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 in preventing tyrannies of the majority. The model identifies conditions under which the optimal role of the court may be to *allow* tyranny of the majority – and the tyrannized minority will be better off as a result. This implication hinges 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 the revelation of new information (modeled as a random shock) that affects the level of the payoffs generated by that policy. We explain how the model applies to three controversial rulings (*Serrano v. Priest*, *Kelo v. City of New London*, and *In re Marriage Cases*). In so doing, we demonstrate how the model can help distinguish scenarios in which judicial constraints on majority rule are socially beneficial from those in which they are harmful.

"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 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 that relying on an independent court "is preferable when the majority's preferences are likely to inflict large negative externalities on the

[1]This is evinced, for example, in 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.

[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).

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"?[5]

In this paper, we examine the conditions under which a court committed to blocking

tyrannizing policies (which we define as policies that generate positive net benefits for the majority

but negative net benefits for society as a whole) may actually make the tyrannized minorities *worse*

off. We begin by characterizing two important roles played by courts, and then ask what happens

when a court plays those roles jointly.[6] The two roles are: 1) protecting minorities from majorities,

and 2) 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).[7] In our model, we focus on how those roles interact with the timing of two critical

events: the lifting of a veil of ignorance related to being among the beneficiaries or losers from a

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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 (2004a) 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. The mechanism we develop in our paper also draws on the idea 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; Hanssen 2004b; Fleck and Hanssen 2006; Anderson and Parker 2008; Falaschetti 2008).

[5]Although scholars have questioned the ability of courts to protect tyrannized minorities (e.g., Dahl 1957, 1989; McCloskey 1960; Klarman 1996), or how to square such protection with democratic principles (e.g., Bickel 1962; Ely 1980), the conventional wisdom remains that courts are a potentially important mechanism for limiting majority abuses of minority rights.

[6]Although a number of scholars have explored the implications of each of these roles individually, to the best of our knowledge, we are the first to model them jointly.

[7]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 2010). Also see Carrubba and Rogers (2003), who model efficiency gains from a court that monitors states that operate under the Commerce Clause.

prospective policy, and the observation of new information (modeled as a random shock).

Our model predicts that the order in which those two events occur will be critical. In simple cases when voters are behind the veil of ignorance at the time they set the rules that courts are assigned to enforce (think of a constitution), the conventional wisdom is correct: By overruling tyrannizing policies that majorities pass in subsequent periods, courts make minorities better off. Yet when the initial majority rule decisions take place after the veil has been lifted, the conventional wisdom may be wrong. The reason is that an out-from-behind-the-veil majority will pass a different set of policies if it anticipates judicial reversals of tyrannizing policies, and this may leave the minority even worse off than it would be under a purely majority rule system. As a result, the lot of the minority (and that of the majority, too) may be improved if the court instead makes decisions solely on the basis of benefits to the majority. We discuss how these conclusions apply to three controversial court decisions: *Serrano v. Priest*, *Kelo v. City of New London*, and *In re Marriage Cases*.

Our paper contributes to several expanding literatures. Related theoretical work on judicial review includes: Shipan (2000), who models how legislators can benefit from a strategic design of the judicial review process; Rogers (2001) and Rogers and Vanberg (2002), who model efficiency gains arising from the informational role played by judicial review; Rogers and Vanberg (2007), who model judicial-legislative interaction and show how even an activist judiciary (with ideologically driven judges) can beneficially constrain legislative behavior. More broadly, our findings 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, by examining how

the benefits of different possible decision rules employed by courts depend on what voters know

when, our findings complement previous research on the forward-looking behavior of courts (e.g.,

Gely and Spiller 1990; Eskridge 1991; Ferejohn and Weingast 1992; Spiller and Gely 1992; Spiller

and Spitzer 1992; Epstein, Knight and Martin 2001; Bergara, Richman, and Spiller 2003).[8]

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

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

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[8]The court in our model does not act strategically, but simply follows the instructions it receives from the (forward looking) public in the initial time period. This allows us to focus on what the public would want the court to do.

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*.[9]

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.[10] And this,

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

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

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).

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[9]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*). Including 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.

[10]Our approach thus abstracts from real-world deviations, driven by such things as judicial ideology, and perhaps enabled by imprecise constitutional guidelines.

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) that affects both the

majority and the minority:

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

where e_i (the shock) is drawn from a 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 court's

only role is to prevent 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 $\mathrm{E}v_i > 0$ (in Case B).[11]

The value of having a court is thus easy to determine. For Case A, if $x_i > 0$ and $v_i > 0$, or if $x_i < 0$ and $v_i < 0$, there will be no tyranny and there is nothing valuable for the court to do. Yet if $x_i > 0$ and $v_i < 0$, the court prevents a tyranny and, therefore, the court's role is worth $-v_i$ (a positive number) to the public.[12] Similarly, if $x_i < 0$ and $v_i > 0$, the court prevents a tyranny and, therefore, is worth v_i (again a positive number) to the public. The interpretation is the same for Case B as for Case A, except that the costs and benefits in Case B are expected values.[13]

Illustrations

To illustrate why a court acting as described above (i.e., ruling based $v_i > 0$ or $\mathrm{E}v_i > 0$) 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

$$m_2 = .6$$

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[11]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 $m_i \underline{x}_i + (1 - m_i)\underline{y}_i > 0$.

[12]Recall that $v_i = m_i x_i + (1 - m_i)y_i$.

[13]Recall that $\mathrm{E}v_i = m_i \underline{x}_i + (1 - m_i)\underline{y}_i$.

$$\underline{x}_2 = -1$$
$$\underline{y}_2 = 2$$
$$\underline{e}_2 = 2$$

Note that policy 1 is exactly what policy 2 would be with an always zero shock.[14] 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 $x_i < 0$.

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

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 the absence of a court. The public would pass such a policy even if the court did not exist, yet will have a higher expected payoff with a court that prevents outcomes with negative social benefits (i.e., prevents $v_i<0$). In other words, the value of the court is the avoidance of losses – which can be expressed quantitatively by multiplying the following two terms: the probability of a loss occurring; the expected value of the loss, conditional on a loss occurring.   Mathematically, this is: $P(v_i<0)E(v_i|v_i<0)$.[15] 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. Thus, the value of the court is can be expressed as the probability of policy being beneficial multiplied by the expected value of the policy, conditional on a policy being beneficial. Mathematically, this is $P(v_i>0)E(v_i|v_i>0)$.[16]

Illustrations

To illustrate the two categories just described for Case C, consider policy 2 (defined earlier) and the following:

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[15]The logic here 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 $v_i\geq0$. 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 increases expected benefits by: $P(v_i>0)E(v_i|v_i>0)$ - $E(v_i) = -P(v_i<0)E(v_i|v_i<0)$.

[16]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 $v_i\geq0$. Thus, the value of the court is $P(v_i>0)E(v_i|v_i>0)$.

Example Policy 3

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

Policy 2 illustrates the first scenario, because $Ev_2 > 0$. Without the court, the public's expected return is $Ev_2 = .2$; with the court, the public's expected return is $P(v_2>0)E(v_2|v_2>0) = .605$. 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 $v_2<0$.[17]

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 what the public instructs the court to do 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,

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[17]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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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.

To calculate the value of the court (relative to having no court), consider whether a tyranny would occur in the absence of the court. If (i) $Ex_i<0$ and $Ev_i<0$ or (ii) $Ex_i>0$ and $Ev_i>0$, the majority's behavior is aligned with the minority's interest, and no tyranny will occur.[18] The value of the court would come solely from monitoring shocks and, therefore, be the same as for Case C. Yet if $Ex_i<0<Ev_i$ or $Ev_i<0<Ex_i$, the majority (in the absence of a court) would vote against the option that maximizes expected value; thus, a tyranny occurs. With $Ex_i<0<Ev_i$, the court's value is $P(v_i>0)E(v_i|v_i>0)$, because the policy will not be in place unless there is a court, yet the court ensures that efficient policies are implemented. With $Ev_i<0<Ex_i$, the court's value is $-P(v_i<0)E(v_i|v_i<0)$, because the court prevents (and hence saves the losses from) inefficient policies.

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 $v_i<0<x_i$.

Identifying the expected value of having a court follows the logic used for the other cases, with the court's decision rule now based on the sign x_i rather than the sign of v_i. Without the court, the expected social value of the outcome is Ev_i if $\underline{x}_i>0$ and zero if $\underline{x}_i<0$. With the court, the expected

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[18]Recall that $Ex_i=\underline{x}_i$ and $Ev_i=m_i\underline{x}_i+(1-m_i)\underline{y}_i$.

social value of the outcome is $P(x_i>0)E(v_i|x_i>0)$. Thus, if $\underline{x}_i>0$, the role of the court is worth

$P(x_i>0)E(v_i|x_i>0)-Ev_i$. And if $\underline{x}_i<0$, the role of the court is worth $P(x_i>0)E(v_i|x_i>0)$.[19] With the court's

instructions coming from the majority (and the court, by assumption, following those instructions),

the majority will expect to benefit from the court's existence (or, if $\underline{x}_i+\underline{e}_i\leq0$, be unaffected). The

minority, however, may expect to be harmed by the courts existence, because it may be that

$P(x_i>0)E(y_i|x_i>0)<0$ when $\underline{x}_i<0$. To see why, note that for any given values of the other parameters,

a sufficiently low $\underline{y}_i$ (i.e., $\underline{y}_i$ far below zero) will guarantee that the minority is harmed by the policy.

Moreover, if this harm to the minority is larger than the benefit to the majority (another property that

can be guaranteed with sufficiently low $\underline{y}_i$), it will render the net effect of the court negative.[20] In

plain language, this says that the minority, and the behind-the-veil public, can be better off without

a court, because the majority will only implement the policy when the court is there to protect the

majority from being harmed by that policy.

Optimal Court Behavior: Cases A - E

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. The starting point here

is to recall one of the model's key assumptions: A forward-looking period 1 public makes a majority

rule decision when instructing the court, which then follows those instructions. This serves an

important purpose, because the model needs a clear behavioral assumption in order to characterize

outcomes. Yet for applying the model, it is useful to go an additional step here by considering the

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[19]If $P(x_i>0)=0$, the value of the court is zero even though $E(v_i|x_i>0)$ would be undefined.

[20]For example, keeping the parameters the same as in policy 3, but replacing $\underline{y}_3=1$ with any value less than -3.5 will guarantee that the policy has negative social benefits. Yet the majority would pass the policy, and have positive expected benefits from doing so, if the court ruled based on the sign of x_3.

idea of an optimal court. For this purpose, we will maintain the assumption that the court must commit credibly to its behavior (i.e., the public is not fooled), then ask how the behind-the-veil public would want the court to behave.

The optimal court in Cases A, B, C, and D

In four cases (A, B, C, and D), the optimal court behavior is obvious from the analysis we have already presented. The key point is that the timing of the events makes it efficient for the court to rule on the basis of social benefits (v_i or Ev_i) – and that is exactly what the public will instruct the court to do, because the public is still behind the veil when it instructs the court.

The optimal court in Case E

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.[21] We will also assume that drawing the most favorable shock would lead to positive social benefits ($v_i>0$) and positive benefits to the majority ($x_i>0$).[22]

To identify a general solution for optimal court behavior with respect to a given policy i, it is useful to examine ranges of e_i based on three cutoffs (e_i^{fb}, e_i^{ic}, and e_i^*) defined such that: $e_i>e_i^{fb}$

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[21]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.

[22]When put in terms of the exogenous parameter, assuming $v_i>0$ can be restated as $[m_i\underline{x}_i + (1-m_i)\underline{y}_i] + \underline{e}_i > 0$; otherwise, the solution is obvious: It would be optimal for the court always to block the policy. Similarly, assuming $x_i>0$ can be restated as $\underline{x}_i+\underline{e}_i>0$; otherwise, the majority would reject policy i, regardless of what the court behavior.

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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 $\mathrm{E}x_i = 0$. 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: $e_i^* = \max(-[m_i \underline{x}_i + (1-m_i)\underline{v}_i],$ $-2\underline{x}_i - \underline{e}_i)$.[23]

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 outcome will be obtained with $e^* = e_i^{fb}$.[24] 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

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[23]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.

[24]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: $P(v_3 > 0)\mathrm{E}(x_3 | v_3 > 0) = (1.8/4)(.1) = .045$.) 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.

(i.e., using e_i^{fb} as its cutoff) would not be doing what the public would want behind the veil.[25]

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.*[26]

When the Criterion for Court Rulings is Set Before the Information Case is Known

We will now extend our model to illustrate the tradeoffs involved when deciding whether to employ a first-best criterion. The key issue is that, as we have shown, the feasibility the first-best outcome can depend on the timing of events. To keep the exposition straightforward, we will maintain all of our previous assumptions, except that we now assume that the criterion for court decisions must be chosen before the timing of information revelation is known. More specifically, prior to learning whether the timing of events fits Case D or Case E, a decision must be made either to count or to ignore the minority's costs and benefits. Let δ_i represent the probability that policy i will have information revealed as in Case D, with $1-\delta_i$ the probability of information revealed as in Case E; δ_i is exogenous; $0<\delta_i<1$.

The first step is to recognize that when the incentive constraint is non-binding (i.e., if $e_i^{ic}<e_i^{fb}$), the first-best criterion is optimal. When is this the case? If policy i is worth more (per

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[25]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.

[26]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).

capita) to the majority than to the minority, or if it is worth more to the minority by not by a sufficiently large amount (ceteris paribus), the incentive constraint non-binding – because a first-best criterion will not deviate too far from the majority's interests.[27] Also, if the expected benefits of policy i are positive for the majority (i.e., $\underline{x}_i > 0$), this renders the incentive constraint non-binding. In these circumstances, there is no harm from using a first-best criterion, and there can be a disadvantage from ignoring the minority's costs and benefits. Thus, the potential problem with using a first-best criterion arises in other circumstances – those that allow a binding incentive constraint. Specifically, the majority's expected benefits from policy i must be (i) smaller than those of the minority and (ii) likely negative.

The next step is to consider the implications of a binding incentive constraint. A simple way to express the problem is as the difference between the expected benefits obtained by a first-best criterion and those obtained by a majority-serving (i.e., minority-ignoring) criterion. This can be obtained by subtracting the expected loss from using the first-best criterion in Case E from the expected gain from using the first-best criterion in Case D.

$$\Delta EV_i = (\delta_i)[\text{Prob}(x_i < 0 < v_i)][E(v_i | x_i < 0 < v_i)] - (1-\delta_i)[\text{Prob}(x_i > 0)][E(v_i | x_i > 0)]$$

This can be expressed in terms of the exogenous variables as follows[28]

$$\Delta EV_i = (\delta_i)[(\underline{v}_i - \underline{x}_i)^2/(4\underline{e}_i)] - (1-\delta_i)(\underline{e}_i + \underline{x}_i)[(\underline{v}_i + \underline{e}_i) + (\underline{v}_i - \underline{x}_i)]/(4\underline{e}_i)$$

which generates three useful implications.

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[27]More formally, if $\underline{x}_i > [(1-m)/(2-m)]\underline{v}_i - (2-m_i)\underline{e}_i$, the incentive constraint will be non-binding, and this holds when $\underline{v}_i < \underline{x}_i$.

[28]To see why, note that: $\text{Prob}(x_i < 0 < v_i) = (\underline{v}_i - \underline{x}_i)/(2\underline{e}_i)$; $E(v_i | x_i < 0 < v_i) = (\underline{v}_i - \underline{x}_i)]/2$; $\text{Prob}(x_i > 0) = (\underline{e}_i + \underline{x}_i)/(2\underline{e}_i)$; $E(v_i | x_i > 0) = [(\underline{v}_i + \underline{e}_i) + (\underline{v}_i - \underline{x}_i)]/2$.

First, a higher value of δ_i will, ceteris paribus, lead to a higher value of ΔEV_i.[29] In plain language, when there is a higher probability of Case D, there is more reason to employ with a first-best criterion, and when there is a higher probability of Case E (with a binding incentive constraint), there is more reason to employ a majority-serving criterion. Looking at this another way, suppose a rule (or precedent) must be established to guide court decisions on a variety of future issues: The higher one's forecast of the proportion of those issues on which the key public decisions will be made while still behind the veil, the more reason one has for favoring a judicial system that weighs all benefits and costs, not just the majority's benefits and costs.

Second, a higher value of $\underline{x}_i$ will, ceteris paribus, lead to a higher value of ΔEV_i.[30] The reason is that, as the majority's benefits from policy *i* become closer to those of the minority (a marginal increase in $\underline{x}_i$ will move x_i toward y_i), for Case D the expected value of a majority-serving criterion will become closer to that of the first-best criterion, while for Case E the value of a majority-serving criterion will become even more valuable relative to a first-best criterion. Again, recall that our analysis here has been based on a binding incentive constraint – this is important to keep in mind because a sufficiently large increase in $\underline{x}_i$ will render the incentive constraint non-binding. Thus, the advantage of choosing a majority-serving criterion is largest when the majority's preferences diverge sufficiently from minority's to make the incentive constraint binding, but not so much that majority-serving rule causes excessive deadweight losses.

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[29]This can be determined as follows: $\partial(\Delta EV_i)/\partial\delta_i = [(\underline{v}_i\text{-}\underline{x}_i)^2/(4\underline{e}_i)] + (\underline{e}_i\text{+}\underline{x}_i)[(\underline{v}_i\text{+}\underline{e}_i)\text{+}(\underline{v}_i\text{-}\underline{x}_i)]/(4\underline{e}_i)$, which is positive, because each of the individual terms must be positive either by assumption ($\underline{e}_i\text{>}0$) or by the parameter restrictions necessary of the case under consideration, in which the incentive constraint is binding ($\underline{v}_i\text{-}\underline{x}_i\text{>}0$; $\underline{e}_i\text{+}\underline{x}_i\text{>}0$; $\underline{v}_i\text{+}\underline{e}_i\text{>}0$).

[30]This follows from: $\partial(\Delta EV_i)/\partial\underline{x}_i = \text{-}(\delta_i)(1\text{-}m)(\underline{v}_i\text{-}\underline{x}_i)/(2\underline{e}_i) - (1\text{-}\delta_i)(\underline{v}_i\text{-}\underline{x}_i)/(2\underline{e}_i) - (1\text{-}\delta_i)(\underline{e}_i\text{+}\underline{x}_i)(m)/(2\underline{e}_i)$, which has all terms negative, because $\underline{v}_i\text{-}\underline{x}_i\text{>}0$ and $\underline{e}_e\text{+}\underline{x}_i\text{>}0$ when the incentive constraint is binding.

Third, a higher value of $\underline{v}_i$ may lead to an increase or decrease in ΔEV_i. The reason is that a higher value of $\underline{v}_i$ increases the loss from using a first-best criterion when the first-best outcome is infeasible, while it also increases the loss from using a majority-serving criterion when the first-best is feasible. Thus, the direction in which $\underline{v}_i$ affects ΔEV_i depends on the other exogenous conditions. The key factor here is δ_i: When Case D scenarios are common and Case E scenarios rare (i.e., when δ_i is near one), an increase in $\underline{v}_i$ is more reason to employ a first-best criterion, whereas in the opposite case (i.e., when δ_i is near zero), an increase in $\underline{v}_i$ is more reason to employ a majority-serving criterion.[31] The logic here is parallel to what we showed earlier: The fact that a policy may have very high potential benefits for a minority need not imply that courts should seek to evaluate the policy on the basis of social benefits – because when the majority anticipates the use of a first-best criterion, the majority may not pass the policy even though the policy would, with a court that served the majority, generate positive expected benefits for both the majority and the minority.

As a final point here, it is useful to mention what does and does not drive the interesting findings. The critical point is that the majority may, if it can act after the veil is lifted, set policy *looking ahead* to the way a given criterion for judicial decisions will work; this is what Case E illustrates. The potential disadvantage of the first-best criterion would not arise if it were simply the case that the majority could sometimes undo court rulings. In other words, if the lottery did not involve Case E but instead merely assumed that the public could sometimes, but not always, overrule the court, there would be no reason for a court to employ a majority-serving criterion over a first-best criterion.

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[31]This can be seen from: $\partial(\Delta EV_i)/\partial/\underline{v}_i = m(\delta_i)[(\underline{v}_i\text{-}\underline{x}_i)/(2\underline{e}_i)] - m(1\text{-}\delta_i)(\underline{e}_i\text{+}\underline{x}_i)/(2\underline{e}_i)$. Note that the first term is positive (because $\underline{v}_i\text{-}\underline{x}_i>0$) and the second term is negative (because $\underline{e}_i\text{+}\underline{x}_i>0$). Thus, as $\delta_i\rightarrow1$, $\partial(\Delta EV_i)/\partial/\underline{v}_i$ must be positive, while as $\delta_i\rightarrow0$, $\partial(\Delta EV_i)/\partial/\underline{v}_i$ must be negative.

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.[32]

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 2004a).

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 must wait (and/or incur substantial costs) to observe a policy's net benefits. An 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 a strong right to privacy in the sense of sharply limiting governmental powers to spy on individuals. And suppose that, in response to a

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[32]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).

wave of organized crime (e.g., mafia style extortion, Ku Klux Klan style violence, marauding religious "militias" who attack nonbelievers, or terrorist attacks), politicians and police officials seek to revoke policy i so that new surveillance technology can be used to monitor what citizens do.

What factors might make the net benefits of revoking (versus retaining) policy i unknown ex ante? If the new surveillance technology turned out to be highly effective and government officials turned out to be faithful agents of the public, then revoking policy i – that is, allowing broad surveillance powers – could generate large benefits. Yet if the available technology turned out to be ineffective against organized crime, but easy for corrupt officials to exploit for their own gain, then revoking policy i could be very harmful. And the public may not know in advance the extent to which new surveillance technology will be effective or the degree to which government officials will be corrupt. The shock in this context would be the revelation of new information regarding the technology's effectiveness and the degree of corruption. Similarly, periodic crises, such as wars, may operate as shocks affecting the benefits and costs of revoking policy i.[33]

Courts regularly evaluate "shocks" of this type, because in practice specifying a set of guaranteed civil liberties involves some latitude for interpretation. In the U.S., for example, the rights of suspects, the right to bear arms, and the right to privacy have been long been topics of controversial judicial rulings. And, very importantly for applying our model, views regarding the optimal interpretation of a stated right have changed over time in response to events analogous to what we call shocks in our model (e.g., crime waves, wars or foreign threats, revelations of

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[33]The question of whether courts should allow politicians to reduce the scope of civil liberties to during times of crisis has been the subject of a very large literature, as has the positive question of how courts actually do behave. Indeed, the Supreme Court itself has at times argued, in essence, that constitutional protections of rights must remain in place during wartime, but at other times argued, in essence, that various rights (set in peacetime) could be violated by majority-elected politicians during wartime because the net gains of doing so were sufficiently high. See, e.g., Epstein et al. (2005).

conspiracies, the advent the telephone or internet, advances in DNA testing). 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.[34]

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 already been lifted when voters (or their elected representatives) set policy. That is, do the circumstances correspond more closely to Case D, in which the period 1 decisions made by the public occur when voters are still behind the veil, or do the circumstances correspond more closely to Case E, in which those initial decisions occur after the likely winners and losers are identified?

Although actual court rulings are too complex to classify cleanly into those two categories (or as a lottery between them), one can gain substantial insight by applying the basic logic of Cases D and E. To demonstrate this, we will consider examples related to equality in the provision of education (*Serrano v. Priest*), the taking of property (*Kelo v. City of New London*), and same-sex marriage (*In re Marriage Cases*). These court cases are, of course, single battles in long-running legal struggles – the major policy issues at stake involve many court rulings on many laws enacted by voters and/or legislatures. Thus, when we assess whether voters are behind the veil, we must focus our discussion on specific periods of interaction between voters (or their representatives) and the court, and then ask the following: Will an already-identified majority (i.e., no longer behind the veil) make important decisions in view of expected judicial constraints on policies preferred by the majority? If so, the circumstances correspond to a period 1 public that is out from behind the veil

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[34]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 (2010).

(as in Case E).

The three rulings we examine differ in ways that illustrate how controversies over court decisions relate to Cases D and E. We will argue the following. In *Serrano*, it appears that the court sought to enforce a behind-the-veil law (equal protection) and successfully constrained the public on one dimension of education policy – the allocation of funds. Yet on another key dimension of education policy – the level of total spending – decisions depend on an already-identified majority, which considers the criteria employed by the court. Thus, even if it were clear what the optimal "behind-the-veil" policy would be, the court would be constrained away from guaranteeing that outcome. The *Kelo* decision is interesting for a different reason, because the public's response to *Kelo* came from voters who knew little about which individuals might be harmed by weaker judicial constraints on eminent domain. Thus, in the post-*Kelo* era, policy decisions to rein in eminent domain have been made by voters who remain largely behind the veil. With the legal and electoral battles over same-sex marriage still being fought, it is too early to know the eventual policy implications of *In re Marriage Cases* and, hence, too early to say whether the decision will protect or harm a tyrannized minority.

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.[35] In arriving at its decision, the Court emphasized equal protection under the 14th Amendment of the United States Constitution, which it took to be

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

"substantially equivalent" to clauses in the California state constitution.[36] 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 how did that change the substantive outcomes? Our model suggests two possible interpretations, and comparing them helps to explain why the *Serrano* decision has been so controversial.

One possible interpretation of the *Serrano* decision is that the Court enforced a behind-the-veil law (i.e., equal protection) that unequal school spending had violated, and that by doing so it moved policy toward what a behind-the-veil public would have wanted. To see this, suppose that the behind-the-veil allocation of education services – given the "shock" that made the returns to education much larger 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.[37] Stated 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

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[36]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.

[37]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 such a major policy issue. On the reasons for the rise of public funding in the 19th century, see Stoddard (2009).

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, and suppose that the court has evaluated the evidence and correctly determined that moving to a high level of funding for the minority (as well as for the majority) would have benefits exceeding the costs. 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 voters know that anything with unequal funding (such as policy k) will be overturned as a violation of equal protection, the majority may (especially if moving their children to private schools is an attractive option) refrain from approving the first-best budget level – and the net effect may be reduced funding for the minority.

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

rule, the voters chose *not* to pass a "high" budget – thus, 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

public education in California.[38]

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 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.[39] Yet despite these constitutional

limitations, there has always been controversy over the use of eminent domain.[40] The debate (and

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[38]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. On voter initiatives more generally, see Matsusaka (1992, 2005).

[39]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. For an overview of the economics of eminent domain, see Miceli and Segerson (2007).

[40]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

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widespread furor) over the most recent major ruling – *Kelo v. City of New London* – 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.[41] 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.[42] 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

controversies. Fleck and Hanssen (2010) provide an overview of the recurring controversies over, and the changing judicial interpretations of, eminent domain laws. Also see Epstein (1985) and Hermalin (2005).

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

[42]Of course, in the real world, neither the minority nor the majority would be homogeneous in terms of benefits received, but those who stood to lose would be few in number (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).

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.

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.[43]

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 elsewhere would (in the presence of more favorable shocks) be socially beneficial, then it may be undesirable for courts 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*

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[43]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, claim to deliver widespread gains, but regardless of how exaggerated those claims are, an obvious concern would be that most benefits would accrue to small, politically influential groups.

redevelopment plans were undesirable.[44] Nevertheless, he voted with the majority. Thus, Stevens

favored allowing what was – according to his own statements – not 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 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, for the most part, 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.[45] The result was substantial pressure to limit eminent

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[44]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."

[45]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).

domain powers.[46] In terms of our model, the public responded to *Kelo* by curtailing policies that would be beneficial only in the presence of a court that prevents tyrannies of the majority. In other words, the public is acting as if it believes the Court will fail to prevent Case D tyrannies.

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 they will desire to marry partners of the same 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 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 banning same-sex marriage violates equal protection.

It is also important to recognize that, even in the case of gay rights, courts consider new information – they do not base their decisions solely on some abstract notion of equal protection or constitutionality. Analogous to monitoring shocks in our model, courts weigh evidence on the effects of same-sex marriage (e.g., potential benefits to gay couples and their children, effects on

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[46]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 (2010).

local economies). The evidence on benefits and costs even includes empirical work by economists.[47]

Thus, while the principal issue at stake here is neither the allocation of funding (as in *Serrano*) nor the taking of property (as in *Kelo*), the legal battle over same-sex marriage involves weighing costs and benefits (broadly defined). And this makes the topic interesting in the context of our model.[48]

The key question is 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, currently 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.[49] 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 attempted, through Proposition 22, to revoke equal protection for an already identified minority). This would fit Case D.

But that is not the end of the story. In November 2008, California voters passed Proposition 8, a constitutional amendment that bans same-sex marriage. To apply our model, the best way to think about this is as a new round of play (i.e., separate from Proposition 22, because of our model

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[47]See, e.g., Bazelon (2010), Wollan (2010), and *Findings of Fact and Conclusions of Law* in *Perry v. Schwarzenegger* (available from https://ecf.cand.uscourts.gov/cand/09cv2292/).

[48]Only in the past few decades has same-sex marriage become a prominent political issue. One could view the increased salience of same-sex marriage as being produced (in part) by a "shock" resulting from an increase in the number of same-sex couples desiring to be married. That is, 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 sufficiently to generate a legal battle.

[49]*In re Marriage Cases* (2008) 43 C4th 757.

has only a single round of play). Consider two key points about the way this fits our model. First, when voters set constitutional rules to be enforced by the court, that corresponds to a period 1 move by the public. Second, the veil had already been lifted when the Proposition 8 vote occurred. Thus, if Proposition 8 stands, an already-identified majority will have determined that equal protection (arguably desired behind the veil) does not apply to an already-identified minority. Under such circumstances, a court that can be foreseen to rule on the basis of a first-best criterion may not help, and may even harm, the tyrannized minority (Case E). This depends on whether the expectation of a court using the first-best criterion (pro same-sex marriage in our illustration) causes the tyrannizing majority's period 1 policy decision to be worse for the minority than it would otherwise be.

Whether *Marriage Cases* will improve or worsen legal protections for gay and lesbian couples cannot yet be determined.[50] The key point is that, while the judicial decision was in an obvious way supportive of same-sex marriage, judicial support for same-sex marriage leads voters to seek laws (such as Proposition 8) that may delay same-sex marriage's legal passage. In the context of the model's Case E, one can view the passage of Proposition 8 as period 1 voters choosing *not* to pass a strong equal protection clause. If voters had expected courts to rule in the interest of the majority, they might have supported a less tyrannous policy.

Note that our inability to forecast the eventual effect of *Marriage Cases* on gay rights points to the importance of the Case D versus Case E lottery we modeled in Section II. If, even after observing several court rulings, we cannot say what will happen, it is clear that no one could have

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[50]Proposition 8 was upheld by the California Supreme Court, but subsequently ruled unconstitutional in *Perry v. Schwarzenegger* in federal district court. Then motion for a stay pending appeal was granted by the Ninth Circuit Court (http://www.ca9.uscourts.gov/datastore/general/2010/08/16/order_motion_stay.pdf). Many gay rights supporters have favored efforts to challenge Proposition 8 in federal court, but some, fearing the efforts will backfire, have not; see, e.g., McKinley (2009) and Bazelon (2010).

known in advance (e.g., when writing a minority protections into federal and state constitutions) what the court's optimal decision criterion would be. Moreover, in the real world, as in the case of the lottery we modeled, even a superbly designed judicial system will employ criteria that are, when viewed with hindsight, imperfect.

To understand the value of our model, it is useful to recognize that our argument involves more than the obvious point that voters can sometimes undo what courts do. Note, for example, that we could easily modify our model's Case D to include a possible (but not certain) opportunity for the public to decide – subsequent to the court ruling – whether to undo the court's decision. In this case, there would be no harm from a ruling in the style of *Marriage Cases*. Such a ruling would (i) help the minority if it turned out that the public lacked the opportunity to undo the court's decision and (ii) not affect the minority if the public reversed the court ruling. Thus, it is not the public being able to act subsequent to the court ruling that causes judicial efforts to protect tyrannized minorities to backfire. What causes those efforts to backfire is the majority choosing not to pass (or not to retain) a policy that they would, in the presence of a majority-serving court, choose to pass and retain. Underscoring this point is the fact that voters and/or legislatures in most states have passed prohibitions on same-sex marriage, and many of these do not undo state courts, but rather constrain courts that voters expect may not otherwise do what the majority wants.[51]

IV. Conclusion

Do courts that set out to protect tyrannized minorities actually make those minorities better off? In this paper, we show that the answer is less straightforward than one might think. Even under

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[51]Vestal (2009) presents a timeline and state-level data, which indicate thirty states having constitutional amendments, and nine additional states having statutes, banning same-sex marriage.

the relatively ideal conditions we assume in our model – 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 may be socially undesirable for courts to overturn tyrannizing decisions (i.e., polices that cost a minority more than the majority benefits). A critical concern for identifying whether a court can successfully protect minorities is when a veil of ignorance is lifted: In essence, when do voters learn whether they will be in a potentially tyrannizing majority or a potentially tyrannized minority?

To illustrate this point, we examined three controversial rulings: *Serrano v. Priest*, *Kelo v. City of New London*, and *In re Marriage Cases*. Based on the application of our model, we offer the following three conjectures. First, the *Serrano* decision appears to have been an attempt to block a tyranny of the majority, yet it may have harmed the minority group it sought to protect. The basic problem was that the court could not use the behind-the-veil rule (equal protection) in a manner that imposed the total budget level that (arguably) would have been chosen behind the veil. Instead, a majority that is already outside the veil continues to set the total budget. Second, in the *Kelo* case, the court chose not to protect a minority, even though voters – who are still behind the veil – see the case as a judicially preventable tyranny. Third, it is too early to discern whether *Marriage Cases* will decrease or increase the harm done by tyrannies of the majority. If the events play out so that a strong behind-the-veil equal protection rule is applied (that is, if the *Marriage Cases* decision stands and Proposition 8 is struck down), the California courts will have successfully protected same-sex couples from majority-supported policies. Yet if Proposition 8 – which was passed after the veil had been lifted – withstands all its challenges, California will have a weaker equal protection clause than it did before courts entered the gay marriage debate.

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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	