Article

Majoritarian Judicial Review: The Case of Taiwan

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ABSTRACT

Conventional wisdom has it that judicial review is counter-majoritarian in the sense that it nullifies laws passed by the majority. Yet despite the principal-agent issue of whether legislators faithfully fulfill their obligations, this is still a simplistic depiction and does not take into account when and where the majority is formed. It simply assumes that public opinion does not change once the laws are passed, and judicial review around the globe functions in the same way. This article tries to demonstrate that the Constitutional Court in Taiwan is indeed a majoritarian court from three perspectives: docket records, agenda-setting, and case studies. This article argues that, owing to its institutional crisis, the Court sides with the majority most of the time in the sense that it rarely resists the contemporary congressional majority. Consequently, judicial supremacy does exist in Taiwan, but simply because it is in accordance with the majority. By contrast, judicial self-restraint, championed in many other countries as a virtue, is indeed counter-majoritarian. This characteristic directly affects the likelihood of whether the Court can bring about political and social change in the future.

Keywords: *Judicial Review, Counter-majoritarian Difficulty, Democratic Transition, Constitutional Court, Judicial Yuan Interpretation*

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I. FOREWORD

Since the end of World War II, the world has seen several waves of constitution-making.[1] The violations of human rights during the World War II caused new democracies around the globe to establish several forms of judicial review, strong[2] or weak,[3] in the hope of entrenching human rights enshrined in newly enacted constitutions.[4] Most nascent constitutions vest the judiciary with the power of judicial review to veto the collective decisions made through ordinary democratic processes.[5] In addition, owing to the abstractness and vagueness of constitutional texts, this tremendous power in practice allows Justices to take part in policy-making, an area previously monopolized by politicians.[6] Furthermore, congressmen may intentionally invite politically insulated Justices to solve thorny issues with which they either cannot or will not grapple – a situation that is called the judicialization of politics. The pace of judicialization of politics[7] has accelerated to the extent that, some scholars contend, modern democracy has transformed into a new political order – juristocracy.[8]

Not surprisingly, the propriety of judicial intervention in politics, sometimes known as judicial activism, is hotly debated.[9] Together with the judicialization of politics, this has caused many thorny conflicts embedded in judicial review to emerge.[10] Among them, the fundamental dilemma of judicial review[11] is that, on the one hand, the branch with neither purse nor

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1. *See* Jon Elster, *Forces and Mechanisms in the Constitution-Making Process*, 45 DUKE L.J. 364, 369 (1995).

2. *See* Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346, 1354-55 (2006). It is noteworthy that the judicial review in this paper refers to strong judicial review.

3. *See* Mark Tushnet, *The Rise of Weak-form Judicial Review*, *in* COMPARATIVE CONSTITUTIONAL LAW 321, 323-27 (Tom Ginsburg & Rosalind Dixon eds., 2011).

4. MARTIN SHAPIRO & ALEC STONE SWEET, ON LAW, POLITICS, AND JUDICIALIZATION 136 (2002).

5. Tom Ginsburg, *The Global Spread of Constitutional Review*, *in* THE OXFORD HANDBOOK OF LAW AND POLITICS 81, 90 (Keith E. Whittington et al. eds., 2008).

6. *See* SHAPIRO & STONE SWEET, *supra* note 4, at 142-45, 177; but *see* BRIAN Z. TAMANAHA, BEYOND THE FORMALIST-REALIST DIVIDE: THE ROLE OF POLITICS IN JUDGING 111-31 (2010).

7. For more discussion about law and politics, *see, e.g.*, John Ferejohn, *Judicializing Politics, Politicizing Law*, 65 L. & CONTEMP. PROBS. 41 (2002); Ran Hirschl, *The Judicialization of Politics*, *in* THE OXFORD HANDBOOK OF LAW AND POLITICS, *supra* note 5, at 119-24, 129-38; C. Neal Tate, *Why the Expansion of Judicial Power*, *in* THE GLOBAL EXPANSION OF JUDICIAL POWER 27 (C. Neal Tate & Torbjörn Vallinder eds., 1995).

8. RAN HIRSCHL, TOWARDS JURISTOCRACY 222-23 (2004).

9. *See, e.g.*, STEFANIE A. LINDQUIST & FRANK B. CROSS, MEASURING JUDICIAL ACTIVISM 1-46 (2009).

10. *See* Ran Hirschl, *The Judicialization of Mega-Politics and the Rise of Political Courts*, 11 ANN. REV. POLIT. SCI. 93, 98-108 (2008).

11. Barry Friedman, *The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy*, 73 N.Y.U. L. REV. 333, 334-46 (1998); Mihui Pak, *The Counter-Majoritarian Difficulty in Focus: Judicial Review of Initiatives*, 32 COLUM. J.L. & SOC. PROBS. 237, 240-48 (1998-1999); Barry Friedman, *The Counter-Majoritarian Problem and the Pathology of*

sword[12] must be empowered to check and balance, and protect the discrete and insular minorities from the potential tyranny of the majority. On the other hand, many people begin to wonder whether judicial review is repugnant to democratic accountability since unelected Justices now have the final say over many cardinal policies in the name of constitutional interpretation. Students of judicial review have debated harshly, trying to solve this dilemma by proposing a variety of theories concerning judicial review and judicial interpretation. Given the undemocratic stigma,[13] proponents argue, judicial review is still desirable so long as it is only exercised in certain ways.[14] In contrast, opponents maintain the counter-majoritarian difficulty of judicial review renders it fundamentally contradictory to democratic values.[15] Instead, they advocate for "popular constitutionalism,"[16] or "democratic constitutionalism."[17]

Nevertheless, most theories of judicial review seem to be grounded on the shaky assumption that counter-majoritarian difficulty does exist[18] – that is, Justices are independent of popular will when exercising the power of judicial review to strike down laws. However, whether, or to what extent, the counter-majoritarian difficulty exists has never been proved beyond doubt.[19] Moreover, this assumption begs the question: What counts as the majority?[20] Is there a single majority? From the perspective of political science, there is an array of reasons that the judiciary is supposed to be majoritarian, rather than counter-majoritarian. For example, the judiciary often relies on

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Constitutional Scholarship, 95 NW. U. L. REV. 933, 935-42 (2001).

12. THE FEDERALIST No. 78 (Alexander Hamilton).

13. ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH 16-23 (1962).

14. *See, e.g.*, JOHN HART ELY, DEMOCRACY AND DISTRUST 73-179 (1980); 1 BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 230-94 (1991); DAVID A. STRAUSS, THE LIVING CONSTITUTION 33-46 (2010); CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT 10-19 (1999); RONALD DWORKIN, FREEDOM'S LAW 1-38 (1996); RONALD DWORKIN, LAW'S EMPIRE 375 (1986); but *see* Cass R. Sunstein, *Beyond Judicial Minimalism*, 43 TULSA L. REV. 825, 836-42 (2008).

15. *See* Waldron, *supra* note 2, at 1359-69; MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS 159 (1999); KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION 34-35 (1999).

16. *See* Larry D. Kramer, *The Supreme Court 2000 Term – Foreword: We the Court*, 115 HARV. L. REV. 5, 16-74 (2001-2002); LARRY D. KRAMER, THE PEOPLE THEMSELVES (2004); but *see* RICHARD H. FALLON, JR., IMPLEMENTING THE CONSTITUTION 127-32 (2001); JEREMY WALDRON, LAW AND DISAGREEMENT 285-302 (1999).

17. *See* Robert Post & Reva Siegel, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373 (2007).

18. For detailed discussions about the relationship between the counter-majoritarian difficulty and these theories, *see* THE JUDICIARY AND AMERICAN DEMOCRACY: ALEXANDER BICKEL, THE COUNTERMAJORITARIAN DIFFICULTY, AND CONTEMPORARY CONSTITUTIONAL THEORY (Kenneth D. Ward & Cecilia R. Castillo eds., 2005).

19. *See* Nathaniel Persily, *Introduction*, *in* PUBLIC OPINION AND CONSTITUTIONAL CONTROVERSY 3, 4-7 (Nathaniel Persily et al. eds., 2008).

20. *See* Barry Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five*, 112 YALE L.J. 153, 173-76 (2002).

coordinate branches to implement its decisions; Justices are nominated and confirmed by elected agents that embody mainstream values; and the legislature is armed with a variety of constitutional means, such as impeachment and budgetary cuts, to check the wayward judiciary.[21] In other words, it is plausible to argue that judicial review is indeed majoritarian.[22]

Moreover, even if the judiciary is not constrained by these check and balance mechanisms, judicial activism and judicial review are not necessarily counter-majoritarian.[23] This is because not all decisions that strike laws down on constitutional grounds are inconsistent with public opinion.[24] To label a decision as antidemocratic, one must prove beforehand that the law failing to survive the gauntlet of judicial review really represents the majority will. In reality, the judiciary can be much more democratic than many legal scholars would like to admit, in the sense that its decisions are, more often than not, in harmony with public opinion. Many legal scholars, as well as political scientists, have argued that even the most powerful and influential court in the world, the U.S. Supreme Court, seldom defies popular will consistently and continuously for long periods of time.[25] This is true even when judicial activism was allegedly most rampant in American history.[26]

Yet whether judicial review in nascent democracies functions in the same way it does in old democracies has so far not been lucidly articulated. Most new democracies were previously authoritarian regimes, which could lead to two paradigms of judicial review. They could be more counter-majoritarian since they are established in the hope of protecting discrete and insular minorities. This function is particularly crucial in new democracies where democratic institutions are not fully mature, and the tyranny of majority is therefore more likely to occur. Contrarily, it could also be more deferential to the majority since the judiciary has not established its authority and supremacy,[27] and thus has more incentives to rule in favor of

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21. BARRY FRIEDMAN, THE WILL OF THE PEOPLE 374-76 (2008); TERRI JENNINGS PERETTI, IN DEFENSE OF A POLITICAL COURT 137-47 (1999).

22. Michael J. Klarman, *Majoritarian Judicial Review: The Entrenchment Problem*, 85 GEO. L.J. 491 (1996-1997).

23. Mark A. Graber, *Constructing Judicial Review*, 8 ANN. REV. POL. SCI. 425, 427-28 (2005).

24. DAVID G. BARNUM, THE SUPREME COURT AND AMERICAN DEMOCRACY 278-80 (1993).

25. *See, e.g.*, ROBERT G. MCCLOSKEY, THE AMERICAN SUPREME COURT 14, 260-61 (2010); THOMAS R. MARSHALL, PUBLIC OPINION AND THE REHNQUIST COURT 153-62 (2008); David S. Law, *A Theory of Judicial Power and Judicial Review*, 97 GEO. L.J. 723, 728-30 (2009); Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279, 283-86, 291-94 (1957); JACK M. BALKIN, THE LIVING ORIGINALISM 287-93 (2011); JEFFREY ROSEN, THE MOST DEMOCRATIC BRANCH 185 (2006); Daryl J. Levinson, *Parchment and Politics: The Positive Puzzle of Constitutional Commitment*, 124 HARV. L. REV. 657, 733-45 (2011); PERETTI, *supra* note 21, at 180-83.

26. AKHIL REED AMAR, AMERICA'S UNWRITTEN CONSTITUTION 191, 197-98 (2012).

27. *See* Lee Epstein & Thomas G. Walker, *The Role of the Supreme Court in American Society:*

the majority.[28] With these two possibilities, it remains largely unanswered how judicial review in new democracies will behave.

Based on the development of the Constitutional Court in Taiwan (hereinafter "the Court"[29]), this article endeavors to fill in this academic lacuna. It suggests that the practice of judicial review in Taiwan is majoritarian in the sense that it does not rule against popular majority opinion most of the time. After the Republic of China lost the Chinese civil war, Taiwan became an authoritarian regime. Until democratization began in1987, Justices of the Court remained obedient to the strongmen most of the time. Owing to the crisis of legitimacy after democratization, the Court evolved to function progressively and democratically, nullifying a constellation of laws that violated human rights during the authoritarian period.[30] In other words, most of the laws declared unconstitutional were extremely unpopular. Hence, this article argues that judicial review in Taiwan is indispensible precisely because the Court has exercised the power of judicial review in a majoritarian way. Sometimes, the Court may be even more democratically responsive than a legislative branch paralyzed by factional conflicts or sectarian interests.

In a nutshell, two theses of this article are: first, judicial review in Taiwan is majoritarian, rather than counter-majoritarian; second, the majoritarian propensity of judicial review in Taiwan originates from the judiciary's legitimacy crisis after democratization, which makes it more susceptible to public opinion. It is noteworthy that public opinion may affect judicial review both directly and indirectly.[31] Justices, however insulated institutionally from outside pressure, are still part of society.[32] Any event may influence the Justices' personal attitudes and public opinion simultaneously, which means the causal relationship, if any, between public opinion and decisions could be confounding and spurious.[33] Therefore, this

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Playing the Reconstruction Game, *in* CONTEMPLATING COURTS 315, 316-39 (Lee Epstein ed., 1995).

28. *See* Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787, 1813-42 (2005).

29. In Taiwan, there are also a Supreme Court and a Supreme Administrative Court, which are the last resort of all civil, criminal, and administrative controversies. In order not to confuse with these courts, "the Court" in this article always refers to the Constitutional Court.

30. TOM GINSBURG, JUDICIAL REVIEW IN NEW DEMOCRACIES: CONSTITUTIONAL COURTS IN ASIAN CASES 145-47, 253-54 (2003).

31. William Mishler & Reginald S. Sheehan, *Public Opinion, the Attitudinal Model, and Supreme Court Decision Making: A Micro-Analytic Perspective*, 58 J. POL. 169, 196-98 (1996); Micheal W. Gile et al., *The Supreme Court in American Democracy: Unraveling the Linkages between Public Opinion and Judicial Decision Making*, 70 J. POL. 293, 303-04 (2008).

32. *See* Lee Epstein et al., *The Supreme Court During Crisis: How War Affects Only Non-War Cases*, 80 N.Y.U. L. REV. 1, 30 (2005).

33. *See* JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED 425-29 (2002); but *see* Christopher J. Casillas et al., *How Public Opinion Constrains the U.S. Supreme Court*, 55 AM. J. POL. SCI. 74, 74, 79-86 (2011).

article does not argue that Justices in Taiwan render decisions based on any public opinion poll. Rather, it argues that the decisions they deliver are usually consistent with the majority, and tries to explain why this occurs.

The rest of this paper proceeds as follows. Part II examines three pieces of evidence that support the first thesis of this article. To begin with, the docket record of the Court demonstrates that it seldom rules against the current majority. Empirical evidence shows that most laws declared unconstitutional were enacted by a congressional majority no longer in power at the time of the case. Secondly, the paper analyzes two critical cases in which laws with quasi-constitutional status were declared unconstitutional. At first blush, nothing could be more counter-majoritarian than nullifying constitutional amendments. Nevertheless, the two decisions, as well as the Court itself, were extremely popular at that time. Finally, when public opinion is unclear or divided, the Court simply refused to hear related cases in order to avoid being embroiled in contentious issues. The issues of death penalty and gay marriage exemplify this strategic agenda-setting. Part III begins with the question: Why would judicial review in Taiwan be majoritarian if Justices are not elected democratically? Institutional, political, and historical factors account for this counter intuitive argument. Part IV discusses the relationship between the majoritarian Court and its ability to bring about political and social change. It also analyzes the likelihood of a majoritarian court to change society. Part V is the conclusion.

II. MAJORITARIAN JUDICIAL REVIEW IN TAIWAN

Before examining the extent to which judicial review in Taiwan is majoritarian, it is helpful to briefly introduce the system of judicial review in Taiwan. The power of judicial review is plainly stipulated in Article 78 and 173 of the Constitution of the Republic of China (hereinafter "the Constitution").[34] The Court, also known as the Council of Grand Justices, exclusively exercises this power.[35] Decisions delivered by the Court are called Judicial Yuan Interpretations, which are supreme and binding in Taiwan. Taiwan adopts so-called "abstract judicial review,"[36] which means the Court examines only the constitutionality of the law itself, rather than its application in concrete cases.[37] The procedural requirements to petition the

34. CHUNGHUAMINKUO HSIENFA [CONSTITUTION OF THE REPUBLIC OF CHINA] (1947) (Taiwan).

35. Wen-Chen Chang, *The Role of Judicial Review in Consolidating Democracies*, 2 ASIA L. REV. 73, 74 (2005).

36. *See id.* at 81-82; Nuno Garoupa & Tom Ginsburg, *Building Reputation in Constitutional Courts: Political and Judicial Audiences*, 28 ARIZ. J. INT'L & COMP. L. 539, 548-50, 560-61 (2011). It is noteworthy that in separation-of-powers cases, the issues can be concrete.

37. There are, however, some exceptions in which the Constitutional Court denounced a law

Court is partly prescribed in the Constitutional Interpretation Procedure Act.[38] People can petition the Court after exhausting all remedial possibilities available. After Interpretation No. 371,[39] judges of lower courts also have the power to petition the Court when they believe the laws in question are constitutionally problematic. This provides ordinary citizens an additional method to petition the Court, so long as they can convince the presiding judges in their case.[40] The Court has struck down the challenged laws in approximately one-third of the cases heard since democratization in 1987.

Nonetheless, this does not mean that the Court rules against the current majority in one-third of its decisions. From the perspective of political science, the judiciary will not, and actually cannot, be an institution that insulates itself from majority opinion if Justices want to implement their decisions. The necessity of public support for the judiciary is twofold. First, the judiciary, like its coordinate branches, is part of a larger government that derives its legitimacy from public support.[41] Secondly, the judiciary also needs public support to check and balance the other two branches. It is in this sense that the judiciary needs its own broadly defined constituency.[42] Given that fact, whether the Court is counter-majoritarian is worth discussing. The following paragraphs demonstrate how the Court has wielded the power of judicial review democratically from three angles: docket records, case studies, and agenda-setting.

A. *Docket Records*

In practice, when the judiciary strikes a law down, it does not necessarily follow that the judiciary is at odds with current majority opinion, that is, counter-majoritarian, unless the law still reflects the contemporary *and* national majority opinion.[43] This is because there surely will be a time lag between the enactment of laws and the promulgation of decisions. The longer the time lag, the more tenuous the relationship between the law and popular will can become. The landmark privacy case *Griswold v. Connecticut*,[44] for instance, is one telling example, in which the law stricken

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unconstitutional as applied in concrete cases, such as J. Y. Interpretation No. 242 (1989).

38. Ssufayüen Tafakuan Shênli Anchien Fa [Constitutional Interpretation Procedure Act] (1948) (Taiwan) [hereinafter Constitutional Interpretation Procedure Act].

39. J. Y. Interpretation No. 371 (1995).

40. For an overview about the power and function of the Constitutional Court, *see* Chang, *supra* note 35.

41. Kevin T. McGuire & James A. Stimson, *The Least Dangerous Branch Revisited: New Evidence on Supreme Court Responsiveness to Public Preferences*, 66 J. POL. 1018, 1021 (2004).

42. MCCLOSKEY, *supra* note 25, at 46-50.

43. BALKIN, *supra* note 25, at 302.

44. Griswold v. Connecticut, 381 U.S. 479 (1965).

down had no longer represented the majority opinion in Connecticut when the decision was delivered.[45] Nor did it represent the consensus of national majority. In other words, it would require more elaboration before labeling these kinds of decisions as anti-democratic. With this caveat in mind, the following paragraphs empirically examine whether, and to what extent, the alleged counter-majoritarian difficulty overshadows the Court.

Since Taiwan's democratization, the Court has issued about 500 decisions, in which more than 150 statutes and administrative regulations have been ruled repugnant to the Constitution and void.[46] However, the temporal interval between the enactment and nullification of a law varies significantly. Some laws were annulled almost immediately after they were promulgated. It is plausible to argue that the Court ruled against the majority in such scenario. By contrast, at the opposite end of the spectrum, there was an extreme case in which the constitutionally problematic statute remained in the book for three-quarters of a century before being declared unconstitutional. In the latter case, it would be more difficult to argue that the statute at issue still represented public opinion.

Table I compiles the data with respect to the temporal interval between the promulgation (enacted by the Congress) and nullification (declared by the Court) of contested statutes. It is noteworthy that legislators in Taiwan served a renewable three-year term until 2008. Consequently, the assumption here is that the Court rules inconsistent with public opinion when the interval is less than three years.[47] The longer the span is, the less likely it is that the Court is counter-majoritarian. In other words, the proxy of public opinion here is the congressional majority.

Table 1 Temporal Interval between Enactment and Nullification (statutes)

Interval	less than 3 (3-)	3–6-	6–9-	9–12-	12–15-	15–18-	18–21-	more than 21	Total
Number of statutes	16	10	11	8	3	3	7	20	78
	20.5%	12.8%	14.1%	10.3%	3.8%	3.8%	9.0%	25.6%	99.9%
Fifth Term*	1	0	1	1	0	0	1	6	10
	10%	0%	10%	10%	0%	0%	10%	60%	100%

45. *See* RICHARD POSNER, HOW JUDGES THINK 288 (2008).

46. Some precedents issued by the Supreme Court and the Supreme Administrative Court were also declared unconstitutional among these decisions. However, since judges of these courts are not elected through regular elections, cases in which precedents were overruled by the Constitutional Court are excluded from the following two tables.

47. It should be noted that starting from 2008, the term is extended from 3 years to 4 years. Nevertheless, this change does not affect the conclusion of this paper since all statutes declared unconstitutional after 2008 were enacted either in less than 3 years or more than 4 years.

Interval	less than 3 (3-)	3–6-	6–9-	9–12-	12–15-	15–18-	18–21-	more than 21	Total
Sixth Term	7 28%	3 12%	3 12%	2 8%	2 8%	0 0%	2 8%	6 24%	25 100%
After 2003	8 18.6%	7 16.3%	7 16.3%	5 11.6%	1 2.3%	3 7.0%	4 9.3%	8 18.6%	43 100%

Source: Author

∗Decisions rendered before democratization are excluded; for further explanation of the term of Justices, *see* http://www.judicial.gov.tw/constitutionalcourt/en/p01_04.asp.

There are a total of 78 statutes that have been expressly declared unconstitutional by the Court in the 74 decisions made since democratization. In these cases, the average interval between a statute being enacted and being annulled is approximately 16 years. Table I shows that in only about one-fifth of the cases did the Court declare a law enacted less than three years unconstitutional. This fraction (20.5%) is a proxy, albeit imperfect, that suggests how infrequently the Court rules against the majority. By contrast, in 79.5 percent of the cases, it is plausible to argue that the Court does not rule against the current majority based on the amount of time passed between enacting and annulling the statute. In addition, the cases in which statutes stricken down are enacted over twenty years ago occupy more than one-fourth of the docket. In these circumstances, it is highly questionable whether the exercise of judicial review could be branded as counter-majoritarian. Furthermore, this majoritarian propensity seems to be commonplace even among Justices of different terms. Neither the fifth-term nor the sixth-term Justices seem to rule against the majority frequently; Justices nominated after 2003 are no exception. Even Justices of the sixth term, widely regarded as most active, ruled against the majority in less than one-third of the cases. In other words, the Court in general is deferential to the majority in power.

By the same token, Table II shows the temporal interval between the enactment and nullification of administrative regulations that were successfully challenged in the Court. It is noteworthy that, unlike legislators, the president serves a four-year term in Taiwan, and may be reelected once. Therefore, the Court ruling is most likely inconsistent with public opinion when the interval is less than four years in the context of administrative regulations. Similarly, the longer the interval, the less likely it is that the Court should be accused of being counter-majoritarian.

Table 2 Temporal Interval between Enactment and Nullification (regulations)

Interval	less than 4 (4-)	4–8-	8–12-	12–16-	16–20-	more than 20	Total
Number of Regulations	8 9%	23 26%	20 23%	9 10%	15 17%	13 15%	88 100%
Fifth Term*	3 17.6%	7 41.2%	4 23.5%	0 0%	2 11.8%	1 5.9%	17 100%
Sixth Term	5 13.9%	10 27.8%	6 16.7%	5 13.9%	5 13.9%	5 13.9%	36 100.1%
After 2003	0 0%	6 17.1%	10 28.6%	4 11.4%	8 22.9%	7 20%	35 100%

Source: Author

*Decisions rendered before democratization are excluded.

There are 88 administrative regulations which fail to survive judicial review in 73 decisions. The average interval between an administrative regulation being passed and stricken down is about 12 years. Among them, nine percent were declared unconstitutional in four years while about 15 percent were declared unconstitutional after more than 20 years. From these findings, the Court disagreed with the ruling party in merely nine percent of the decisions, a number that is even lower than that in the legislative context. Again, the Justices rule in favor of the majority most of the time no matter when they are nominated. From Table I and II, it seems fair to argue that the Court consistently stands in line with both the congress and the executive most of the time, although there is minor variance.

Another intriguing question is whether Justices are counter-majoritarian in certain areas, but not in others. For example, the Supreme Court of the United States, scholars argue, is most likely to ignore public opinion in cases regarding the First Amendment because of its "special constituency."[48] In the Taiwanese context, however, there seems to be no such situation. Tables III and IV show the interval in three areas in which the Court renders most cases after democratization. All three areas are related to fundamental rights. Generally speaking, the Court is consonant with majority opinion in all three categories. Ironically, however, the Court is more majoritarian in the field of fundamental rights, an area that the judiciary is supposed to protect the discrete and insular minorities from majoritarian tyranny.[49]

48. FRIEDMAN, *supra* note 21, at 378.

49. *See* Mark A. Graber, *The Countermajoritarian Difficulty: From Courts to Congress to Constitutional Order*, 4 ANN. REV. L. SOC. SCI. 361, 364 (2008).

Table 3 Interval between Enactment and Nullification of Selected Statutes

Interval of years	less than 3 (3-)	3–6-	6–9-	9–12-	12–15-	15–18-	18–21-	more than 21	Total
Equal Protection	3(#) 18.8%	1 6.3%	2 12.5%	2 12.5%	1 6.3%	0 0%	3 18.8%	4 25%	16 100.2%
Property	1 6.7%	1 6.7%	2 13.3%	2 13.3%	0 0%	1 6.7%	2 13.3%	6 40.%	15 100%
Right to Petition	1 7.7%	0 0%	2 15.4%	3 23.1%	0 0%	1 7.7%	3 23.1%	3 23.1%	13 100.1%

Source: Author

Table 4 Interval between Enactment and Nullification of Selected Regulations

Interval of years	less than 4 (4-)	4–8-	8–12-	12–16-	16–20-	more than 20	Total
Equal Protection	0 0%	0 0%	0 0%	0 0%	3 50%	3 50%	6 100%
Property	1 2.3%	12 27.3%	10 22.7%	8 18.2%	9 20.5%	4 9.1%	44 100.1%
Right to Petition	1 33.3%	0 0%	1 33.3%	0 0%	0 0%	1 33.3%	3 99.9%

Note: There are few cases with respect to right to petition since many disputes in this area relate to the constitutionality of precedents issued by the Supreme Court. All these cases are excluded because judicial precedents are not issued by elected branches.

The validity of this evidence undoubtedly hinges upon how precisely the proxy (congressional majority) reflects the public's majority opinion. Conceivably, there are at least three inquiries that may challenge the validity of this evidence. To begin with, the "majority" in the context of counter-majoritarian difficulty refers to the majority among citizens, not the congressional majority. Although citizens directly elect the congressmen, the congressional majority is not necessarily representative of public opinion due to principal-agent issues, gerrymandering concerns, and other problems that may result from the failure of the political process.[50] It is therefore too risky to equate congressional majority with majority opinion.[51]

Secondly, some may further doubt whether the temporal interval is an appropriate indicator because there surely is a lag between the enactment of a law and the occurrence of a dispute. In addition, when disputes occur,

50. *See, e.g.*, Kenneth A. Shepsle, *Congress is a "They," Not an "It": Legislative Intent as Oxymoron*, 12 INT'L REV. L. & ECO. 239, 246-48 (1992).

51. For more discussion about the baseline, *see* Richard H. Pildes, *Is the Supreme Court a "Majoritarian" Institution?*, 2010 SUP. CT. REV. 103, 117-20 (2010).

citizens are usually required to exhaust all available remedies before they bring their cases to the Court, and the procedures in lower courts can be time-consuming.[52] Thus, even if the congressional majority is a good proxy for majority opinion, the three-year or four-year intervals in the statutory and regulatory contexts are both imprecise, if not arbitrary, indicators of how long majority opinion persists. From this perspective, the fundamental challenge is that it is possible that majority opinion with respect to certain issues, such as suicide or adultery, does not change for long periods of time. In these circumstances, a law enacted decades ago could still be representative of public opinion. It is impossible to know for sure whether a decision should be labeled as majoritarian or counter-majoritarian unless there are polls that investigate citizens' attitudes toward these laws.

Thirdly, even if a decision is indeed counter-majoritarian, however defined, the congress may choose not to punish an anti-democratic court since there will be some political risks or costs.[53] In other words, the judiciary can still be counter-majoritarian so long as it stays in the "zone of acquiescence"[54] or "zone of reasonableness."[55] Within this zone, it is hard to tell whether a decision is majoritarian or counter-majoritarian since the congress will remain silent in both cases.

Admittedly, these critiques are correct insofar as the proxy is not perfect and does not take into account the inevitable time lag. Nevertheless, it is still a workable proxy for the following reasons. First of all, it is true that the congressional majority sometimes does not represent public opinion, and the principal-agent concern could be more serious in new democracies. However, public opinion itself is a precarious measurement,[56] and there is simply no poll regarding the attitudes of citizens toward each constitutional decision in Taiwan. The preferences of the congressional majority are more observable, and the congressional records are relatively more reliable. In fact, scholars have contended that "While it may never be possible rigorously and definitively to resolve the question of whether a legislature *really* represents a 'majority,' . . . such evidence as we have suggests that Congress is not markedly out of line with its constituents (emphasis in original)."[57] Besides, the public does not have direct ways of controlling the Court. It can only express its disappointments and disagreements with the

52. *See* Jonathan D. Casper, *The Supreme Court and National Policy Making*, 70 AM. POL. SCI. REV. 50, 56 (1976).

53. Keith E. Whittington, *Legislative Sanctions and the Strategic Environment of Judicial Review*, 1 INT'L J. CONST. L. 446, 459-61 (2003).

54. *See* Or Bassok & Yoav Dotan, *Solving the Countermajoritarian Difficulty?* 11 INT'L J. CONST. L. 13, 20 (2012).

55. POSNER, *supra* note 45, at 86-87.

56. THOMAS R. MARSHALL, PUBLIC OPINION AND THE SUPREME COURT 48-51 (1989).

57. Richard Funston, *The Supreme Court and Critical Elections*, 69 AM. POL. SCI. REV. 795, 796 n.7, 9 (1975).

judiciary through elected representatives. Despite some bribery scandals, the political channel is usually clear in Taiwan, and the gerrymandering issue has not really existed since democratization.[58] Generally speaking, the elections in Taiwan have been open and fair in the past two decades, and people are enthusiastic about voting (about 70% of eligible people vote in each election), which makes the proxy more trustworthy and representative. Therefore, this paper suggests that the proxy is valid, albeit imperfect.

With respect to the timing issue, some evidence can alleviate the worries. To begin with, the exhaustion clause is not the only way for lay people to petition the Court. As already mentioned, judges in lower courts can petition the Court directly, which shortens the time lag to some extent, if they are convinced that the laws applied in their cases are unconstitutional. Moreover, the congressional minorities are entitled to petition the Court even before any concrete case occurs,[59] since judicial review in Taiwan is abstract. The constitutionality of a statute can be challenged immediately after its promulgation. Historically, legislators have occasionally challenged the constitutionality of controversial statutes through this approach. Consequentially, the time lag will be shorter than originally thought. In addition, no matter what causes the time gap, there is no denying that the Court is not acting against the current majority when they strike down laws enacted by former legislators. From this perspective, the lag may be understood as a way the Court intentionally tries to avoid head-on conflict with current majority.

Furthermore, empirical statistics demonstrate that most cases remain in lower courts for less than 3 years (or 4 years in the context of regulations) before they are brought to the Court. Specifically, people usually spend 2.9 years in lower courts before they challenge the statutes in the Court.[60] When the laws at issue are administrative regulations, people usually spend 3.34 years. Firstly, it is noteworthy that the two figures (2.9 and 3.3) are smaller than the term of legislators and presidents. This implies that constitutionally problematic laws will often be challenged in the Court before the current majority changes, which further strengthens the validity of the proxy. Besides, even if we take this time lag into account and loosen the definition of counter-majoritarian cases, Table I and II show that the Court rules against the majority respectively in 33.3 (20.5 plus 12.8) and 35 (9 plus 26) percent

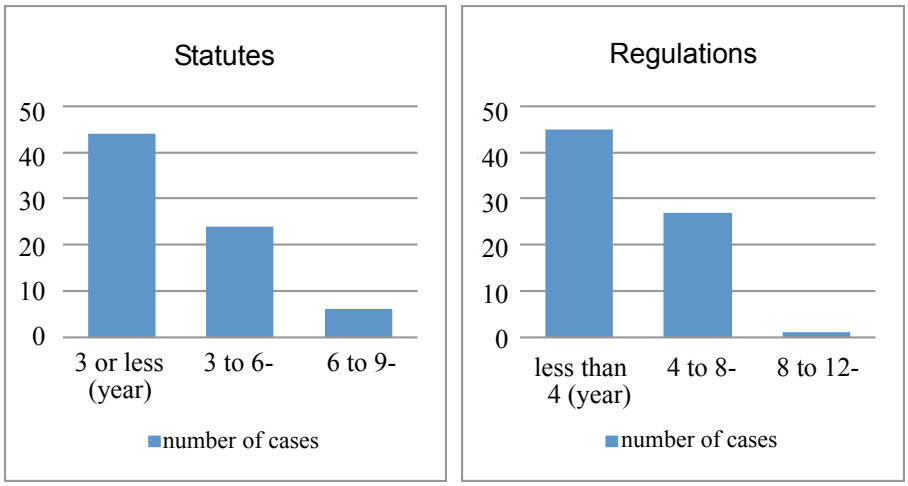
58. Some constitutional designs, such as seats for nationwide constituency and citizens residing abroad, and the electoral system may also affect the credibility of this proxy to some extent. The author is thankful to one anonymous reviewer for pointing this out. Due to the limit of time and the author's ability, however, a full discussion of this point is beyond the scope of this article.

59. Constitutional Interpretation Procedure Act, art. 5, *available at* http://www.judicial.gov.tw/constitutionalcourt/en/p07_2.asp?lawno=73.

60. It is noteworthy that the years required would be drastically shortened in some circumstances, such as constitutional petition launched by minority legislators.

of the cases. Namely, the Court still rules consistently with the majority in about two-thirds of the cases.

Figure 1 Time Required in Lower Courts



Source: Author
Note: No case takes more than 9 or 12 years respectively.

Critics may further argue that the decisions that strike down laws enacted decades ago could still be categorized as counter-majoritarian since public opinion may last for a long time. On the one hand, since the laws being struck down are, on average, enacted 16 years ago (almost one generation), it is likely that public opinion has changed on many issues given this long time span.[61] In addition, legislators can attack the Court if these laws, enacted decades ago, still represent mainstream opinions. Historically, the legislators did attack the Court several times when it issued unpopular constitutional interpretations. It would be plausible to argue that those decisions are not counter-majoritarian if there is no such legislative reprisal.

As to the third inquiry, it is extremely difficult, if not impossible, to evaluate with surgical precision the cost the congress is willing to bear. Besides, the cost may vary from time to time, depending on political environment, distribution of congressional seats among different parties, and the attitudes of other political actors. In this regard, it is theoretically possible that the Court is slightly more counter-majoritarian than what the statistics have demonstrated. Nonetheless, the zone of acquiescence the Court enjoys is not broad given the history of the interaction among all three branches of government in Taiwan. Most of the time, the congressional majority in Taiwan is also the ruling party. In theory, this political reality

61. *See* BARNUM, *supra* note 24, at 283.

decreases the costs and risks for the congress to check and balance the Court as the executive stands by the legislature. In practice, both the legislature and the executive have attacked the Court several times. Accordingly, the problem may not be as serious as it first appears.

Last but not least, it is worth noting that even if the Court strikes down laws enacted in recent years, the decisions are not necessarily at odds with majority opinion. It could be there is no discernible majoritarian opinion at all due to some legislative institutional defects.[62] It could also be that legislators may intentionally invite Justices to issue their opinions regarding thorny issues in order to shift political responsibility.[63] This interaction can be observed when other structural limitations occur, such as federalism, entrenched interests, and factions.[64] In these circumstances, it would be unfair to condemn judicial review as anti-democratic since they are merely the scapegoat of the political branches.

B. *Case Studies*

In addition to empirical evidence, case studies also indicate that public opinion plays a significant role during the judicial decision-making process. This is especially true in major cases that attract the attention of most, if not all, Taiwanese people at a certain time. The following section introduces two cardinal cases critical to the political and constitutional development of Taiwan. In the first case, the Court struck down the Temporary Provisions, a law with quasi-constitutional status; in the second case, the 1999 constitutional amendments were stricken down. At first blush, it seems that the Court behaved in a "counter-super majoritarian" way since it struck down not statutes but constitutional laws. Nevertheless, the Court would have not been able to render these two pivotal decisions without the support of public opinion and political elites. Moreover, the majoritarian propensity of the Court can also be observed from some cases with respect to fundamental rights.

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62. *See* Mark A. Graber, *The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary*, 7 STUD. IN AM. POL. DEV. 35, 37-38 (1993).

63. *See* Tom Ginsburg, *Courts and New Democracies: Recent Works*, 37 L. SOC. INQUIRY 720, 722 (2012); Yoav Dotan & Menachem Hofnung, *Legal Defeats—Political Wins Why Do Elected Representatives Go to Court?* 38 COMP. POL. STUDIES 75, 89-102 (2005); KEITH E. WHITTINGTON, POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY 134-52 (2007); BALKIN, *supra* note 25, at 292; Hirschl, *supra* note 7, at 136-38; Stefan Voigt & Eli M. Salzberger, *Choosing Not to Choose: When Politicians Choose to Delegate Powers*, 55 KYKLOS 289, 294-95 (2002).

64. *See* Keith E. Whittington, *Interpose Your Friendly Hand: Political Supports for the Exercise of Judicial Review by the United States Supreme Court*, 99 AM. POL. SCI. REV. 583, 586-93 (2005).

1. *Interpretation No. 261*[65]

The most salient example is Interpretation No. 261,[66] in which the Court plainly declared the Temporary Provisions unconstitutional.[67] The issue in this decision was whether the first-term national representatives should be allowed to exercise their powers indefinitely without periodical reelection. During the authoritarian stage, the Court recognized the suspension of national election, prescribed by the said Provisions, as necessary due to national calamity. After democratization, however, legislators of the opposition party brought up the issue again. Knowing that it was no longer tolerable to postpone the election indefinitely, the Court proclaimed that a nationwide election should be held for the maintenance of the constitutional system.[68] The KMT party that enacted the Temporary Provisions was still the ruling party that controlled both the executive and the legislature at that time. At first glance, it seems that the Court made a very bold decision, ruling against the majority by striking down a quasi-constitutional law.

Nevertheless, the outcome was a political corollary if one takes the historical context into account. At that time, the first-term national representatives had remained in power without democratic legitimacy for forty years due to the suspension of the national election. The outcry against these representatives and the thirst for democracy were so intense that it quickly became a national consensus to replace them. Even the ruling KMT party did not support these unpopular representatives, and the opposition party had attacked them strongly. In fact, the ruling KMT elites strategically invited the Justices to solve this hot potato for them since it would be embarrassing for the ruling KMT elites to force their KMT representatives to retire.[69] One former Justice that participated in this decision later confirmed that these representatives had already become a burden to the ruling party.[70] He also acknowledged that this Interpretation exemplified the judicialization of politics, and defended it on the ground that a constitution was essentially political.[71]

The promulgation of this decision has multiple implications for the

65. J. Y. Interpretation No. 261 (1990).

66. Jiunn-rong Yeh & Wen-Chen Chang, *The Emergence of East Asian Constitutionalism: Features in Comparison*, 59 AM. J. COMP. L. 805, 830 (2011).

67. *Id.* at 113-15.

68. *Id.* at 144-48.

69. *See* Chin-Shou Wang, *T'aiwan Ssufa Chêngchih Tê Hsingch'i* [*The rise of judicial politics in Taiwan*], 16 T'AIWAN CHÊNGCHIH HSIAOK'AN [Taiwan Pol. Sci. Rev.] 59, 67-71 (2012).

70. Yu-Ling Yang, *Tafakuan Tiêrhliuihao Chiehshih Yü Wokuo Hsienchêng Fachan* [*Interpretation No. 261 by the Council of Grand Justices, the Judicial Yuan and the Development of Constitutional Democracy*], 23 HSIENCHÊNG SHIHTAI [CONST. REV.] 3, 19 (1998).

71. *Id.* at 16.

purpose of this paper. First of all, it is clear that the support of public opinion and political elites was indispensible to this iconic decision. Without that support, it is inconceivable that the deferential Court would dare to nullify the Provisions that governed Taiwan for forty years during the authoritarian era. Secondly, the Court established its own supremacy and popularity by striking down the Temporary Provisions that ruled Taiwan for four decades. As the Court's popularity grew, so did its authority. In the democratic period, the Court realized that it should be deferential, not to the autocrat, but to the will of people, especially when social consensus is formidable. Based on the first two points, it follows that the Court's ability to bring about political and social change hinges on how much support it can aggregate.

2. *Interpretation No. 499*[72]

Interpretation No. 499 is another paradigmatic example in which the Court was in line with public opinion. In this decision, the Court declared the 1999 constitutional amendments unconstitutional. At first glance, it seemed that the decision was plainly counter-majoritarian. After all, what could be more democratically representative than a constitutional amendment enacted in one year in a modern democracy?

Despite the theoretical controversy of whether a court could constitutionally nullify a constitutional amendment, this decision was indeed widely welcomed by most people and endorsed by constitutional scholars in Taiwan.[73] It is also an excellent example that demonstrates how the insulated judiciary can sometimes be more democratic than the legislature when the political channel is jammed. The issue in this case was whether constitutional amendments, already promulgated, can be denounced as unconstitutional and void. At that time, only representatives of National Assembly had the power to amend the Constitution. Exploiting this power, they aggrandized themselves as an exchange whenever the Constitution needed to be amended. In 1999, they prolonged their term by amending the Constitution anonymously, which led to great dissatisfaction among most of the citizens. It reminded Taiwanese people of the previous authoritarian regime, when the term of national representatives was prolonged indefinitely and national elections were suspended. Furthermore, the social consensus was that the National Assembly should be repealed since there was already

72. J. Y. Interpretation No. 499 (2000).

73. *See e.g.*, Tzong-Li Hsu, *Hsienfa Weihsien Hu*? [*Is the Constitution unconstitutional?*], 60 Yüeh Tan Fa Hsiao [TAIWAN L. REV.] 141 (2000); Hwai-Tzong Lee, *T'an Hsienfa Tê Chiachih T'ihsi* [*Discussions about Constitutional Values*], 61 Yüeh Tan Fa Hsiao [TAIWAN L. REV.] 142 (2000); Chih-Hsiung Hsu, *Hsienfa Paochang Yü Weihsien Tê Hsienfa Kuifan* [*Constitutional Protection and Unconstitutional Constitution*], 11 T'aiwan Pênt'u Fahsiao Tsachih [TAIWAN L.J.] 21 (2000); Yeh & Chang, *supra* note 66, at 830-31.

another institution, the Legislative Yuan, equivalent to the Congress in western democracies.

However, it seemed that there was no way to prevent such corruption from occurring since the constitutional amendment that prolonged their term had been ratified and put into practice. Finally, it was the Court that played the role of constitutional savior by declaring the 1999 constitutional amendments unconstitutional. Specifically, it was politicians that invited the Court to solve this constitutional difficulty. This was because politicians could shift the blame to the Court; avoid head-on conflict with their colleagues who passed the 1999 constitutional amendments; and claim credit from their angry constituencies.

In this case, the attitude of the political majority was ambiguous at the beginning, but it is clear that public opinion was overwhelmingly against the prolongation of the term. It is plausible to assume this strong dissatisfaction affected the attitudes of political elites, who in turn decided to bring the case to the Court. By the time the case was debated in the Court, it was relatively clear that the Court had won the support of both public opinion and politicians. The decision, although it nullified constitutional amendments, was consonant with most people's expectations. Again, the Court further entrenched its prestige and supremacy by delivering a decision that was ostensibly counter-majoritarian but majoritarian in reality.

3. *Morality Cases*

In addition to separation-of-powers cases, the Court takes public opinion into account in fundamental rights cases as well, especially cases regarding sexual morality. Generally speaking, Taiwan is still a morally conservative country. Sexual transactions are strictly prohibited; diversity of sexual orientation has not been fully respected. Not to mention that adultery is still criminalized. This conservative propensity is reflected in many decisions the Court has rendered. In this area, the Court is highly deferential to the legislature. For example, in Interpretations No. 407, 617, and 623, one of the core issues is the definition of obscenity. The Court upheld the constitutionality of all three laws, articulating nothing more than "I know it when I see it."[74] Furthermore, the Court has reiterated the importance of marriage and family, emphasizing that it is constitutionally protected. Accordingly, the Court expressly endorsed the constitutionality of criminalizing adultery in Interpretation No. 554. Notice that the Court also acknowledged that this issue "must be weighed and determined by the

74. Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

legislature."[75]

Interpretation No. 666, which relates to sexual transactions, is also illustrative.[76] In the past, only the sellers had been punished in sexual transactions, but not the buyers, which is undoubtedly constitutionally problematic. In this decision, the Court first stressed the reasoning that "how to regulate and whether penalty is warranted for sexual transactions is within the confines of legislative discretion."[77] Therefore, it struck down the law at issue on the ground of equal protection, and reminded the government to enact statutes or regulations to control or penalize sexual transactions, trying not to be mistakenly conceived as sexually progressive. Unsurprisingly, the law now punishes both parties of sexual transaction.

4. *Electoral Law Cases*

Electoral law is another litmus test that can be used to examine how majoritarian the Court is. On the one hand, electoral laws are enacted by congressional majorities, who would undoubtedly stipulate certain conditions favorable to themselves to decrease competition from the minority. For instance, these laws may gerrymander, raise the endorsement and security deposits, require certain educational degrees and work experiences, and offer benefits for party-recommended candidates. On the other hand, these laws are usually the targets of constitutional litigations since they can effectively obstruct political change. Given that, the more the Court upholds the constitutionality of electoral laws, arguably the more majoritarian the Court is.[78]

So far, the Court has delivered five decisions that directly relate to the constitutionality of electoral laws: Interpretations No. 290, 331, 340, 442, and 468. Only in Interpretation No. 340 did the Court rule against the current majority. In Interpretation No. 290, the law at issue required that all candidates must have certain educational degrees and working experiences in order to be elected as representatives. The Court sided with the majority, maintaining that these restrictions do not contradict the Constitution; whether these restrictions are reasonable, the Justices argued, is a matter of legislative discretion.[79] In Interpretation No. 468, the law requires that independent candidates must meet two preconditions: joint endorsements

75. J. Y. Interpretation No. 554 (2002).

76. J. Y. Interpretation No. 666 (2009).

77. *Id.*

78. Compared to moral issues, the interpretation of the Court's ruling in electoral cases is more debatable since legislators are self-interested, and the principle-agent problem is more likely to occur here. Nevertheless, since there is no consensus about how serious the problem is in Taiwan, I do not fundamentally question the legitimacy of the congressional majority in this regard.

79. J. Y. Interpretation No. 290 (1992).

and a security deposit. The first one means that would-be candidates must garner endorsements from at least 1.5 percent of the total number of electors; the second one means that candidates must make a security deposit in the amount of one million NT dollars. Both prerequisites may act as prohibitive burdens to nominees of small parties. Still, the Court ruled in partnership with the congressional majority, claiming that these restrictions are "not unnecessary restriction[s] on the right to be elected as president or vice president, nor [are they] in violation of the right of equality as stipulated by the Constitution."[80]

It is true that the Court struck down the electoral law that reduced the guarantee deposit for party-recommended candidates, but not all candidates, in Interpretation no. 340. Nonetheless, this decision is indeed beneficial to the two major parties in Taiwan. The Court articulated in its reasoning that:

> If and when the amount of the guarantee deposit published by the competent authority is too high, a person intent on running for the public office concerned may simply bring together a handful [or small group] of people and form a political party . . . , and then lessen his or her financial burden in the name of a party-recommended candidate. As a result, smaller parties will be mushrooming, which may not be conducive to a healthy development of party politics.[81]

Given these decisions, it is clear the Court stands by the congressional majority in the realm of electoral law, aiming to support a two-party political system. This is of course preferable to the leading two political parties, which further demonstrates the majoritarian propensity of the Court. But for those discrete and insular minorities, this is hardly a good sign.

C. *Agenda Setting*

The third evidence is the Court's agenda-setting power: The Court exercises its discretion by avoiding being embroiled in highly contentious issues in which public opinion is highly divided.[82] Being one of the political branches, the decision-making stage is by no means the only way a court can pursue its political preferences. Agenda setting is a critical component of

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80. J. Y. Interpretation No. 468 (1998).

81. J. Y. Interpretation No. 340 (1994).

82. It is true that the discretion of the Court at this stage is not as broad as its American counterpart since the Constitutional Interpretation Procedure Act does not expressly prescribe this power. In practice, though, the Court does have this discretion, which can be observed from its reasoning in some decisions.

judicial review. By choosing the right case at the right time in order to issue a more popular decision, judicial review is more likely to be successful, especially in new democracies.[83]

Researchers have pointed out that Justices behave strategically not only in delivering their opinions, but also in setting their agenda.[84] When deciding whether or not to hear a case, a Justice takes into account both endogenous and exogenous factors.[85] Internally, for example, a Justice may decide to hear a case even if he or she thinks that it is not the best candidate to solve a particular dispute.[86] The Justice may also intentionally decide not to hear a case when it is believed that he or she would lose on the merit.[87] Unsurprisingly, it is also possible for the Justice to hear cases even though he or she wants to affirm.[88] Externally, the stances of other branches are also influential when a court exercises this agenda-setting power.[89] For instance, opinions of the Solicitor General have been highly respected by the U.S. Supreme Court at both decision-making and certiorari-granting stages.[90] Interest groups also play an important role in shaping the judicial agenda by filing amicus briefs.[91]

This agenda-setting power is derived from two factors. The first one is the broad discretion the highest court usually enjoys in deciding its docket. When disputes are extremely thorny or public opinion is highly divided, the

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83. David Fontana, *Docket Control and the Success of Constitutional Courts*, *in* COMPARATIVE CONSTITUTIONAL LAW 624, 627-33 (Tom Ginsburg & Rosalind Dixon eds., 2011).

84. *See, e.g.*, Lee Epstein et al., *Dynamic Agenda-Setting on The United States Supreme Court: An Empirical Assessment*, 39 HARV. J. ON LEGIS. 395 (2002); Tracey E. George & Albert H. Yoon, *Chief Judges: The Limits of Attitudinal Theory and Possible Paradox of Managerial Judging*, 61 VAND. L. REV. 1, 16-19 (2008); but *see* Ryan C. Black & Ryan J. Owens, *Agenda Setting in the Supreme Court: The Collision of Policy and Jurisprudence*, 71 J. POL. 1062, 1072 (2009); Ryan J. Owens, *The Separation of Powers and Supreme Court Agenda Setting*, 54 AM. J. POL. SCI. 412, 425 (2010); Ryan J. Owens, *An Alternative Perspective on Supreme Court Agenda Setting in a System of Shared Powers*, 32 JUST. SYS. J. 183, 199 (2011).

85. *See* LAWRENCE BAUM, THE PUZZLE OF JUDICIAL BEHAVIOR 78-83 (2000); Barry Friedman, *The Politics of Judicial Review*, 84 TEXAS L. REV. 257, 308-20 (2005); Jan Palmer, *An Econometric Analysis of the U.S. Supreme Court's Certiorari Decisions*, 39 PUB. CHOICE 387, 393-96 (1982); Anna Harvey & Barry Friedman, *Ducking Trouble: Congressionally Induced Selection Bias in the Supreme Court's Agenda*, 71 J. POL. 574, 575-76, 590 (2009).

86. This is named aggressive grants. *See* H.W. PERRY, JR., DECIDING TO DECIDE 207-12 (1991); Sara C. Benesh et al., *Aggressive Grants by Affirm-Minded Justices*, 30 AM. POL. RES. 219 (2002).

87. This is usually called "defensive denials." *See* PERRY, *supra* note 86, at 198-207; LEE EPSTEIN & JACK KNIGHT, THE CHOICES JUSTICES MAKE 80 (1998).

88. Gregory A. Caldeira et al., *Sophisticated Voting and Gate-Keeping in the Supreme Court*, 15 J. L. ECO. & ORG. 549, 550 (1999); THOMAS HAMMOND ET AL., STRATEGIC BEHAVIOR AND POLICY CHOICE ON THE U.S. SUPREME COURT 226-27 (2005).

89. William N. Eskridge, Jr., *Reneging on History?: Playing the Court/Congress/President Civil Rights Game*, 79 CAL. L. REV. 613 (1991).

90. LINCOLN CAPLAN, THE TENTH JUSTICE (1987); REBECCA SALOKAR, THE SOLICITOR GENERAL (1992); David Strauss, *The Solicitor General and the Interests of the United States*, 61 L. & CONTEMP. PROBS. 165 (1998).

91. PERETTI, *supra* note 21, at 148-51.

judiciary may decide not to hear the cases lest it stands by the wrong side. Secondly, this power is also made possible by the symbiotic interaction between a court and its petitioners since a court needs to rely on litigants to set its agenda.[92] This is especially telling when the petitioners are the coordinate branches. Elected officials usually encounter divided, sometimes even antagonistic, opinions from their constituents, which may prevent them from taking a clear stance on certain issues. In these circumstances, the existence of an independent judiciary becomes a "boon"[93] to these officials since they may shift the responsibilities to these unelected Justices. The more accustomed politicians are to shifting blame, the more discretion the judiciary can exercise in setting its agenda.

Like its American counterpart, the Court has wide discretion in setting its own agenda, and the process has so far been shrouded in complete secrecy. Theoretically speaking, national courts that adopt abstract review, such as the Court, have more leeway in setting their agenda.[94] In practice, the Court did repeatedly announce that "the subject matter evaluated is not limited to that specified in the petition, but may include the laws and orders adopted to reach the final verdict and those closely related requested for interpretation in the petition."[95] The Court can examine the constitutionality of any law so long as there is a "close relationship" between the law and the case in hand. Perhaps unsurprisingly, the Court never clearly defines what counts as "close relationship," which in practice vests the Court with greater agenda-setting power.

This agenda-setting power can be further analyzed by examining its two elements: the cases it decides to hear and the cases it decides not to hear. As will be discussed later, the Court had a crisis of legitimacy after democratization due to its past submissive image during the authoritarian regime. Therefore, it changed the composition of its docket dramatically by using its agenda-setting power. During its first three terms, when Taiwan was an autocracy, the Court rarely heard cases appealed by citizens.[96] After democratization, Figure II shows that the ratio of cases appealed by individuals gradually increased over time. Now cases appealed by citizens occupy the majority of the Court's docket because it realized the importance

92. *See* Vanessa Baird & Tonja Jacobi, *Judicial Agenda Setting Through Signaling and Strategic Litigant Responses*, 29 WASH. U. J.L. & POL'Y 215, 216-17, 226-39 (2009); Gregory A. Caldeira & John R. Wright, *Organized Interests and Agenda Setting In The U.S. Supreme Court*, 82 AM. POL. SCI. REV. 1109 (1988).

93. Graber, *supra* note 62, at 44.

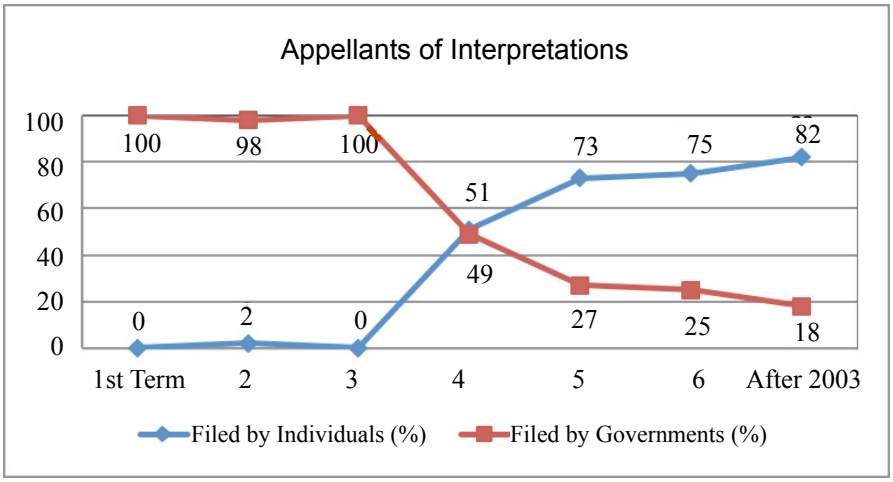
94. *See* Garoupa & Ginsburg, *supra* note 36, at 550.

95. J. Y. Interpretation No. 576 (2004); J. Y. Interpretation No. 644 (2008); J. Y. Interpretation No. 664 (2009).

96. Before the revision of Constitutional Interpretation Procedure Act in 1958, citizens were not allowed to petition the Court at all, which explains why there was no case appealed by citizens during the first term. The author is thankful to one reviewer for pointing this out.

of public opinion. Admittedly, agenda-setting is by no means the only factor that contributes to this change. Democratization itself and the revision of related procedural rules also account for this change. But the composition of the docket would have remained the same if the Court did not intentionally exercise its agenda-setting power, catering to the majority citizens.

Figure 2 Appellants of Interpretations



Note: Till Interpretation No. 708.

In addition, the Court cunningly avoids hearing certain kinds of cases, especially regarding issues with intensely divided public opinion. Just as politicians may shift responsibility to the judiciary by petitioning the Court, the Court may shift it back by not hearing the cases at all. The death penalty and gay marriage are the best two examples of this strategy.

1. *Death Penalty*

Whether the death penalty is constitutionally acceptable is controversial around the globe. In the American context, the polling data with respect to the death penalty has repeatedly influenced how Justices have thought about the proper interpretation of "cruel and usual punishment" since the 1960s.[97] Justices in Taiwan are similarly influenced. In the past, the Court thrice ruled that the death penalty does not violate the right to life enshrined in Article 15 in Interpretation No. 194, 263, and 476. This is understandable given that the first case, Interpretation No. 194, was delivered during the authoritarian period. After that, the Court repeatedly claimed that Interpretation No. 194

97. *See* John Hanley, *The Death Penalty*, *in* PUBLIC OPINION AND CONSTITUTIONAL CONTROVERSY 108, 133-35 (Nathaniel Persily et al. eds., 2008).

controls this issue since judicial review in Taiwan is abstract review. Interpretation No. 476, delivered in 1999, was the last time this issue was debated in the Court.

When the sixth-term Justices retired in 2003, more liberal Justices were nominated and appointed. In addition, the Taiwan Alliance to End the Death Penalty[98] was founded in 2003 as well. Together with some lawyers and scholars, the Alliance has published an annual report discussing the progress made regarding the abolishment of the death penalty in Taiwan and other areas of the world,[99] trying to bring the dispute of the death penalty back into the courtroom. Moreover, the Taiwanese government voluntarily signed the International Covenant on Civil and Political Rights[100] and International Covenant on Economic, Social and Cultural Rights[101] in 2009. More and more people have begun to support the end of the death penalty. Still, 70 percent of Taiwanese people have consistently supported, or at least do not oppose, the death penalty.[102] One former minister of the Ministry of Justice was forced to resign since she publicly refused to execute the death penalty.[103] The conflict reached its peak in 2011 when an innocent soldier was proved to be tortured and wrongly executed in 1997.[104]

The Alliance still petitioned the Court, trying to challenge the constitutionality of death penalty. Even though Justices nominated after 2003 are more liberal than their predecessors, the Court has refused to address the issue twice, in 2006 and 2010, owing to the strong resistance of the public to end the death penalty. The Court declared that the issue had been solved, and the signature of the two Covenants did not fundamentally change anything.[105] Most importantly, the Justices emphasized that whether capital prisoners should be pardoned was a political problem that should be decided

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98. TAIWAN ALLIANCE TO END THE DEATH PENALTY, http://www.taedp.org.tw/en_ (last visited Feb. 5, 2014).

99. *See, e.g.*, Taiwan Alliance to End the Death Penalty, *A Blow to Human Rights: Taiwan Resumes Executions, The Death Penalty in Taiwan 2010*, ISSUU (Mar. 28, 2011), http://issuu.com/taedp/docs/taedp_report2010_en?mode=a_p

100. International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171.

101. International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3.

102. *Ssuhsing Ts'unfei Wênt'i Mini Tiaoch'a Chaiyao* [*Poll on Death Penalty*], FAWU PU [MINISTRY OF JUSTICE] (Feb. 7, 2012), http://www.moj.gov.tw/ct.asp?xItem=259538&CtNode=30968&mp=001.

103. BBC Chinese, The Minister of Ministry of Justice in Taiwan Resigned (2010), http://www.bbc.co.uk/zhongwen/trad/china/2010/03/100312_taiwan_justice_minister.shtml.

104. Judicial Reform Foundation, The Case of Jiang Guoqing, http://www.jrf.org.tw/newjrf/rte/myform_detail.asp?id=2912. (last visited Feb. 22, 2013).

105. Jui Wên Jan, *Ssuhsingfan Shêngch'ing Shihhsien Tafakuan Huii Pohui* [*The Constitutional Court Decided Not To Hear Death Penalty Cases*], PTS NEWS NETWORK (May 29, 2010), http://pnn.pts.org.tw/main/2010/05/29/%E6%AD%BB%E5%88%91%E7%8A%AF%E8%81%B2%E8%AB%8B%E9%87%8B%E6%86%B2-%E5%A4%A7%E6%B3%95%E5%AE%98%E6%9C%83%E8%AD%B0%E9%A7%81%E5%9B%9E/.

by the legislative branch, rather than the judiciary. It is clear that the Court endeavors to prevent itself from being entangled in issues without social consensus, sending this issue back to the political branches.

2. *Gay Marriage*

In addition to death penalty, gay marriage is another issue the Court is unwilling to tackle because of public opinion. Compared to other Asian countries, Taiwan is relatively friendly to homosexuals, but discrimination in regard to sexual orientation still exists. The Court has never delivered any decision that directly relates to gay rights. In Interpretation No. 617, the Constitutional Court ruled that article 235 of the Criminal Code, which punishes inter alia the selling of obscene writing or pictures of any subject, is constitutional. Since the contested subjects in this case were gay magazines, this morally conservative decision is criticized as stigmatizing sex between homosexuals.

In the past, homosexuality was a moral taboo that could only be discussed under the table in Taiwan. With the liberation of human rights after democratization, discrimination based on sexual orientation has been hotly debated in the past decade. Unsurprisingly, gay marriage is one, if not the most, crucial issue. In Taiwan, no law expressly prohibits gay marriage, but article 972 of the Civil Code stipulates "An agreement to marry shall be made by the male and the female parties . . . "[106] In addition, article 982 regulates that "A marriage shall be effected in writing, which requires the signatures of at least two witnesses, and by the registration at the Household Administration Bureau."[107] Due to these two articles, gay couples have always been rejected at the registration stage with no exception, which means that in practice their marriages are not officially recognized.

Public attitude plays an important role in the discussion about gay marriage.[108] In 2000, a gay couple challenged the constitutionality of the said articles; they petitioned the Court after exhausting all available remedies. Predictably, the Court refused to hear the case.[109] Roughly at the same time, the Research, Development, and Evaluation Commission promulgated an official poll, in which 60 percent of Taiwanese people

106. Minfa [Civil Code] (2012) (Taiwan).

107. *Id.*

108. *See, e.g.*, Patrick J. Egan et al., *Gay Rights*, *in* PUBLIC OPINION AND CONSTITUTIONAL CONTROVERSY 234 (Nathaniel Persily et al. eds., 2008).

109. Chin Lan Huang, *T'unghsing Hunyin Shihhsien Tafakuan Huii Chüehi Pu Shouli* [*The Constitutional Court Decided not to Hear Gay Marriage Cases*], GENDER/SEXUALITY RIGHTS ASSOCIATION TAIWAN, http://gsrat.net/news/newsclipDetail.php?ncdata_id=960 (last visited Feb. 22, 2013).

opposed gay marriage, while only 23 percent supported it.[110] In April 2012, another poll showed that 49 percent of Taiwanese people endorsed gay marriage while 29 percent still opposed.[111] It seems that public opinion toward gay marriage has significantly changed in the past decade. Supporters outnumber opponents, and have nearly become the majority. Given this attitudinal change, another gay couple challenged the constitutionality of the same articles again at the end of 2012. Before exhausting all available remedies, they successfully convinced judges of the Administrative High Court to petition the Court for them. This was the first time judges of lower courts – that is, government officials –challenged the constitutionality of the prohibition against gay marriage. Nevertheless, the couple eventually decided to withdraw the petition before the Court made any decision as to whether it would hear the case. The couple explained that they withdrew the petition because of an anonymous threat and, perhaps more importantly, worries that the Court would reach an unfavorable conclusion, which would be extremely detrimental to future gay rights movements.[112]

Strictly speaking, it is judges of the lower courts, instead of Justices of the Court, who are influenced by public opinion. It is hard to know whether the Court would have heard the case if the couple did not withdraw. Nevertheless, it still demonstrates that the judiciary is attentive to public opinion, even though it is supposed to be independent of this.

D. *Summary*

To be sure, some may criticize that there are still cases in which unelected Justices rule against the majority, such as Interpretation No. 603. From previous paragraphs, however, it is clear that the Court is in line with the majority most of the time. It seems that the counter-majoritarian difficulty is not a big problem in Taiwan.

This may be explained by its diffuse support.[113] Both politicians and lay people have incentives to tolerate a somewhat precarious court so long as it

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110. Research, Development, and Evaluation Commission, Executive Yuan, *Minchung Tui Feich'u Ssuhsing Tê K'anfa* [*Poll on Death Penalty*], http://www.ndc.gov.tw/m1.aspx?sNo=0027257 (last visited Feb. 22, 2013).

111. *TVBS Mintiao: T'aiwan 49% Minchung Tsanch'êng T'ungchih Hunyin Hêfahua* [*TVBS poll: 49% of Taiwanese endorse gay marriage*], ETTODAY (Apr. 19, 2012), http://www.ettoday.net/news/20120419/40337.htm.

112. Hsin-Hua Chang, *You Shihhsien Chiehkuo Pu Lêkuan, T'ungchih Panlu_ Ch'êhui Hsingchêng Susung* [*Worrying about the interpretation, Gay couple dismissed the lawsuit*], COOLLOUD (Jan. 23, 2013), http://www.coolloud.org.tw/node/72528.

113. Gregory A. Caldeira & James L. Gibson, *The Etiology of Public Support for the Supreme Court*, 36 AM. J. POL. SCI. 635, 636-49 (1992); James L. Gibson et al., *On the Legitimacy of National High Courts*, 92 AM. POL. SCI. REV. 343, 348-52 (1998).

by and large remains within the "zone of acquiescence."[114] Politicians may hope that the Court may serve as insurance after they are no longer in power.[115] Even when they are in power, they may need the help of the Court to "interpose its friendly hand" when there is a political stalemate.[116] Sometimes a scapegoat is required when politicians are unwilling to shoulder political responsibilities. As for the general population, although it is likely that people are usually not aware of what the Court really does,[117] they may still support the Court as long as they believe that it generally behaves in accordance with public opinion. Also, they may support the Court out of specific support.[118] This is particularly persuasive in Taiwan since the Court did play a critical role in many political junctures during the transitional period from autocracy to democracy.[119]

To better understand how majoritarian the Court is, further analysis about when the Court deviates from the majority in congress is necessary. From Figure III, six out of sixteen Interpretations in which the Court ruled against congressional majority relate to separation of powers. Justices are most likely to rule against the majority in the field of three fundamental rights: equal protection, due process of law, and right to hold public office.[120] Since there are much fewer separation-of-powers decisions than fundamental-rights cases issued, it is fair to say the Court is much more likely to rule against the current congressional majority in the area of separation-of-powers. In fundamental rights cases, relatively speaking, the Court is more deferential to the congressional majority.

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114. *See* Bassok & Dotan, *supra* note 54.

115. *See* GINSBURG, *supra* note 30, at 22-33.

116. *See* Whittington, *supra* note 64.

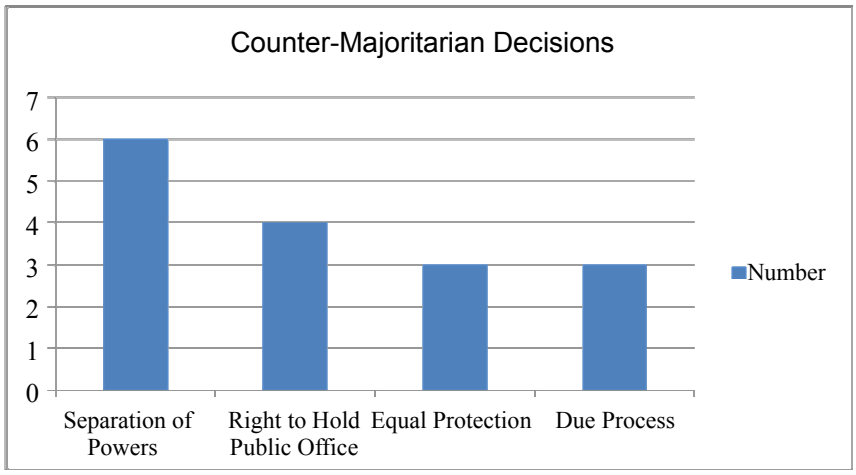
117. But *see* James L. Gibson & Gregory A. Caldeira, *Knowing the Supreme Court? A Reconsideration of Public Ignorance of the High Court*, 71 J. POL. 429, 439 (2009).

118. Caldeira & Gibson, *supra* note 113, at 642, 658.

119. In this article, I interchangeably use the term "transitional period" and "democratization stage," which refers to the span from 1987, the lifting of martial law, to 2008, the second party turnover. *See* SAMUEL P. HUNTINGTON, THE THIRD WAVE 266 (1991).

120. Equal protection cases are Interpretations No. 340, 405, and 670. Due process cases are Interpretations No. 384, 471, and 670. Decisions concerning right to hold public office are Interpretations No. 405, 453, 491, and 655.

Figure 3 Counter-Majoritarian Decisions (till No. 708)



Source: Author

The six separation-of-powers decisions are Interpretation No. 371, 499, 585, 601, 613, and 633. Except for Interpretation No. 371 and the said Interpretation No. 499, all other separation-of-powers cases occurred during periods of divided government – that is, when the legislature and the executive were controlled by different parties. When a party controls both the executive and the legislature, it is clear that the ruling party represents the majority of public opinion, at least in theory. Under this circumstance, a majoritarian court, such as the Court, will be less likely to rule against the majority since the will of the people is quite clear. Contrarily, when the government is divided, either the congressional majority or the president can represent the true public opinion. It could also be that public opinion is highly divided, and there is no stable majority. Given that, Justices are less constrained by public opinion and more likely to rule against the congressional majority since the Court is still supported by the president, who also represents the majority.

Secondly, it is intriguing that the Court is more majoritarian in the field of fundamental rights than in the area of separation-of-powers. This finding is contradictory to the general expectation of a constitutional court, which is supposed to function as a guardian of human rights, protecting discrete and insular minorities from majority tyranny. On the one hand, it seems to further support the insurance theory of judicial review[121] in which the losing party regards judicial review as a mechanism to protect itself from being retaliated against by the new winning coalition. On the other hand, this finding may lead to a controversial debate with respect to whether courts can

121. GINSBURG, *supra* note 30, at 22-33.

bring about social change.[122] The records of the Court examined seem to imply that losers in the congress hall will still be losers in the court room since the Court seldom defies the current congressional majority in the domain of fundamental rights. Some may contend that the Court did strike down many laws that infringed human rights after democratization. Although this counterargument is true insofar as the Court did have a brilliant record in striking down laws violating human rights, its decisions were usually consistent with the majority opinion. Elected branches should have revised these outdated laws before they were challenged in the Court since the social consensus had already changed before the intervention of the Court. In this sense, other factors outside the courtroom have contributed to the social change; the Court merely reflects it.

The agenda-setting power of the Court as well as case studies also suggest that the popularity and supremacy of the Court derive from the dynamic interaction between the Court and public opinion: when the congressional majority failed to reflect public opinion by revising outdated laws, the Court progressively struck them down in the name of the Constitution; when the new congressional majority enacted laws, the Court respected their collective decisions; and when public opinion was divided and represented by both the congress and the president, the Court had the most leeway in determining whether, and how, to render a decision.

III. WHY MAJORITARIAN?

Based on previous analyses, judicial review in Taiwan seems to be majoritarian in the sense that it usually rules in favor of the current congressional majority. But why does it function in a majoritarian way, contrary to what most constitutional theories assume? Is it because judicial review in essence is not as counter-majoritarian as many legal scholars think? Or is it because judicial review in new democracies functions differently than it does in old democracies?

I argue that both account for this anomaly. Conceptually, students of judicial review do have reasons to worry about the problem of judicial supremacy and counter-majoritarian difficulty. Justices enjoy different levels of institutional protections once they are nominated and confirmed. Some of them have life tenure, they are very unlikely to be impeached, and, most notably, they are not directly responsible to public opinion. Nonetheless, in reality there are many external and internal constraints[123] that may force

122. GERALD N. ROSENBERG, THE HOLLOW HOPE (2d ed. 2008).

123. *See* Forrest Maltzman et al., *Strategy and Judicial Choice: New Institutionalist Approaches to Supreme Court Decision-Making*, *in* SUPREME COURT DECISION-MAKING 43, 48-57 (Cornell W. Clayton & Howard Gillman eds., 1999); FALLON, *supra* note 16, at 47-52; BALKIN, *supra* note 25, at

them to be in line with public opinion.[124] Constrained by these institutional limitations, judicial review tends to be more majoritarian than some students of judicial review may believe. This is plausible even in old democracies.

Moreover, judicial review in new democracies does have some unique characteristics that may make it less likely to be counter-majoritarian. Before the transition from autocracy to democracy, the judiciary in authoritarian regimes is usually unable to resist the will of the dictator. Even worse, dictators can use judicial decisions as a legal means of legitimizing their atrocities. This deferential and oppressive image tends to make the judiciary unpopular at the beginning of democratization. Conversely, new charismatic political leaders usually enjoy widespread popularity, especially at the early stage of transition. Consequently, it would be extraordinarily difficult for the unpopular judiciary to fight against elected branches until its own legitimacy and authority have been established. The history of judicial review in Taiwan vividly exemplifies this point. The following paragraphs analyze why judicial review in Taiwan is majoritarian through three different factors.

A. *Institutional Factors*[125]

Beginning with the nomination and confirmation process, there are various institutional factors that cause the judiciary to act in a majoritarian manner. To begin with, each Justice must be nominated by a president and confirmed by the majority of congress before he or she serves on the bench.[126] Since both the president and the legislators are elected and face the pressure of reelection, they unavoidably take public opinion into account when exercising their powers of nomination or confirmation.[127] This process makes Justices more likely to be majoritarian,[128] even though the majority does not directly elect them. Namely, the president is unlikely to choose an extremist as a candidate, and the congress is equally unlikely to confirm such a candidate.[129] In addition, nominees usually grow up in upper-middle class families, are trained to become lawyers in reputable law schools, and share

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19, 293-96.

124. *See* MARSHALL, *supra* note 56, at 14-25; Lee Epstein & Andrew D. Martin, *Does Public Opinion Influence The Supreme Court? Possibly Yes (But We're Not Sure Why)*, 13 U. PA. J. CONST. L. 263, 279-81 (2010-2011).

125. *See generally* Cornell W. Clayton, *The Supreme Court and Political Jurisprudence: New and Old Institutionalisms*, *in* SUPREME COURT DECISION-MAKING, *supra* note 123, at 15.

126. But *see* Pildes, *supra* note 51, at 139-42.

127. *See* JEFFREY A. SEGAL ET AL., THE SUPREME COURT IN THE AMERICAN LEGAL SYSTEM 245-74 (2005).

128. *See* ANTONIN SCALIA, A MATTER OF INTERPRETATION 47 (1999).

129. *See, e.g.*, LEE EPSTEIN & JEFFERY A. SEGAL, ADVICE AND CONSENT 85-116 (2005); Cornell Clayton, *Law, Politics, and the Rehnquist Court*, *in* THE SUPREME COURT IN AMERICAN POLITICS 151, 157 (Howard Gillman & Cornell Clayton eds., 1999).

similar values with mainstream society.

Even if a Justice sometimes does not hold the majority viewpoint, the composition of a high court prevents him or her from acting solely of his or her own will. Unlike some judges in lower courts, Justices of a high court make decisions collectively. They have to negotiate, compromise, and collaborate with their colleagues until an internal majority is formed.[130] More often than not, the stance of a moderate Justice (usually the median or swing Justice) is adopted as court opinion.[131] And since the stance of each Justice generally reflects different attitudes within society, the moderate typically does not deviate from mainstream society too far. Hence, this collective decision-making procedure also renders a high court majoritarian. In a similar vein, another internal factor that may force a court to be more majoritarian is the quorum requirement for making decisions. Not all high courts require only simple majority to promulgate a decision. Compared with simple-majority quorum, a supermajority quorum makes judicial review less likely to frustrate the congressional majority. Once a decision is delivered, it will be more majoritarian since it is unlikely that a supermajority of Justices will disregard or misjudge public opinion.

Besides, the most critical defect of judicial power is the lack of implementing ability.[132] To make its judgments function as the supreme law of the land in practice, the judiciary unavoidably needs to take into account the reaction of coordinate branches,[133] lower courts,[134] and public opinion.[135] Other branches may have no power to overrule a constitutional decision once delivered, but they can passively refuse to implement it. In the American context, the resistance of southern states against *Brown v. Board of Education*[136] is a telling example.[137] This is not to say that the judiciary should always follow the step of mainstream society, but there is certainly some resistance when a court walks too fast or too slow.

Finally, not all Justices around the globe are life-tenured. It is likely that the shorter the term is, the more susceptible to public opinion Justices have

130. EPSTEIN & KNIGHT, *supra* note 87, at 118-35; FORREST MALTZMAN ET AL., CRAFTING LAW ON THE SUPREME COURT 15-16 (2000).

131. HAMMOND ET AL., *supra* note 88, at 95-138.

132. ROSENBERG, *supra* note 122, at 16; McGuire & Stimson, *supra* note 41, at 1019; Georg Vanberg, *"John Marshall has made his Decision": Implementation, Transparency, and Public Support*, *in* INSTITUTIONAL GAMES AND THE U.S. SUPREME COURT 69 (James R. Rogers et al. eds., 2006).

133. Lee Epstein et al., *The Supreme Court as a Strategic National Policymaker*, 50 EMORY L.J. 583, 585 (2001); Jack Knight & Lee Epstein, *Institutionalizing Constitutional Democracy*, *in* POLITICS FROM ANARCHY TO DEMOCRACY 196, 200-04 (Irwin L. Morris et al. eds., 2004).

134. ROSENBERG, *supra* note 122, at 16-18.

135. James A. Stimson et al., *Dynamic Representation*, 89 AM. POL. SCI. REV. 543, 555-56, 560 (1995).

136. Brown v. Board of Education of Topeka, 347 U.S. 483 (1954).

137. ROSENBERG, *supra* note 122, at 72-93.

to be in the hope of being re-nominated or finding a new job elsewhere.

In Taiwan, Justices of the Court are nominated by the president and confirmed by the Legislative Yuan, the Taiwanese equivalent of Congress. Historically, either the Control Yuan or the National Assembly had exercised the confirmation power since they were once "considered as equivalent to the parliaments of democratic nations."[138] No matter which body exercises the confirmation power, it has always been monopolized by the parliament. This institutional factor is designed to ensure that the will of the people prevails. In Interpretation No. 541, the Justices plainly acknowledge this point by maintaining,

> it is clear that while the nomination of the President of the Judicial Yuan, the Vice (Deputy) President of the Judicial Yuan and the Grand Justices falls within the executive power of the President, the power of consent or veto shall be exercised by a government agency *in accordance with the will of the people*. This is the legislative intent of the Constitution and its Amendments (emphasis added).[139]

Furthermore, Justices in Taiwan do not have life tenure. All Justices nominated before 1997 served a fixed and renewable term of nine years;[140] Justices nominated since 2003 serve a staggered, non-renewable term of eight years. This institutional design of a staggered, eight-year term ensures that every president can nominate at least some Justices in his or her term since the presidential election is held every four years. In this regard, it makes the Court more majoritarian in two ways. First, Justices of the Court have more incentives to rule in line with the majority because they are less constitutionally insulated from the society.[141] Second, it also means that the Court will always comprise of some Justices nominated and confirmed by the latest political majority.

Besides, a supermajority of Justices is required to deliver a constitutional interpretation in Taiwan.[142] Specifically, a decision needs two-thirds of the votes (three-fourths before 1993) to become the supreme

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138. J. Y. Interpretation No. 76 (1957).

139. J. Y. Interpretation No. 541 (2002).

140. F. Fraser Mendel, *Judicial Power & Illusion: The Republic of China's Council of Grand Justices and Constitutional Interpretation*, 2 PAC. RIM. L. & POL'Y J. 157, 168-76 (1993).

141. A cynical presumption is that such institutional design would make all justices nominated after 2003 more apt to rule in favor of the sitting president. *See* Chien-Liang Lee, *Tafakuan Tê Chihtu Pienkê Yü Ssufayüen Tê Hsienfa Tingwei* [*Reform of the Institution of the Grand Justices and Constitutional Status of the Judicial Yuan*], 27 Kuoli T'aiwan Tahsiao Fahsiao Lunts'ung [NTU L.J.] 217, 225-26 (1998); Mendel, *supra* note 140, at 173-74.

142. It requires only a majority to deliver a uniform Interpretation.

law of the land.[143] This high threshold makes it less likely for Justices to rule against the congressional majority. Finally, there is no guarantee that every decision the Court issues will be faithfully implemented by coordinate branches and other courts. Historically, several Interpretations were not implemented for over a decade, and clashes between the Constitutional Court and the Supreme Court in Taiwan had taken place several times.

B. *Political Factors*

Although it is hard to impeach a Justice, elected branches usually have many other methods of disciplining the judiciary when needed.[144] For example, the congress may cut the budget, limit the jurisdiction, lower the number of staff members, or raise the quorum required to render decisions of the court. In addition, the executive may refuse to implement unpopular decisions, or even try to pack a high court. Accordingly, although the conventional wisdom is that the judiciary is independent of public opinion, it in fact is not. Contrarily, public support is extremely important for the judiciary.[145] Although public opinion acts as an external constraint on the judiciary, it simultaneously undergirds its legitimacy.[146] As public support of the judiciary changes, the interaction between the judiciary and other political branches differs as well. When popular support is low, for example, the judiciary either remains silent or becomes submissive to the executive. The impotence of the U.S Supreme Court during *Marbury v. Madison*,[147] as well as during the reconstruction and New Deal periods, exemplifies this argument.[148]

In Taiwan, the transition from autocracy to democracy is the most cardinal political change of the past three decades. During the authoritarian period, the interaction between the judiciary and other political branches was

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143. Constitutional Interpretation Procedure Act, art. 14, *available at* http://www.judicial.gov.tw/constitutionalcourt/en/p07_2.asp?lawno=73.

144. *See, e.g.*, Gerald N. Rosenberg, *Judicial Independence and the Reality of Political Power*, 54 REV. POL. 369 (1992); but *see* Pildes, *supra* note 51, at 133-39.

145. *See supra* note 25 and accompanying text.

146. WALTER F. MURPHY, ELEMENTS OF JUDICIAL STRATEGY 19-21 (1964); Robert H. Durr et al., *Ideological Divergence and Public Support for the Supreme Court*, 44 AM. J. POL. SCI. 768, 775 (2000); Roy B. Flemming & B. Dan Wood, *The Public and the Supreme Court: Individual Justice Responsiveness to American Policy Moods*, 41 AM. J. POL. SCI. 468, 492-95 (1997); David Adamany, *Legitimacy, Realigning Elections, and the Supreme Court*, 1973 WIS. L. REV. 790, 811-15 (1973); Gregory A. Caldeira, *Public Opinion and the U.S. Supreme Court: FDR's Court-Packing Plan*, 81 AM. POL. SCI. REV. 1139, 1149-50 (1987); Barry Friedman, *The History of the Countermajoritarian Difficulty, Part II: Reconstruction's Political Court*, 91 GEO. L.J. 1, 47-64 (2002-2003); Barry Friedman, *The History of the Countermajoritarian Difficulty, Part Four: Law's Politics*, 148 U. PENN. L. REV. 971, 1027-35 (2000); Gregory A. Caldeira, *Neither the Purse or the Sword: Dynamics of Public Confidence in the Supreme Court*, 80 AM. POL. SCI. REV. 1209 (1986).

147. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

148. *See generally* FRIEDMAN, *supra* note 21, at 58-136, 225-29.

rather straightforward: the judiciary was a puppet of the executive. After democratization, the interaction between the judiciary and other political branches became much more intricate, and the Court has demonstrated its flexibility at different stages. In short, the Court dedicated itself to signal sending, rejected zero-sum judgments, emphasized inter-branch dialogue, and preserved leeway for political response during the transitional stage.[149] Now that Taiwanese democracy has matured, the Court instead underscores abstract principles, delivers clear-cut decisions, stresses checks and balances, and limits political discretion.[150] This shift is attributable to the gradual growth of the judicial popularity among citizens.

Compared to branches directly generated by regular elections, the judiciary lacks direct democratic legitimacy. Thus it avoids head-on conflict with other political branches until its judgments are widely accepted as binding. At the early stage of transition, the Court had not yet established its authority and supremacy among politicians and citizens. Therefore, it is understandable that the Court stressed dialogue, gave political branches greater leeway, and sent signals instead of issuing clear-cut, zero-sum decisions. By sending signals that were not constitutionally binding, the Court ran less risk of retaliation. Besides, when the popularity of the Court was low, it was less likely the executive would implement any decision they did not agree with, and any executive disobedience would further weaken the authority of the Court. Given that, decisions that stressed signals and dialogue had no such worries since there was no clear mandate as to what other branches should do except negotiate. Only after the authority of the Court was gradually accepted and entrenched at the late stage of transition did its decisions become respected and implemented. The shift from transitional-court model to ordinary-court model was a process in which the judiciary gradually entrenched its authority and popularity among public opinion.

This is not to say that the Court never misjudged its popularity and power. In fact, the Court has been attacked by the congress several times when it delivered decisions against the current congressional majority. Interpretation No. 499 and No. 585 are two paradigmatic examples. In Interpretation No. 499, the Court declared the 1999 constitutional amendments enacted by the National Assembly unconstitutional; in Interpretation No. 585, the Court struck down a politically sensitive statute enacted by the then congressional majority on constitutional grounds. In response, the representatives of national assembly deprived the Justices of some constitutional protections, while the legislators curtailed the budget of

149. Jiunn-rong Yeh, *Ts'ung Chuanhsing Fayüen Tao Ch'angt'ai Fayüen* [*From Transitional Court to Ordinary Court*], 31 Kuoli T'aiwan Tahsiao Fahsiao Lunts'ung [NTU L.J.] 59, 66-74 (2002).

150. *Id.* at 74-80.

the Justices. It is true that not every reprisal succeeded. But suffice it to say that the Justices in Taiwan have always been under the shadow of legislative discipline, which has forced them to take into account the reactions of the congressional majority and public opinion. Besides, the judiciary had little leverage over the executive, and its decisions were often ignored in the past. Some judicial decisions were not implemented until decades after the promulgation,[151] and the Court needed to nudge the reluctant executive branch by striking down the same law several times.

In this regard, the Court is literally the least dangerous among the three branches. Only by rendering majoritarian decisions can it defend itself with the support of public opinion.

C. *Historical Factors*

Institutional and political factors may be influential in shaping the Court's opinions, but history is the most critical one that makes the Court more willing to stand in line with the majority. Taiwan was once an autocracy when the ruling party, KMT, lost the Chinese civil war and retreated to Taiwan. Under the authoritarian regime, it was crystal clear that the political elites were not representative of the majority. Moreover, the Court was extremely deferential, and it even bent the meaning of the constitution in its interpretations to meet the dictator's needs. In addition, Justices at that time all came from mainland China with the KMT. It is not clear what counts as "the majority" to them: the Chinese people as a whole, or the Taiwanese people. One thing is certain: from the perspective of Taiwanese people, the Court was counter-majoritarian; it did not serve as a human rights guardian to protect minorities from majoritarian tyranny, but instead functioned as a constitutional means for the autocrats to suppress the will of the people.

Having previously been a part of the authoritarian regime, the status of the Court became increasingly awkward after democratization because its deference and impotence during the autocracy significantly undermined its legitimacy.[152] Neither the Constitution nor the constitutional amendments mention the Constitutional Court at all, and whether Justices of the Constitutional Court even occupied the highest rung of the judicial ladder was once a controversial issue since the Supreme Court in Taiwan also claimed its supremacy in the domains of civil law and criminal law.[153]

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151. Such as Interpretations No. 86 and No. 166.

152. GINSBURG, *supra* note 30, at 129-30.

153. For more discussion about the conflict between Constitutional Court and Supreme Court in civil law countries, *see* Lech Garlicki, *Constitutional Courts Versus Supreme Courts*, 5 INT'L J. CONST. L. 44 (2007).

Moreover, the Court itself did not pay too much attention to public opinion since, in its first three terms, it only heard one case in which the petitioner was not a governmental agency. Since democratization, both the executive and the legislative branches have strengthened their legitimacy in the nascent democracy through national elections. But where does the legitimacy of the Court and the Justices come from after democratization?

As scholars have pointed out, "No institution in a democratic society could become and remain potent unless it could count on a solid block of public opinion that would rally to its side in a pinch."[154] Facing crises of legitimacy and authority, the Court had more incentives to pay attention to public opinion. Wielding neither purse nor sword, the power of judicial review thus became its only tool to reestablish its legitimacy and authority.

What did the majority want after democratization when the Court began to notice the importance of public opinion? Obviously, most citizens wanted to repeal the laws that infringed upon their human rights during the authoritarian regime. They could either ask the congressmen to revise the laws, or challenge their constitutionality in the Court. The political approach was, however, not efficient owing to a variety of reasons, including filibusters, bribes, and factions. The democracy was not fully mature: legislators threw shoes, climbed on desks, and had fistfights in the assembly hall. Clearly, most people were disappointed at these national representatives. They turned to the once toothless judiciary in the hope of eradicating past wrongs. This time, the judiciary grasped the opportunity and functioned actively by striking down unpopular laws, most of which were enacted decades previously. By striking down these laws, the Court exercised the power of judicial review in an active and majoritarian way that was consistent with people's expectations. Contrary to conventional wisdom, its passive self-restraint in the past was in fact counter-majoritarian.

Given this history, judicial review today is majoritarian and welcomed by Taiwanese people because the laws it strikes down are often repugnant to the will of the people. Judicial activism has never been a serious problem in Taiwan. It is not unreasonable to believe that judicial review became popular after democratization precisely because of judicial activism and judicial supremacy.[155] Of course, whether this kind of judicial review can be categorized as judicial activism in a traditional sense is another issue. The point here is that, contrary to conventional wisdom, judicial review in Taiwan is majoritarian precisely because it substantially intervenes in the political process in which elected branches are often paralyzed by political antagonism and stalemate. Its timely intervention not only restores people's

154. MCCLOSKEY, *supra* note 25, at 46.
155. For similar situation in the American context, *see* FRIEDMAN, *supra* note 21, at 362-63.

confidence in the judiciary, but also leads, at least ostensibly, to crucial political and social change in Taiwan.

IV. MAJORITARIAN COURTS AND SOCIAL CHANGE

One of the key questions in law and politics is: Can courts bring about social change?[156] There are many theories of evaluating judicial impact.[157] Generally speaking, proponents argue that two iconic cases, *Brown v. Board of Education* and *Roe v. Wade*, epitomize the ability of judicial decisions to bring about social change. Without these two Supreme Court decisions, African Americans and women would have remained deprived of equal protection and the right to abortion. Opponents maintain that courts are like fly papers in the sense that they "draw[] resources to litigation and away from political mobilization."[158] In other words, the strategy of litigation to generate social change is inefficient since courts cannot bring about social change without the support of other branches.

Similarly, many social groups and social movements in Taiwan, such as Taiwan Alliance to End the Death Penalty, LBGT groups, and women rights movements, have tried to advance their goals by litigation. This is understandable since the Court has usually been considered an active court, striking down many unconstitutional laws in the field of fundamental rights. Many human rights, such as gender equal protection, freedom of speech, and the right to petition, have made significant progress since democratization. This makes the Court even more popular than its coordinate branches, like its American counterpart.[159] Furthermore, many people aver that Interpretation No. 261, in which the Court declared the Temporary Provisions unconstitutional, demonstrated that decisions of the Court could also play a pivotal role in bringing about political change. The Court has earned a reputation for being active, progressive, and responsive to public opinion since the transitional period. Given that, social groups even today often adopt the litigation strategy to advance their goals. It seems that the

156. ROSENBERG, *supra* note 122; MICHAEL W. MCCANN, RIGHTS AT WORK (1994); DONALD L. HOROWITZ, THE COURTS AND SOCIAL POLICY (1977); Peter H. Schuck, *Public Law Litigation and Social Reform*, 102 YALE L.J. 1763, 1769-70 (1993) (book review); LEVERAGING THE LAW (David A. Schultz ed., 1998); L.A. Powe, Jr., *The Supreme Court, Social Change, and Legal Scholarship*, 44 STAN. L. REV. 1615 (1991-1992) (book review); Malcolm M. Feeley, *Hollow Hopes, Flypaper, and Metaphors*, 17 LAW & SOC. INQUIRY 745 (1992) (book review); MATTHEW E. K. HALL, THE NATURE OF SUPREME COURT POWER 95-96, 160-65 (2011).

157. BRADLEY C. CANON & CHARLES A. JOHNSON, JUDICIAL POLICIES 154-85 (1999).

158. Gerald N. Rosenberg, *Knowledge and Desire: Thinking about Courts and Social Change*, *in* LEVERAGING THE LAW, *supra* note 156, at 254; ROSENBERG, *supra* note 122, at 420-29; but *see* Roy B. Flemming et al., *One Voice Among Many: The Supreme Court's Influence on Attentiveness to Issues in the United States*, 1947-92, 41 AM. J. POL. SCI. 1224, 1229-30 & n.6 (1997).

159. MARSHALL, *supra* note 25, at 126.

Court has transformed itself from a puppet of dictatorship into an active force for political and social change.

Nonetheless, I argue that even though the majoritarian Court brought about cardinal political and social change during the transitional era,[160] it is overly optimistic to expect that the same majoritarian Court in a full-fledged democracy can efficiently bring about political and social change. Of course, whether the judiciary can bring about social change is a theoretical as well as an empirical question. The following analyses, without the support of empirical evidence, are at best speculative.

A. *Transitional Period*

Conventional wisdom has it that there are three reasons that restrict courts' ability to generate social change: lack of independence, lack of implementation power, and lack of majority support.[161] Nonetheless, the Court successfully overcame these three hurdles and brought about political change during the transitional period.

With respect to the first difficulty, the Court in fact behaved independently most of the time during this period.[162] As indicated earlier, the Court faced a crisis of legitimacy after the collapse of the authoritarian regime. During the authoritarian era, unsurprisingly, the Court was merely a puppet of the autocrats. To get rid of this image and entrench its authority, it needed to establish its prestige by ruling impartially. Therefore, since the martial law was lifted in 1987, the Court has exercised the power of judicial review frequently, especially in the field of fundamental rights. Decisions in the human rights domain are usually less politically controversial since politicians have fewer stakes in human rights cases. Therefore, they have less incentive to control the Court in this field. Additionally, these decisions were more popularly welcomed given the history of human rights violations under the authoritarian regime. Goals such as expanding the rule of law and protecting human rights quickly became the national consensus. There were little ideological differences between the two major parties regarding whether or how the Court should protect human rights, which also explains why the Court could function independently. In short, the crisis of judicial legitimacy and the popularity of these decisions helped the Court to overcome the first obstacle by ruling for citizens instead of for political

160. *See* Wen-Chen Chang, *Public Interest Litigation in Taiwan: Strategy for Law and Policy Changes in the Course of Democratization, in* PUBLIC INTEREST LITIGATION IN ASIA 136, 142-44 (Po Jen Yap & Holning Lau eds., 2011).

161. *See* MCCANN, *supra* note 156, at 290; ROSENBERG, *supra* note 122, at 10-21.

162. *See* Nuno Garoupa et al., *Explaining Constitutional Review in New Democracies: The Case of Taiwan*, 20 PAC. RIM L. & POL'Y J. 1 (2011).

parties.

The same rationale explains how the Court solved the implementation problem. Since most decisions directly related to fundamental rights were ignored during the authoritarian era, public opinion tended to press newly elected representatives to implement these decisions once they were promulgated. Political elites generally did not resist these decisions, partly because there was little dissent among political elites over the rulings.[163] Besides, politicians could claim credit by supporting these decisions. At the early stage of transition, no promising politician would risk his or her political career by blocking these highly acclaimed and popular decisions. Indeed, it could also be that the party in power supported the policy by inviting the Court to render decisions that were consistent with its interests. Thus, by shifting the blame to the Court, the ruling party could pursue their preferred policies, while claiming that it was constitutionally required to implement judicial decisions.[164] Finally, many constitutional decisions issued during this period did not ask elected branches to do anything burdensome. The implementation problem was lessened to a significant degree in cases relating to negative liberties.[165] In many cases, Justices simply nullified laws without demanding further action; sometimes they directly replaced the void laws with their opinions through judicial lawmaking. Thus, there was not much work for the political branches to do, and even if there was, it was widely supported by public opinion.

Finally, these decisions were widely supported by both politicians and citizens. Their popularity among lay people is understandable, since a large proportion were human rights cases decided in favor of petitioners. As for politicians, members of the opposition party welcomed these decisions since they expanded the protection of political rights, such as freedom of association and the right of election, which substantially advanced their political agenda.[166] On the other hand, members of the ruling party did not resist these popular decisions since they also needed public support to compete with the opposition party.

In a nutshell, immediately after the lifting of martial law, the Court did bring about political and social change in the fields that garnered a national consensus, such as political liberalization and protection of human rights. With the Court overcoming these numerous hurdles, the litigation strategy was effective and efficient. Interpretation No. 261 and other fundamental rights cases from this time exemplify this point. It successfully ended the

163. *See* Knight & Epstein, *supra* note 133, at 196, 205-06.

164. *See supra* note 69-71and accompanying text.

165. HIRSCHL, *supra* note 8, at 148.

166. *See* Tom Ginsburg, *Law and Transformation in Korea and Taiwan*, *in* FIGHTING FOR POLITICAL FREEDOM 43, 58-59 (Terence C. Halliday et al. eds., 2007).

prolongation of the first-term national representatives and required the government to hold national elections, which terminated the forty-year authoritarian period.

B. *Democratization Stage*

As Taiwan gradually became a fully democratized country, it became increasingly difficult for the Court to bring about political and social change. All of the conditions for the Court to overcome the said three obstacles during the transitional period either disappeared or weakened with time.

Firstly, it has become difficult for Justices to vote impartially since the confirmation process for Justices has become much more politicized since the party turnover in 2000.[167] Since then, political conflict between the two major parties has become more intense. Politicians realize that Justices of the Constitutional Court do have the power to shape the political agenda, and they scrutinize the candidates more carefully. Consequently, several candidates were rejected by the congress in 2007 because of political concerns. Given this new political milieu, Justices are less likely to be politically neutral. Those counter-majoritarian decisions in the field of separation-of-powers mentioned above clearly demonstrated the tension between the congress and the executive with the support of the Court.

With respect to the Court's implementing ability, the escalation of this political antagonism has made it increasingly difficult for the Court to implement its decisions. The hostile congress is becoming less cooperative with both the executive and the Court in implementing judicial decisions effectively. Interpretation No. 632 is the best example in which the congress refused to cooperate with the executive branch by not confirming the candidates for ombudsmen nominated by the president, regardless of its constitutional obligation and the Court's mandate.

Finally, public opinion has become more diversified in a mature democracy than it was at the early stage of transition. Using constitutional jargon, easy cases are quickly settled, while hard cases persist. For example, people in the transitional period were satisfied to see the prohibition of torture and mandatory death penalties; now they quarrel about whether a conditional death penalty violates right to life. In the past, the government endeavored to eliminate blatant gender discrimination; now people debate whether the prohibition of gay marriage violates equal protection. The same ideological gap occurs in the field of separation of powers, too. In the past, there were common goals, such as the lifting of martial law and the holding

167. For a brief introduction about the political parties in Taiwan, *see*, for example, JOHN F. COPPER, TAIWAN: NATION-STATE OR PROVINCE? 131-46 (2009).

of national elections. Now politicians dispute the extent of presidential privilege.

All in all, in a highly divided society, there is no single majority, but rather many pluralities. Without clear and strong support from the majority, it is difficult, if not impossible, to garner national consensus. Accordingly, any decision the Court issues will face strong opposition from opponents, which makes it unlikely for the Court alone to bring about social change in the future. What is worse, given the past records discussed above, it is not likely that the majoritarian Court will stand by the minorities. In other words, losers in the congress will probably still be losers in the courtrooms.

Admittedly, the definition of "political and social change" could have multiple interpretations.[168] Critics argue that a traditional court-centered framework overly narrows and underestimates the causality and impact of judicial decisions.[169] Some scholars instead analyze the relationship between courts and social change from a bottom-up, dispute-centered perspective,[170] maintaining that some obstacles to social change could become resources for social movements. The incompetence of courts and the uncertainty of legal norms, for instance, can leverage change if maneuvered properly.[171] It is even possible that losing a case in court will still lead to some social or political changes.[172] As indicated earlier, however, a comprehensive study of courts and social change is beyond the scope of this paper. Suffice it to say that compared to other courts, it is less likely for a majoritarian court, such as the Court, to bring about political and social change, however defined, since it will more often than not follow mainstream society at the expense of the minority.

V. CONCLUSION

This article tries to demonstrate that the Court is a majoritarian court more often than not from three perspectives: docket records, agenda-setting, and case studies. I argue that the Interpretations are consistent with public opinion most of the time in the sense that the Court seldom resists the contemporary congressional majority. When it rules against the majority, it did so more often in separation-of-powers cases than in fundamental-rights

168. *See* Michael W. McCann, *Law and Political Struggles for Social Change: Puzzles, Paradoxes, and Promises in Future Research*, *in* LEVERAGING THE LAW, *supra* note 156, at 333-37.

169. MCCANN, *supra* note 156, at 290; but *see* Gerald N. Rosenberg, *Positivism, Interpretivism, and the Study of Law*, 21 LAW & SOC. INQUIRY 435, 445-54 (1996).

170. *See* Michael W. McCann, *Reform Litigation on Trial*, 17 LAW & SOC. INQUIRY 715, 728-43 (1992); CANON & JOHNSON, *supra* note 157, at 16-26.

171. MCCANN, *supra* note 156, at 177-79.

172. *Id.* at 154.

cases.[173] Additionally I argue that judicial review is majoritarian mainly because of its legitimacy crisis after democratization. Judicial supremacy exists in Taiwan, but only in accordance with the majority.[174] This also explains why most Taiwanese people, including constitutional law scholars, do not worry about judicial activism. This is in stark contrast to proposals about judicial minimalism, popular constitutionalism, and departmentalism in the United States. In Taiwan, judicial self-restraint, championed in many other countries as a virtue, is indeed counter-majoritarian. This feature directly affects the likelihood that the Court will bring about political and social change in the future.

In new democracies, courts are usually expected to eradicate past wrongs and bring about significant change in the political arena,[175] and Taiwan is no exception. When there is social consensus, and when the political branches fail to work properly,[176] it is relatively easy to bring about political and social change through litigation. Contrarily, when public opinion is divided or opposed to change, there is little reason to believe that the judiciary can actively create the tide of change alone. The performance of the Court before and after democratization seems to support this argument. Besides, it is possible that the more political a court becomes, the more representative and majoritarian it will be.[177] Given this, with the increasingly politicized nomination and confirmation processes seen in Taiwan in recent years, it seems pessimistic that the Court can play a role in leading political and social change in the future.

Nevertheless, the majoritarian propensity of the Court should not be overstated. This article obviously does not contend that the Court has always been majoritarian after democratization; nor do I claim that public opinion dictates the ruling of every single case the Court has made. The concept of "the majority" in any democracy is hard to evaluate with surgical precision, no matter what the proxy or baseline is. With the caveat in mind, however, it is possible that courts in new democracies are more likely to be majoritarian than their counterparts in old democracies. In addition to the political and institutional factors that constrain courts around the globe similarly, courts in nascent democracies usually face more distrust and inquiry because they are part of the authoritarian regimes before transition. This legitimacy crisis would make them more inclined to seek support from the public.

Being an old constitutional court in a new democracy, scholars have had

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173. SHAPIRO & STONE SWEET, *supra* note 4, at 183.

174. WHITTINGTON, *supra* note 63, at 294.

175. *See* Tom Ginsburg, *The Constitutional Court and judicialization of Korean politics*, *in* NEW COURTS IN ASIA 145, 155 (Andrew Harding & Penelope Nicholson eds., 2010).

176. FRIEDMAN, *supra* note 21, at 260.

177. PERETTI, *supra* note 21, at 80-132.

different evaluations of the Court's performance after democratization. Some believe it is cautious,[178] while others contend it is relatively active.[179] At first blush, the two arguments seem to be contradictory. Actually, they are two sides of the same coin. Public opinion contributes both to the activeness and cautiousness of the Court: it is active when it is backed by public opinion; it is cautious when a divided public opinion is translated into a political clash. It is still not clear whether this majoritarian judiciary is peculiar in Taiwan, or it is common among new democracies. It is possible, however, that courts in new democracies would behave differently to their Western counterparts. Further studies would clarify this puzzle.

178. *See* Yeh & Chang, *supra* note 66, at 823-31 (2011); GINSBURG, *supra* note 30, at 154.

179. *See* GRAHAM HASSALL & CHERYL SAUNDERS, ASIA-PACIFIC CONSTITUTIONAL SYSTEMS 170 (John Ravenhill ed., 2002); Thomas Weishing Huang, *Judicial Activism in the Transitional Polity: The Council of Grand Justices in Taiwan*, 19 TEMP. INT'L & COMP. L.J. 1, 40-45 (2005).

APPENDIX: INTERPRETATIONS INDEX

Table I & Figure I (left-hand side): Interpretations (number of unconstitutional laws if more than one):

No. 224, 251, 288, 300, 318, 321, 339, 340, 365, 366, 371, 373, 384, 386, 392(2), 405, 434, 436, 439, 445, 450, 452, 453, 471, 477, 487, 491, 499, 507, 522, 523, 524, 551, 558, 573, 580, 583, 585, 587, 588, 589, 601, 603, 610, 613, 616(2), 624, 631, 633, 636(2), 641, 644, 645, 649, 653, 654, 655, 662, 663, 664(2), 666, 669, 670, 673, 677, 680, 685, 687, 694, 696, 701, 702, 704, 708.

Table II & Figure I (right-hand side): Interpretations (number of unconstitutional laws if more than one):

No. 218(2), 264, 268, 273, 274, 280, 289, 291, 294, 313, 316, 320, 324, 337, 339, 350, 367, 380, 390, 394, 399, 400(2), 402, 406, 415, 422(2), 423, 425, 443, 450, 451, 454, 455, 456, 457, 474, 478, 479, 484, 492, 505, 514, 515, 524, 529(2), 532, 562, 566, 567, 568, 570(2), 581, 586, 598, 602, 609(2), 619, 625(2), 638, 640, 642, 650, 653, 657, 658, 661, 674(2), 692, 696, 703, 705(6), 706(2), 707.

Table III Interpretations (number of unconstitutional laws if more than one):

Equal Protection Cases: No. 340, 365, 405, 452, 477, 573, 580, 610, 624, 649, 666, 670, 673, 694, 696, 701.

Right to Petition Cases: No. 288, 321, 384, 436, 439, 507, 610, 636, 653, 654, 663, 704.

Property Cases No. 224, 318, 339, 386, 434, 573, 580, 589, 616(2), 641, 663, 673, 680, 696.

Table IV Interpretations (number of unconstitutional laws if more than one):

Equal Protection Cases: No. 400(2), 455, 457, 567, 696.

Right to Petition Cases: No. 273, 423, 653.

Property Cases No. 218(2), 291, 337, 339, 350, 367, 390, 400(2), 406, 415, 425, 451, 474, 478, 484, 492, 514, 515, 562, 566, 581, 586, 598, 602, 625(2), 640, 642, 650, 657, 661, 674(2), 692, 696, 703, 705(6).

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服從多數的司法違憲審查
——以台灣為例

林 建 志

摘 要

傳統見解認為司法違憲審查因宣告國會多數通過的法律無效，而面臨抗多數困境。但這種說法除了沒考慮到國會是否真的代表多數民意外，也並未考量所謂的多數民意是何時、在哪裡形成。這種過度簡化的說法預設了一旦法律通過，民意就不會改變，也預設了全世界的司法違憲審查都以相同的形式在運作。本文嘗試從三個角度指出臺灣的憲法法院實際上是符合多數民意的：判決記錄、議程決定、與個案分析。本文主張憲法法院由於面臨制度上的危機，在多數時候並未選擇對抗當代的多數民意。因此，雖然司法最高性確實存在於臺灣，但僅因為它與多數民意相符。相對地，在許多其他國家被讚揚的司法自制美德，事實上在臺灣是抗多數的。這個特點也影響了憲法法院在將來是否能帶動政治與社會變遷的可能性。

關鍵詞： 司法審查、抗多數困境、民主轉型、憲法法院、司法院大法官解釋