taxes are equivalent to a fee for services. By strictly limiting the ability of districts to use local property taxes to provide local public goods, *Serrano* undercut support for property taxes (and thus spending on schools). A number or scholars – William Fischel most prominently – have suggested that *Serrano*, by breaking the link between local property taxes and spending on local schools, inspired California's 1978 Proposition 13, which greatly reduced spending. Fischel attributes the popularity of Proposition 13 to the second *Serrano* opinion (Fischel 1989, 1996, 2004a, 2008). For a counter to Fischel's argument, see Stark and Zasloff (2003), and see Fischel (2004a) for a response. Silva and Sonstelie (1995) conclude that *Serrano* was responsible for about 50 percent of California's relative (to the rest of the country) drop in per student spending. Finally, it is worth noting that the overall decline in school quality does not appear to be just the price paid for desirable improvements in low-end student performance: Downes (1992) finds that sixth grade achievement test scores were as unequally distributed in 1985-86 as they had been in 1976-77.

[28]The 5th Amendment to the U.S. Constitution contains the phrase "nor shall private property be taken for public use, without just compensation," and the 14th Amendment states that U.S. citizens cannot be deprived of "life, liberty, or property without due process of law," which effectively extends the 5th Amendment's protections to actions by individual states (the 5th Amendment was initially interpreted as applying only to the federal government). Most state constitutions contain similar wording, with some state-specific elaborations.

[29]On the use of, and controversies over, eminent domain in the early United States and the colonial era, see Hart (1995, 1996a, 1996b). Fischel (1995, 2004b) and Somin (2004) examine more recent controversies. Fleck and Hanssen (forthcoming) provide an overview of the recurring controversies over, and the changing judicial interpretations of, eminent domain laws. Also see Epstein (1985) and Hermalin (2005).

provides a good illustration. In *Kelo*, the U.S. Supreme Court ruled (5 to 4) for the city of New London, thus allowing the use of eminent domain to take non-blighted homes in order to provide land for private development.[30] Our model suggests three possible interpretations of the ruling: two that fit Case D and one that fits Case E.

The first interpretation is that even those harmed through the loss of their homes might have (in principle) supported the redevelopment plan behind the veil. This scenario fits Case D of the model, with the *Kelo* decision being the efficient one. In other words, the social benefits from using eminent domain may have been positive. A few homeowners were harmed and, hence, complained – but only after the veil was lifted.

The second interpretation is that the use of eminent domain in the *Kelo* case corresponds to a basic tyranny, also as illustrated in Case D. Suppose policy i allows the use of eminent domain in the manner employed by New London, and the shock observed for New London in particular rendered the overall benefits (v_i) negative.[31] From this perspective, it is at least arguable that the Court made a mistake by failing to protect a tyrannized minority from inefficient policy. And, indeed, Justice O'Connor's *Kelo* dissent emphasized her concern about the manner in which the political system can be expected to weigh the gains and losses from redevelopment projects:

> The beneficiaries are likely to be those citizens with disproportionate influence and power in the political process, including large corporations and development firms. As for the victims, the government now has license to transfer property from those with fewer resources to those with more.

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[30] *Susette Kelo, et al., v. City of New London, Connecticut, et al.*, 545 U.S. 04-108 (2005).

[31] Of course, in the real world, neither the minority nor the majority would be homogeneous in terms of receiving benefits, but those who stood to lose would be few (those forced to sell their homes at below their reservation prices), and the potential beneficiaries, at least according to the promoters of the development project, would be many (e.g., if the project generated tax revenue for local use).

Under the conditions O'Connor describes, one can easily see how, in the absence of a judicial constraint, the proponents of inefficient redevelopment policies ($v_i < 0$) that harm minorities ($y_i < 0$) would prevail.[32]

The third interpretation – which fits Case E in our model – is that, even if the undesirability of the redevelopment policy under review in the *Kelo* case were obvious, a judge could rationally oppose overturning that policy. If the use of eminent domain in the *Kelo* case generated negative social benefits for reasons that could not have been perfectly foreseen (i.e., because of a shock), but similar uses of eminent domain would (in the presence of more favorable shocks) be beneficial, then it may be undesirable for a court to decide each case using a first-best criterion. In other words, consistently disallowing eminent domain when observing negative social benefits ($v_i < 0$) could lead to lower social benefits in the long run (by discouraging valuable, as well as harmful, applications of eminent domain powers).

Does the basic logic of this third interpretation (Case E) have practical relevance to the *Kelo* case? Quite plausibly yes. The key point here is that even some supporters of the *Kelo* decision believe that the New London's use of eminent domain was a mistake. Most notably, Justice Stevens, who wrote the majority opinion in *Kelo*, subsequently expressed the view that the *Kelo* redevelopment plans were undesirable.[33] Nevertheless, he voted with the majority. Thus, Stevens

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[32]The key issue here is that a minority bears the costs. For the minority to be tyrannized, it need not be that a majority actually obtain appreciable benefits. The promoters of redevelopment do, of course, generally claim to deliver widespread gains, but regardless of how exaggerated those claims are, an obvious concern would be a politically influential group of expected winners (along with an indifferent majority and a harmed minority).

[33]As Greenhouse (2005) reports: "His own view, Justice Stevens told the Clark County Bar Association, was that 'the free play of market forces is more likely to produce acceptable results in the long run than the best-intentioned plans of public officials.' But he said that the planned development fit the definition of 'public use' that, in his view, the Constitution permitted for the exercise of eminent domain."

opposed the Court's making an attempt to enforce what was – according to his own statements – the first-best outcome. Although Case E of our model is not the only reason to oppose the use of a first-best criterion (another is respect for precedent), it does provide a practical justification: When the behavior of a rational, forward-looking public makes the first-best infeasible, the optimal court may allow the majority of the public to harm the minority through socially undesirable policies. This is a reason for courts to follow an inter-temporally consistent interpretation of public use (as Justice Stevens argues the court should), even if it requires courts to allow eminent domain to be employed on occasions when it generates negative social benefits.

That said, an essential point to consider is which members of the public remain behind the veil. Recall that the City of New London fought the case all the way to the Supreme Court, suggesting that the majority of New London voters supported (or at least did not strongly oppose) the proposed redevelopment. The reason, of course, is that voters in New London were already out from behind the veil with respect to whose homes were to be taken – and only a small minority stood to lose their homes. By contrast, voters in the rest of the country were generally behind the veil with respect to similar (possible) plans in their own communities. How did the "behind the veil" voters react? In an overwhelmingly negative fashion.[34] The result was substantial pressure to limit eminent domain powers.[35] In terms of our model, the public responded to *Kelo* by curtailing policies that

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[34]As Cole (2006, 1) puts it, "in June 2005 the U.S. Supreme Court decided the case of *Kelo v. New London Development Corporation* and all hell broke loose." He then discusses (and catalogues) the public reaction. On the public and legislative reaction to *Kelo*, also see, e.g., Bell (2006) and Somin (2009).

[35]In short, even middle class homes in pleasant neighborhoods were not safe from government-sponsored redevelopment, and neither majority rule nor the courts post-*Kelo* could be counted on to do what the majority would choose while behind the veil. Thus, current and prospective homeowners who remain behind the veil (in practice, the vast majority of the public) favor revoking city governments' power to interpret public use expansively when taking private homes. For a discussion of the way *Kelo* fits into the long debate over the proper role of eminent domain, see Fleck and Hanssen (forthcoming).

would be beneficial only in the presence of a court that prevents tyrannies of the majority. In other words, the public has reacted as if the Court failed to prevent a Case D tyranny.

Equal protection and same-sex marriage: *In re Marriage Cases*

To see how the issue of same-sex marriage fits our model, consider first that one can plausibly view prohibitions on same-sex marriage as an example of tyranny of the majority. More specifically, one could make the following argument: A behind-the-veil public – that is, before individuals know whether their desired marriage partners will be of the same or different sex – would favor laws that allowed marriage for same-sex couples as well as for opposite-sex couples. But after the veil is lifted, a majority (composed principally of heterosexuals) may seek to block marriages for same-sex couples. To understand our argument here, it is essential to recognize that our purpose is not to evaluate the merits of same-sex marriage, but to illustrate how Cases D and E of our model can be applied to the real world. For the illustration to be useful, one need not accept the view that a behind-the-veil public would favor gay rights, but only that such a view could motivate a court to conclude that restrictions on marriage violate equal protection.

The key question is thus whether a court that views prohibitions on same-sex marriage as a tyranny of the majority would be helping the cause of same-sex marriage if it overturned prohibitions on such marriages. Our model shows why the answer is not obvious. Consider the highlights of how the issue has played out in California, the most prominent battleground. In 2000, the majority (61%) of California voters passed Proposition 22, which banned same-sex marriage. Subsequently, in its 4-3 *In re Marriage Cases* (2008) decision, the California Supreme Court found Proposition 22 unconstitutional. If this were the end of the story, the Court would arguably have applied a behind-the-veil law (equal protection) to prevent a minority (supporters of same-sex marriage) from being

tyrannized by a majority (voters who supported Proposition 22). This would fit Case D.[36]

But that is not the end of the story. In response to the Court overturning Proposition 22, California voters passed Proposition 8 (a constitutional amendment that bans same-sex marriage) in November 2008. If Proposition 8 is found to be constitutional, what this means in the context of our model is that voters can determine – after the veil has been lifted – how equal protection applies to gay marriage. This corresponds to Case E, in which a court that rules on the first-best criterion may not help, or may even harm, the tyrannized minority the court seeks to protect. But, of course, if Proposition 8 is found unconstitutional by a federal court, then the *In re Marriage Cases* decision may prove to be a successful judicial constraint on majority rule.[37]

What will the long run effect on gay rights be? It is too early to say. In addition to the currently unknown judicial fate of Proposition 8, there remains the question of whether rulings such as *In re Marriage Cases* will (along the lines of Case E) make the tyrannized minority worse off. This is a practical concern because laws (such as Proposition 8) designed to prevent courts from allowing same-sex marriages could slow the expansion of gay rights. Notably, even if voter support for same-sex marriage continues to grow in the future, the passage of a constitutional prohibition today may postpone the time at which same-sex marriage becomes legal. And, of course, this is not just a California issue.

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[36]One could interpret the model's "shock" here as resulting (in part) from an increase in the number of same-sex couples desiring to be married. As the number of same-sex couples desiring to be married has increased, and the number of people opposed to same-sex marriage has declined, the benefits of a law allowing same-sex marriages has increased.

[37]Although the California Supreme Court upheld Proposition 8, the question of its constitutionality now depends on federal courts (e.g., *Perry v. Schwarzenegger*).

IV. Conclusion

Our theoretical model shows that the ability of courts to constrain tyrannies of the majority depends on when in the policymaking process the veil is lifted and on how the electorate (and their representatives) will respond to the specific decision-making criteria that courts employ. Even under the relatively ideal conditions we assume – a court that can commit credibly to future rulings, shocks that (once observed) indicate the exact benefits of policy, and a public that complies with court rulings – it can be a mistake to evaluate each policy under review on the basis of whether the social benefits from that given policy are positive or negative. Rulings that ignore this point may harm the minority groups the courts aim to protect, as well as harming the potentially tyrannizing majorities.

These theoretical findings provide practical insight into the long-running debates over the court's optimal role in protecting minority rights. The necessity of considering when the veil of ignorance is lifted for what types of policy makes identifying the optimal role of judicial review more complicated and more controversial. As Section III explains in the context of *Serrano*, even if everyone agreed that the behind-the-veil public would choose an education policy with spending equalized among students, that would not guarantee agreement on whether the behind-the-veil public would want a court to require equal spending. How such a ruling will affect a potentially tyrannized minority depends on how the majority, when no longer behind-the-veil, will respond. In the case of *Serrano*, the empirical evidence from the economics literature suggests that the response (in the form of reduced overall spending) was large. As a point of contrast, the *nationwide* public reaction to the *Kelo* decision is, we argue, best viewed as reflecting a behind-the-veil response. Thus, although in some circumstances (*Serrano* perhaps) the optimal court may allow inefficient policies that harm minorities, the behind-the-veil public sees *Kelo* as a mistake. Finally, when our model is applied to

the recent combination of judicial rulings and voter initiatives related to same-sex marriage, one can

see why a court striking down a prohibition on such marriages may help or harm the minority the

court is seeking to protect.

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Table 1: Order of Events & Information Cases

	Period 1	Period 2	Period 3	Period 4
Voters' Decisions	pass or reject policy *i*; instruct court	retain or revoke policy *i* (if passed in Period 1)		
Court Ruling			approve or overturn public's Period 2 decision	
Information: Case A	shock observed	veil lifted		
Information: Case B		veil lifted		shock observed
Information: Case C			shock observed	veil lifted
Information: Case D		veil lifted	shock observed	
Information: Case E	veil lifted		shock observed	