Majoritarian Judicial Review: The Case of Taiwan

Chien-Chih Lin
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I. Foreword

Since the end of World War II, the world has seen several waves of constitution-making. The human rights violations of the Second World War caused new democracies around the globe to establish several forms of judicial review, strong or weak, in the hope of entrenching human rights enshrined in newly enacted constitutions. Most nascent constitutions, except for those that are sham, vest the judiciary with the power of judicial review to veto the collective decisions made through ordinary democratic processes. 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. Their judicial decisions cannot usually be overruled through normal political process. 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 has accelerated to the extent that, some scholars contend, modern democracy has transformed into a new political order – juristocracy.

Not surprisingly, the propriety of judicial intervention in politics, also known as judicial activism, is hotly debated. Together with the judicialization of politics, this has caused many thorny conflicts embedded in judicial review to emerge. Among

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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 unless specified otherwise.
7 See SHAPIRO & STONE SWEET, supra note 4, at 142-45, 177; but see BRIAN Z. TAMANAH, *BEYOND THE FORMALIST-REALIST DIVIDE: THE ROLE OF POLITICS IN JUDGING 111-31* (2010) (arguing that political scientists tend to exaggerate the role of politics in judicial decision making).
8 For more discussion about the dynamic interaction between law and politics, see John Ferejohn, *Judicializing Politics, Politicizing Law*, 65 L. CONTEMPT. PROBS. 41 (2002); Ran Hirschl, *The Judicialization of Politics*, in *THE OXFORD HANDBOOK OF LAW AND POLITICS*, supra note 6, at 119-124, 129-138 (explaining what the judicialization of politics is and why it happens); C. Neal Tate, *Why the Expansion of Judicial Power*, in *THE GLOBAL EXPANSION OF JUDICIAL POWER 27* (C. Neal Tate & Torbjörn Vallinder eds., 1995). It is noteworthy that judicialization of politics not only occurs in the United States, but also emerges in Asia. See general THE JUDICIALIZATION OF POLITICS IN ASIA (Björn Dressel ed., 2012).
10 See e.g. STEFANIE A. LINDQUIST & FRANK B. CROSS, *MEASURING JUDICIAL ACTIVISM* 1-46 (2009).
them, the fundamental dilemma of judicial review is that, on the one hand, the branch with neither purse nor sword 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, proponents argue, judicial review is still desirable so long as it is only exercised in certain, limited ways. In contrast, opponents maintain the counter-majoritarian difficulty of judicial review renders it fundamentally contradictory to democratic values. Instead, they advocate for “popular constitutionalism,” or “democratic constitutionalism.”


13 See The Federalist No. 78.

14 See e.g., John Hart Ely, Democracy and Distrust: A Theory of Judicial Review 73-179 (1980) (arguing that judicial review could be consistent with democratic spirit when it polices the process of representation, clears the channels of political change, and facilitates the representation of minorities); Bruce Ackerman, We the People: Foundations 230-94 (1991) (justifying judicial review by distinguishing two tracks of lawmaking: normal politics and higher lawmaking); David A. Strauss, The Living Constitution 33-46 (2010); David A. Strauss, Common Law Constitutional Interpretation, 63 CHICAGO L. REV. 877, 884-924 (1996) (advocating for a common law interpretive approach since this approach is a conventional method widely accepted by the Americans); Cass R. Sunstein, One Case at a Time: Judicial Minimalism on the Supreme Court 10-19 (1999) (floating a minimalism approach that reduces both decision costs and error costs, delivering only narrow and shallow decisions); Ronald Dworkin, Freedom’s Law: The Moral Reading of the American Constitution 1-38 (1996); Ronald Dworkin, Law’s Empire 375 (1986) (arguing for a moral reading of the constitution). See Cass R. Sunstein, Beyond Judicial Minimalism, 43 TULSA L. REV. 825, 836-42 (2007-08) (admitting that it is the broad and deep decisions that lead to the “most glorious moments in democratic life”).

15 See Waldron, supra note 2, at 1359-69 (arguing that the judiciary should not intervene in rights-based disputes when certain conditions are met); Mark Tushnet, Taking the Constitution Away from the Courts 159 (1999) (contending that the representation reinforcement argument Ely advanced to justify judicial review “overlooks politics”); Antonin Scalia, Originalism: The Lesser Evil, 57 U. CHICAGO L. REV. 849, 862 (1988-1989) (arguing that originalism, albeit not perfect, could overcome the counter-majoritarian difficulty more easily since the criterion which originalism relies on is historical rather than ideological); Keith E. Whittington, Constitutional Interpretation 34-35 (1999) (arguing that originalism “offers to overcome the countermajoritarian difficulty. . . by dissolving the problem by setting it in a larger constitutional context”).

Nevertheless, most theories of judicial review seem to be grounded on the shaky assumption that counter-majoritarian difficulty does exist\(^\text{19}\) – 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.\(^\text{20}\) Moreover, this assumption begs the question, what counts as the majority?\(^\text{21}\) 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 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.\(^\text{22}\) In other words, it is also plausible to argue that judicial review is indeed majoritarian.\(^\text{23}\)

Moreover, even if the judiciary is not constrained by these check and balance mechanisms, judicial activism and judicial review are not necessarily counter-majoritarian.\(^\text{24}\) This is because not all decisions that strike laws down on constitutional grounds are inconsistent with public opinion.\(^\text{25}\) To label a decision antidemocratic, logically, one must prove beforehand that the law failing to survive the gauntlet of judicial review really represents the majority will. In reality, the judiciary is 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


\(^{20}\) See Nathaniel Persily, Introduction, in PUBLIC OPINION AND CONSTITUTIONAL CONTROVERSY 3, 4-7 (Nathaniel Persily et al. eds., 2008).


popular will consistently and continuously for long periods of time. This is true even when judicial activism was allegedly most rampant in American history. 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, and thus has more incentives to rule in favor of the majority. 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], this paper endeavors to fill in this academic lacuna. This paper 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. Between 1949 and 1987, after the Republic of China lost the Chinese civil war and retreated to Taiwan, Taiwan remained under an authoritarian regime. Until democratization began in 1987, justices of the Court remained obedient to the strongmen the majority of the time. Owing to the crisis of legitimacy after democratization, the Court evolved to function

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26 See e.g. ROBERT G. MCCLOSKEY, THE AMERICAN SUPREME COURT 14, 260-61 (2010) (arguing that the Court, being part of the current of public opinion, “seldom lagged far behind or gorged far ahead of America”); THOMAS R. MARSHALL, PUBLIC OPINION AND THE REHNQUIST COURT 153-62 (2008) (maintaining empirically that “[t]he modern Supreme Court has compiled a remarkably consistent record of representing American public opinion”); David S. Law, A Theory of Judicial Power and Judicial Review, 97 GEO. L.J. 723, 728-30 (2009) (suggesting that “it is entirely possible that judicial invalidation of legislative or executive action actually advances the wishes of the majority”); Robert A. Dahl, Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker, 6 J. PUB. L. 279, 283-86, 291-294 (1957) (arguing that “it would be most unrealistic to suppose that the Court would, for more than a few years at most, stand against any major alternatives sought by a lawmaking majority”); JACK M. BALKIN, THE LIVING ORIGINALISM 287-93 (2011) (elucidating that although the counter-majoritarian assumption is wrong, the judiciary is not simply a mirror of public opinion, either); 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 22, at 180-83.


28 See JEFFREY ROSEN, AMERICA’S UNWRITTEN CONSTITUTION 191, 197-98 (2012) (arguing that the Warren Court generally “partnered with Congress”).


30 It is noteworthy that in Taiwan there is also a Supreme Court, which is the last resort of all civil and criminal controversies. In order not to confuse the two, “the Court” in this paper always refers to the Constitutional Court, which has the final say over all constitutional issues. When mentioning the Supreme Court in Taiwan, I will always use “the Supreme Court.”
progressively and democratically, nullifying a constellation of laws that violated human rights during the authoritarian period. In other words, most of the laws declared unconstitutional were extremely unpopular. Hence, this paper 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 short, judicial review in Taiwan is susceptible to public opinion, which makes it majoritarian, rather than counter-majoritarian.

It is worth noting that public opinion may affect judicial review both directly and indirectly. Justices, however insulated institutionally from outside pressure, are still part of society. 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. Therefore, this paper 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.

The rest of this paper proceeds as follows. Part II examines three pieces of evidence that support the thesis of this paper. First of all, 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, when public opinion is unclear or divided, the Court simply refuses 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. Finally, the paper analyzes two critical cases in which laws with quasi-constitutional status were declared unconstitutional. At first blush, nothing could seem more counter-majoritarian than nullifying constitutional amendments. Nevertheless, the two decisions, as well as the Court itself, were extremely popular at that time. Part III begins with the question:

33 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) (alluding that public opinion during wartimes may render liberal justices more likely to suppress liberties).
34 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) (advancing that “the influence of public opinion on Supreme Court decisions is real, substantively important, and most pronounced in nonsalient cases”).
why would judicial review in Taiwan be majoritarian if justices are not elected officers? 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 a majoritarian court to change society compared to counter-majoritarian courts.

II. Majoritarian Judicial Review in Taiwan

Before examining to what extent 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]. The Court, previously known as the Council of Grand justices, exclusively exercises this power. Decisions delivered by the Court are called Judicial Yuan Interpretations, which are supreme and binding in Taiwan. Taiwan adopts so-called “abstract judicial review,” which means the Court examines only the constitutionality of the law itself, rather than its application in concrete cases. The procedural requirements to petition the Court is partly prescribed in the Constitutional Interpretation Procedure Act. People can petition the Court after exhausting all remedial possibilities available. After Interpretation No. 371, 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. The Court has struck down the challenged law 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. Secondly, the

38 There are, however, some exceptions in which the Constitutional Court denounced a law unconstitutional as applied in concrete cases, such as Judicial Yuan Interpretation No. 242.
40 Kevin T. McGuire & James A. Stimson, The Least Dangerous Branch Revisited: New Evidence on
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.\(^43\) 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: the docket records, judicial agenda-setting, and case studies.

1. 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.\(^44\) 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,\(^45\) for instance, is one telling example, in which the law struck down had no longer represented the majority opinion in Connecticut when the decision was delivered.\(^46\) 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. The basic presumption is that statutes enacted by sitting legislators better represent current majority opinion among citizens than those enacted decades ago.

Since Taiwan’s democratization, the Court has issued about 500 decisions, in which more than 150 statutes and administrative regulations are ruled repugnant to the Constitution and void.\(^47\) However, the temporal interval between the enactment and nullification of a law varies significantly. Some laws are annulled almost immediately after they are promulgated. It is plausible to argue that the Court rules against the current majority in such scenario. By contrast, at the opposite side of the spectrum, there was an extreme case in which the constitutionally problematic statute remained valid for three-quarters of a century before being declared unconstitutional. In the latter case, it would be exceedingly difficult to argue that the statute at issue still

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\(^43\) Mccloskey, supra note 26, at 46-50.

\(^44\) Balkin, supra note 26, at 302.


\(^47\) Some precedents issued by the Supreme Court were declared unconstitutional among these decisions. However, since judges of the Supreme Court are not elected through regular election, cases in which precedents were overruled by the Constitutional Court are excluded from the following two tables.
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 serve a renewable three-year term. Consequently, the preliminary assumption is that the Court rules inconsistent with public opinion when the interval is less than three years. The longer the span is, the less likely it is that the Court is acting in a counter-majoritarian manner.

Table I: Temporal Interval between enactment and nullification (statutes)

<table>
<thead>
<tr>
<th>Interval less than 3 (3-)</th>
<th>3 – 6-</th>
<th>6 – 9-</th>
<th>9 – 12-</th>
<th>12–15-</th>
<th>15–18-</th>
<th>18–21-</th>
<th>more than 21 Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Numbers of statutes</td>
<td>16</td>
<td>10</td>
<td>11</td>
<td>8</td>
<td>3</td>
<td>3</td>
<td>7</td>
</tr>
<tr>
<td>Fifth Term</td>
<td>1</td>
<td>0</td>
<td>1</td>
<td>1</td>
<td>0</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>Term*</td>
<td>10%</td>
<td>0%</td>
<td>10%</td>
<td>10%</td>
<td>0%</td>
<td>0%</td>
<td>10%</td>
</tr>
<tr>
<td>Sixth Term</td>
<td>7</td>
<td>3</td>
<td>3</td>
<td>2</td>
<td>2</td>
<td>0</td>
<td>2</td>
</tr>
<tr>
<td>Term*</td>
<td>28%</td>
<td>12%</td>
<td>12%</td>
<td>8%</td>
<td>8%</td>
<td>0%</td>
<td>8%</td>
</tr>
<tr>
<td>After 2003</td>
<td>8</td>
<td>7</td>
<td>7</td>
<td>5</td>
<td>1</td>
<td>3</td>
<td>4</td>
</tr>
<tr>
<td></td>
<td>18.6%</td>
<td>16.3%</td>
<td>16.3%</td>
<td>11.6%</td>
<td>2.3%</td>
<td>7.0%</td>
<td>9.3%</td>
</tr>
</tbody>
</table>

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](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 roughly 16 years. Table 1 shows that in only about one-fifth of the cases did the Court declare a law enacted less than three years previously 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 court 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, usually regarded as most active, rule against the majority in less than one-third of the cases. In other words, generally speaking, the Court 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 are 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>
<thead>
<tr>
<th>Interval</th>
<th>less than 4 (4-)</th>
<th>4 – 8-</th>
<th>8 – 12-</th>
<th>12 – 16-</th>
<th>16 – 20-</th>
<th>more than 20</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Number of Regulations</td>
<td>8</td>
<td>23</td>
<td>20</td>
<td>9</td>
<td>15</td>
<td>13</td>
<td>88</td>
</tr>
<tr>
<td>Fifth Term*</td>
<td>3</td>
<td>7</td>
<td>4</td>
<td>0</td>
<td>2</td>
<td>1</td>
<td>17</td>
</tr>
<tr>
<td></td>
<td>17.6%</td>
<td>41.2%</td>
<td>23.5%</td>
<td>0%</td>
<td>11.8%</td>
<td>5.9%</td>
<td>100%</td>
</tr>
<tr>
<td>Sixth Term</td>
<td>5</td>
<td>10</td>
<td>6</td>
<td>5</td>
<td>5</td>
<td>5</td>
<td>36</td>
</tr>
<tr>
<td></td>
<td>13.9%</td>
<td>27.8%</td>
<td>16.7%</td>
<td>13.9%</td>
<td>13.9%</td>
<td>13.9%</td>
<td>100.1%</td>
</tr>
<tr>
<td>After 2003</td>
<td>0</td>
<td>6</td>
<td>10</td>
<td>4</td>
<td>8</td>
<td>7</td>
<td>35</td>
</tr>
<tr>
<td></td>
<td>0%</td>
<td>17.1%</td>
<td>28.6%</td>
<td>11.4%</td>
<td>22.9%</td>
<td>20%</td>
<td>100%</td>
</tr>
</tbody>
</table>

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 – four years shorter than that in the statutory context. Among them, nine percent are declared unconstitutional in four years while about 15 percent are declared unconstitutional after more than 20 years. From these findings, the Court disagrees 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.\textsuperscript{48}

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.”\textsuperscript{49} 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 uphold in order to protect the discrete and insular minorities from majoritarian tyranny.

<table>
<thead>
<tr>
<th>Table III: Interval Between Enactment and Nullification of Selected Statutes</th>
</tr>
</thead>
<tbody>
<tr>
<td>Interval of years</td>
</tr>
<tr>
<td>Equal Protection</td>
</tr>
<tr>
<td>Property</td>
</tr>
<tr>
<td>Right to Petition</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Table IV: Interval Between Enactment and Nullification of Selected Regulations</th>
</tr>
</thead>
<tbody>
<tr>
<td>Interval of years</td>
</tr>
<tr>
<td>Equal Protection</td>
</tr>
<tr>
<td>Property</td>
</tr>
<tr>
<td>Right to Petition</td>
</tr>
</tbody>
</table>

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

\textsuperscript{48} It is noteworthy that the Court rarely referred to public opinion in its decisions. So far, the Court mentioned public opinion only in Interpretation No. 603, in which it rejected the idea that the Court should be bound by public opinion.

\textsuperscript{49} FRIEDMAN, supra note 22, at 378.
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. It is therefore too risky to equate congressional majority with majority opinion.

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, 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. 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. In other words, the judiciary can still be counter-majoritarian so long as it stays in the “zone of acquiescence” or “zone of reasonableness.” Within this zone, it is hard to tell whether a decision is majoritarian or

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) (pointing out that “[t]he impact of procedures, like the impact of agenda setters and multiple majorities, loosens the coupling between legislative outcomes and majority preferences”).
51 See Jonathan D. Casper, The Supreme Court and National Policy Making, 70 AM. POL. SCI. REV. 50, 56 (1976) (arguing that “the time required for the typical case to get to the Supreme Court for resolution” should be taken into account when coding).
54 POSNER, supra note 46, at 86-87.
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,\textsuperscript{55} 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).\textsuperscript{56} Besides, the public does not have direct ways of controlling the Court. It can only express its disappointments and disagreements with the 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. 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,\textsuperscript{57} since judicial review in Taiwan is abstract. The constitutionality of a statute can 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.

\textsuperscript{56} Richard Funston, The Supreme Court and Critical Elections, 69 AM. POL. SCI. REV. 795, 796 n.7 & 9 (1975).
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). Specifically, people usually spend 2.9 years in lower courts before they challenge the statutes in the Court. 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 of the cases. Namely, the Court still rules in consistent with the majority in about two-thirds of the cases.

Figure I. Time required in lower courts

![Figure I. Time required in lower courts](chart.png)

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

This figure (33 percent) is also meaningful from the perspective of comparative constitutional research. Half a century ago, American political scientists had empirically advanced that “the policy views dominant on the [U.S. Supreme] Court are never for long out of line with the policy views dominant among the lawmaking majorities of the United States.” Since the inception of modern polling in 1930s,

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

59 Dahl, supra note 26, at 285.
“about three-fifths of Supreme Court decisions represented majority public opinion.”

Even the Warren Court, the most active court in American history, rendered 61 percent of the cases in line with the majority opinion. Other empirical studies conducted later also supported this conclusion. Furthermore, several studies have demonstrated that, on average, the “[U.S.] government policy [was] consistent with public opinion roughly 55 to 65 percent” from 1935 to 1986. From this perspective, it is reasonable to believe that the judiciary was no less democratic than its coordinate branches during that same time span in the United States. Although it is not clear to what extent the Taiwanese government stands in line with public opinion, it is fair to argue that the performance of the Taiwanese Constitutional Court is relatively close to that of the U.S. Supreme Court. Both rule in favor of the majority in about two-thirds of the decisions.

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 stricken 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. 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 decreases the costs and risks for the congress to check and balance the Court as the executive stands by the legislative. In practice, both the legislative and the

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60 Marshall, supra note 26, at 153.
61 Id. at 37 tbl. 2.3.
63 To the knowledge of the author, there is no similar poll conducted in Taiwan.
64 See Barnum, supra note 25, at 283.
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. It could also be that legislators may intentionally invite justices to issue their opinions regarding thorny issues in order to shift political responsibility. This interaction can be observed when other structural limitations occur, such as federalism, entrenched interests, and factions. In these circumstances, it would be unfair to condemn judicial review as anti-democratic since they are merely the scapegoat of the political branches.

2. 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 Provision, 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 behaves in a “counter-super majoritarian” way since it strikes 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.

A. Interpretation No. 261

The most salient example is Interpretation No. 261, in which the Court plainly declared the Temporary Provisions unconstitutional, a statute with

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69 For further discussions about Interpretation No. 261, see GINSBURG, supra note 31, at 144-48.
70 Id. at 113-15.
quasi-constitutional status. The issue in this decision is whether the postponed national election should be held immediately. 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 as soon as possible for the maintenance of the constitutional system. The KMT party that enacted the Temporal Provision was still the ruling party that controlled both the executive and the legislative at that time. At first blush, 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. One former justice that participated in this decision later confirmed that these representatives had already become a burden to the ruling party. He also acknowledged that this Interpretation exemplified the judicialization of politics, and defended it on the ground that a constitution was essentially political.

The promulgation of this decision has multiple implications for the 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

71 Id. at 144-48.
72 See Wang Chin-Shou, Taiwan Si Fa Zheng Zhi De Xing Qi [The rise of judicial politics in Taiwan], 16 TAIWAN ZHENG ZHI XIAO KAN [TAIWAN POL. SCI. REV.] 59, 67-71 (2012).
74 Id. at 16.
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.

B. Interpretation No. 499

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 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. It is also an excellent example of a case in which the insulated judiciary can sometimes be more democratic than the legislature when the political channel is jammed. The issue in this case is 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 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

76 See e.g., Tzong-Li Hsu, Xian Fa Wei Xian Hu? [Is the Constitution unconstitutional?], 60 TAIWAN L. REV. 141-54 (2000); Hwai-Tzong Lee, Tan Xian Fa De Jia Zhi Ti Xi [Discussions about Constitutional Values], 61 TAIWAN L. REV. 142-56 (2000); Chih-Hsiung Hsu, Xian Fa Bao Zhang Yu Wei Xian De Xian Fa Gui Fan [Constitutional Protection and Unconstitutional Constitution], 11 TAIWAN L.J. 21-34 (2000).
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 that the case was debated in the Court, it is 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.

C. 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 legislative. 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.”\(^{77}\) Furthermore, the Court has reiterated the importance of marriage and family, and emphasized that it is constitutionally protected. Accordingly the Court expressly endorses the constitutionality of criminalizing adultery in Interpretation No. 554. Notice that the Court also acknowledges that this issue “must be weighed and determined by the legislature.”\(^{78}\)

Interpretation No. 666, which relates to sexual transactions, is particularly illustrative.\(^{79}\) 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 stresses the reasoning that “how to regulate and whether penalty is warranted for sexual transactions is within the confines of legislative discretion.”\(^{80}\) Therefore, it strikes down the law at issue on the grounds of equal protection, and reminds the government to enact statutes or regulations to control or penalize sexual transactions in the last paragraph of the reasoning, trying not to be mistakenly conceived as sexually progressive. Unsurprisingly, the law now punishes both parties in a sexual transaction. Thus, the court acts consistently with the moral public opinion in fundamental rights cases.

\(^{77}\) Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).


\(^{80}\) Id.
D. 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 working experience, 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.

So far, the Court has delivered four decisions that directly relate to the constitutionality of electoral laws: Interpretations No. 290, 340, 442, and 468. Only in one case, 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 experience 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.\(^\text{81}\)

In Interpretation No. 468, the law requires that applicants for the candidacy for President must meet two preconditions: joint endorsements 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.”\(^\text{82}\)

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.”

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.

3. Agenda Setting

The third evidence is the Court’s agenda-setting power: the Court exercises its discretion by avoiding being enmeshed in highly contentious issues in which public opinion is highly divided. 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 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.

Researchers have pointed out that justices behave strategically not only in delivering their opinions, but also in setting their agenda. When deciding whether or not to hear a case, a justice takes into account both endogenous and exogenous factors. 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. The justice may

84 David Fontana, Docket Control and the Success of Constitutional Courts, in COMPARATIVE CONSTITUTIONAL LAW 624, 627-33 (Tom Ginsburg & Rosalind Dixon eds., 2011).
85 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) (arguing that “the justices will accept a higher proportion of constitutional cases, as opposed to statutory ones” when certain conditions are met); 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) (arguing legal factors play a more critical role than policy preferences in setting judicial agenda); Ryan J. Owens, The Separation of Powers and Supreme Court Agenda Setting, 54 AME. J. POL. SCI. 412, 425 (2010) (arguing that “there is little reason to believe that justices are strategic SOP agenda setters”); Ryan J. Owens, An Alternative Perspective On Supreme Court Agenda Setting In A System Of Shared Powers, 52 JUST. SYS. J. 183, 199 (2011) (arguing that “the Court does not heed the preferences of key pivots in Congress and the executive when setting its agenda”).
87 This is named aggressive grants. See H.W. PERRY JR, DECIDING TO DECIDE: AGENDA SETTING IN THE UNITED STATES SUPREME COURT 207-12 (1991) (confirming that all justices admitted that aggressive grants occur); Sara C. Benesh et Al., Aggressive Grants By Affirm-Minded Justices, 30 AMERICAN POL. RESEARCH 219 (2002).
also intentionally decide not to hear a case when it is believed that he or she would lose merit. Unsurprisingly, it is also possible for the justice to decide to hear cases even though he or she wants to affirm. Externally, the stances of other branches are also influential when a court exercises this agenda-setting power.

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. Interest groups also play an important role in shaping the judicial agenda by filing amicus briefs.

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 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.

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” 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. In practice, the Court did repeatedly announce that “the subject matter evaluated is not limited to that specified in the petition, but may

88 This is usually called “defensive denials.” See PERRY, supra note 86, at 198-207 (maintaining that “All of the justices acknowledged the existence of defensive denials” and “Clerks in all changers were aware of defensive denials”); LEE EPSTEIN & JACK KNIGHT, THE CHOICES JUSTICES MAKE 80 (1998).
92 PERETTI, supra note 22, at 148-51.
93 See Vanessa Baird & Tonja Jacobi, Judicial Agenda Setting Through Signaling And Strategic Litigant Responses, 29 WASH. U. J.L. & POLY 215, 216-17, 226-39 (2009) (emphasizing that “Supreme Court justices can summon cases onto their agendas well before the certiorari process begins, by communicating their priorities and preferences to potential litigants”); Gregory A. Caldeira & John R. Wright, Organized Interests and Agenda Setting In The U.S. Supreme Court, 82 AME. POL. SCI. REV. 1109 (1988)
94 Graber, supra note 65, at 44.
95 See Garoupa & Ginsburg, supra note 37, at 550.
include the laws and orders adopted to reach the final verdict and those closely related requested for interpretation in the petition.” 96 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. 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. 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.

Figure II. Appellants of Interpretations

![Graph showing appellants of interpretations over time]

Note: Till Interpretation No. 708

Although this shows that the Court intentionally heard many more cases appealed by individuals, this does not mean that the Court has stopped exercising its

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agenda-setting power. On the contrary, it 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 avoidance.

A. Death Penalty

Whether the death penalty is constitutionally acceptable is controversial around the globe. In an 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 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 and International Covenant on Economic, Social and Cultural Rights 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.\(^100\) One former minister of the Ministry of Justice was forced to resign since she publicly refused to execute the death penalty. The conflict reached its peak in 2011 when an innocent soldier was proved to be tortured and wrongly executed in 1997.

The Alliance still petitioned the Court, trying the challenge the constitutionality of death penalty. Even though justices nominated after 2003 are more liberal than

\(^{97}\) See John Hanley, The Death Penalty, in P UBLIC OPINION AND C ONSTITUTIONAL C ONTROVERSY 108, 133-35 (Nathaniel Persily et al. eds., 2008)

\(^{98}\) Taiwan Alliance to End the Death Penalty,  h ttp://www.taedp.org.tw/en/category/21


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. Most importantly, the justices emphasized that whether capital prisoners should be pardoned was a political problem that should be decided 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.

B. Gay Marriage

In addition to the death penalty, gay marriage is another issue the Court is unwilling to tackle due to public opinion. Compared to some Asian countries, homophobia in Taiwan is not particularly abhorrent, but discrimination in regard to sexual orientation does exist. The Court has never delivered any decision that directly relates to gay rights. In Interpretation No. 617, the Constitutional Court rules 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 are gay magazines, the decision is criticized as morally conservative and stigmatizing of 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 . . ."101 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."102 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.103 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. Roughly at the same time, the Research, Development, and

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102 Id.
103 See e.g., Patrick J. Egan et al., Gay Rights, in PUBLIC OPINION AND CONSTITUTIONAL CONTROVERSY 234 (Nathaniel Persily et al. eds., 2008) (discussing the interaction between public opinion, political parties and courts).
Evaluation Commission promulgated an official poll, in which 60 percent of Taiwanese people opposed gay marriage, while only 23 percent supported it.\textsuperscript{104} In April 2012, another poll showed that 49 percent of Taiwanese people endorsed gay marriage while 29 percent still opposed.\textsuperscript{105} 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 unfavorable conclusion, which would be extremely detrimental to future gay rights movements.\textsuperscript{106}

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 grant certiorari if the couple had not withdrawn their case. Nevertheless, it still demonstrates that the judiciary is attentive to public opinion, even though it is supposed to be independent of the majority.

4. Summary

From previous paragraphs, it is clear that the Court is in line with the majority most of the time. It seems that the counter-majoritarian difficulty does not exist in Taiwan. To be sure, some may criticize that there are still cases in which unelected justices rule against to the majority.

This may be explained by its diffuse support.\textsuperscript{107} Both politicians and lay people have incentives to tolerate a somewhat precarious court so long as it by and large remains within the “zone of acquiescence.”\textsuperscript{108} Politicians may hope that the Court may serve as insurance after they are no longer in power.\textsuperscript{109} Even when they are in

\textsuperscript{105} TVBS Poll Center, \url{http://www1.tvbs.com.tw/FILE_DB/PCH/201204/5lge5lexqf.pdf}
\textsuperscript{108} See Bassok & Dotan, \textit{supra} note 53.
\textsuperscript{109} GINSBURG, \textit{supra} note 31, at 22-33.
power, they may need the help of the Court to “interpose its friendly hand” when there is a political stalemate.\textsuperscript{110} Sometimes a scapegoat is required when politicians are unwilling to shoulder certain responsibilities. As for the general population, although it is likely that people usually are not aware of what the Court really does,\textsuperscript{111} 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.\textsuperscript{112} 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.\textsuperscript{113} As indicated earlier, the Court has brought about political change and struck down corrupt constitutional amendments.

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 on the three fundamental rights of Equal Protection, due process of law, and right to hold public office.\textsuperscript{114} 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 current congressional majority.

Figure III: Counter-Majoritarian Decisions

\begin{figure}[h]
\centering
\includegraphics[width=\textwidth]{counter-majoritarian-decisions.png}
\caption{Counter-Majoritarian Decisions}
\end{figure}

\textsuperscript{110} Whittington, \textit{supra} note 67.
\textsuperscript{111} \textit{But see} James L. Gibson & Gregory A. Caldeira, \textit{Knowing the Supreme Court? A Reconsideration of Public Ignorance of the High Court}, 71 J. Pol. 429, 439 (2009).
\textsuperscript{112} Caldeira & Gibson, \textit{supra} note 107, at 642, 658.
\textsuperscript{113} Such as Interpretation No. 261 and 499.
\textsuperscript{114} Equal protection cases are Interpretation No. 340, 405, and 670. Due process cases are Interpretation No. 384, 471, and 670. Decisions concerning right to hold public office are Interpretation No. 405, 453, 491, and 655.
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—the is, when the legislative and the executive were controlled by different parties. When a party controls both the executive and the legislative, 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 for 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 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 bring about social change. The records of the Court examined seems 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 does have a brilliant record in striking down laws violating human rights, its decisions are 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.

Finally, the agenda-setting power of the Court as well as case studies suggest that the popularity and supremacy of the Court derive from the dynamic interaction

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115 Ginsburg, supra note 31, at 22-33.
between the Court and public opinion: when the congressional majority fails to reflect public opinion by revising outdated laws, the Court progressively strikes them down in the name of the Constitution; when the congressional majority newly enacts laws, the Court respects the collective decision of the elected representatives; and when public opinion is divided and represented by both the congress and the president, the Court has 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 that may force them to be in line with public opinion.

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

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118 For more discussion about the relationship between public opinion and the Court, see THOMAS R. MARSHALL, PUBLIC OPINION AND THE SUPREME COURT 14-25 (1989) (identifying twelve linkage models between public opinion and Supreme Court decisions); 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) (suggesting “What is surprising is that even after taking into account ideology, Public Mood continues to be a statistically significant and seemingly non-trivial predictor of outcomes”).
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.

1. Institutional Factors\textsuperscript{119}

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. 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.\textsuperscript{120} This process makes justices more likely to be majoritarian,\textsuperscript{121} 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.\textsuperscript{122} In addition, nominees usually grow up in upper-middle class families, are trained to become lawyers in reputable law schools, , and share 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.\textsuperscript{123} More often than not, the stance of a moderate justice (usually the median or swing justice) is adopted as court opinion.\textsuperscript{124} 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

\textsuperscript{119} See generally Cornell W. Clayton, The Supreme Court and Political Jurisprudence: New and Old Institutionalisms, in SUPREME COURT DECISION-MAKING: NEW INSTITUTIONALIST APPROACHES 15 (Cornell W. Clayton & Howard Gillman eds., 1999) (emphasizing “the importance of viewing legal institutions as part of the broader political system”).


\textsuperscript{121} See ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 47 (1999) (pointing out this propensity from the perspective of originalism).

\textsuperscript{122} See e.g., LEE EPSTEIN & JEFFREY A. SEGAL, ADVICE AND CONSENT: THE POLITICS OF JUDICIAL APPOINTMENTS 85-116 (2005) (discussing, inter alia, the nomination of Robert Bork); Cornell Clayton, Law, Politics, and the Rehnquist Court, in THE SUPREME COURT IN AMERICAN POLITICS: NEW INSTITUTIONALIST INTERPRETATIONS 151, 157 (Howard Gillman & Cornell Clayton eds., 1999) (“[t]he political mobilization turned public opinion against Bork”).

\textsuperscript{123} EPSTEIN & KNIGHT, supra note 87, at 118-35; FORREST MALTZMAN ET AL., CRAFTING LAW ON THE SUPREME COURT: THE COLLEGIATE GAME 15-16 (2000).

\textsuperscript{124} HAMMOND ET AL., supra note 88, at 95-138.
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.\footnote{ROSENBERG, supra note 116, at 16; Kevin T. McGuire & James A. Stimson, The Least Dangerous Branch Revisited: New Evidence on Supreme Court Responsiveness to Public Preferences, 66 J. POL. 1018, 1019 (2004); 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).} 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,\footnote{Lee Epstein et al., The Supreme Court As A Strategic National Policymaker, 50 EMORY L. J. 583, 585 (2001) (arguing that “given the institutional constraints imposed on the Court, the justices cannot effectuate their own policy and institutional goals without taking account of the goals and likely actions of the members of the other branches.”); Jack Knight & Lee Epstein, Institutionalizing Constitutional Democracy, in POLITICS FROM ANARCHY TO DEMOCRACY 196, 200-04 (Irwin L. Morris et al., eds. 2004).} lower courts,\footnote{ROSENBERG, supra note 116, at 16-18.} and public opinion.\footnote{James A. Stimson et al., Dynamic Representation, 89 AM. POL. SCI. REV. 543, 555-56, 560 (1995) (arguing that “[t]he Supreme Court appears to reflect public opinion far more than constitutionally expected”).} 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 \textit{Brown v. Board of Education}\footnote{Brown v. Board of Education of Topeka, 347 U.S. 483 (1954).} is a telling example.\footnote{ROSENBERG, supra note 116, at 72-93.} 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 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.”\footnote{Judicial Yuan Interpretation No. 76 (1957), available at http://www.judicial.gov.tw/constitutionalcourt/en/p03_01.asp?expno=76.} 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).\(^{132}\)

Furthermore, justices in Taiwan do not have life tenure. All justices nominated before 1997 served a fixed and renewable term of nine years;\(^{133}\) justices nominated since 1997 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/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 there are less constitutionally insulated from the society.\(^{134}\) 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. Specifically, a decision needs two-thirds of the votes (three-fourths before 1993) to become the supreme law of the land. 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.

2. Political Factors

Although it is hard to impeach a Justice, elected branches usually have many other methods of disciplining the judiciary when needed.\(^{135}\) 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,


\(^{134}\) 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, Reform of the Institution of the Grand Justices and Constitutional Status of the Judicial Yuan: An Analysis Based on the 1997 Constitutional Reform, 27 NTU L.J. 217, 225-26 (1998); Mendel, supra note 133, at 173-74.

\(^{135}\) See e.g., Gerald Rosenberg, Judicial Independence and the Reality of Political Power, 54 REV. POL. 369 (1992) (articulating the court-curbing periods in the American history).
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. Although public opinion acts as an external constraint on the judiciary, it simultaneously undergirds its legitimacy. As public support of the judiciary changes, the interaction between the judiciary and other political branches differs as well. When the 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, as well as during the reconstruction and New Deal periods, exemplifies this argument.

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 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. Now that Taiwanese democracy has matured, the Court instead underscores abstract principles, delivers clear-cut decisions, stresses checks and balances, and limits political discretion. 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

136 See supra note 26 and accompanying text.
138 Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).
139 See generally FRIEDMAN, supra note 22, at 58-136, 225-29 (discussing, inter alia, Chase’s impeachment, the Cherokee controversy, Lincoln’s suspension of writ of habeas corpus, and the switch in time that saved nine).
140 Jiunn-rong Yeh, Tsung Chuanhsing Fayuan Tao Chang Tai Fa Yuen [From Transitional Court to Ordinary Court], 31 NTU L.J. 59, 66-74 (2002).
141 Id. at 74-80.
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 are 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 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, 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 of the three branches. Only by rendering majoritarian decisions can it defend itself in the name of public support.

3. 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

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142 Such as Interpretations No. 86 and No. 166.
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. 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. 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.” Facing crises of legitimacy and authority, the Court had more incentives to pay attention to public opinion. Wielding neither purse not 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

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143 GINSBURG, supra note 31, at 129-30.
144 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).
145 McCLOSKEY, supra note 26, at 46.
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. 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 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? There are many theories of evaluating judicial impact. Roughly 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

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146 For similar situation in the American context, see FRIEDMAN, supra note 22, at 362-63 (arguing that the Kelo Court is criticized for being deferential).
have likely remained deprived of equal protection and the right to abortions. Opponents maintain that courts are like fly papers in the sense that they “draw[] resources to litigation and away from political mobilization.” 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. 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 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, 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 evidences yet, are at best speculative.

1. 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. Nonetheless, the Court successfully overcame these

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150 MARSHALL, supra note 26, at 126.

151 Fore related discussion, see GINSBURG, supra note 31, at 154-57.

152 See McCANN, supra note 147, at 290; ROSENBERG, supra note 116, at 10-21.
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.\textsuperscript{153} 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 in the first place. Therefore, since the martial law was lifted in 1987, the Court, like its Korean counterpart,\textsuperscript{154} 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, if any, 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 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.\textsuperscript{155} 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

\textsuperscript{153} See Nuno Garoupa et al., \textit{Explaining Constitutional Review in New Democracies: The Case of Taiwan}, \textit{20 PAC. RIM L. \\
POL’Y J.} 1 (2011) (admitting “[t]he results do not seem to confirm the political allegiance hypothesis”).

\textsuperscript{154} See Lim Jibong, \textit{The Korean Constitutional Court, judicial activism, and social change, in LEGAL REFORM IN KOREA} 19, \textit{33-34} (Tom Ginsburg ed., 2004) (arguing that the active Korean Constitutional court “[p]lay[s] a leading role in producing social change”).

\textsuperscript{155} See Jack Knight \\
Lee Epstein, \textit{Institutionalizing Constitutional Democracy, in POLITICS FROM ANARCHY TO DEMOCRACY, supra note 126, at 196, 205-06} (arguing that “[for] courts in the early stages of transition to a constitutional democracy, [t]heir primary role will be to reinforce those features of the constitutional system about which there is already substantial agreement”).
was constitutionally required to implement judicial decisions. 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. 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. 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 must have been effective and efficient. Interpretation No. 261 and other fundamental rights cases from this time exemplify this point. It successfully ended the prolongation of the first-term national representatives and required the government to hold national elections, which terminated the forty-year authoritarian period.

2. 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 as time go by.

First of all, 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. Since then, political conflict between the two major parties has

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156 See supra note 72-74 and accompanying text.
157 HIRSCHL, supra note 9, at 148 (arguing that judicial interpretation of negative liberties “has the potential to plant the seeds of social change”).
159 For a brief introduction about the political parties in Taiwan, see JOHN F. COPPER, TAIWAN: NATION-STATE OR PROVINCE? 131-46 (2009).
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 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 of 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 of national elections. Now politicians dispute about 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 to bring about social change alone 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. Critics argue that a traditional court-centered framework overly narrows and underestimates the causality and impact of judicial decisions. Some
scholars instead analyze the relationship between courts and social change from a bottom-up, dispute-centered perspective, 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. It is even possible that losing a case in court will still lead to some social or political changes. 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 paper tries to demonstrate that the Court is indeed a majoritarian court 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 rarely resists the contemporary congressional majority. It did occasionally rule against the current majority, but more often in separation-of-powers cases than in fundamental-rights cases. Institutional, political, and historical factors all account for why the Court is majoritarian, rather than counter-majoritarian. Accordingly I argue that judicial supremacy exists in Taiwan, but only in accordance with the majority. This also explains why most Taiwanese people, including constitutional scholars, do not worry about judicial activism. Comparing to those proposals about judicial minimalism, popular constitutionalism, or departmentalism in the United States, this contrast is particularly stark. In Taiwan, judicial self-constraint, championed in many other countries as a virtue, is indeed counter-majoritarian. This characteristic 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, and Taiwan is no exception. When there is social consensus, and when the political branches fail to work

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162 See Michael W. McCann, Reform Litigation on Trial, 17 LAW & SOC. INQUIRY 715, 728-43 (1992); CANON & JOHNSON, supra note 148, at 16-26 (elaborating a model of implementation and impact of judicial policies that focuses not solely on courts, but on other “populations” as well.).
163 McCANN, supra note 147, at177-79.
164 Id. at 154.
165 SHAPIRO & STONE SWEET, supra note 4, at 183 (arguing that “A rights court must be even more prudent than a separation of powers courts”).
166 WHITTINGTON, supra note 66, at 294 (contending that “Judicial supremacy is established by political invitation, not by judicial putsch.”).
properly, 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. 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.

Being an old constitutional court in a new democracy, scholars have had different evaluations of the Court’s performance after democratization. Some believe it is cautious, while others contend it is relatively active. At first blush, the two arguments seem to be contradictory. Nevertheless, they are two sides of the same coin. In other words, public opinion contributes both to the activeness and cautiousness of the Court. It is active when it realizes it is backed by public opinion; it is cautious when a divided public opinion is transformed into a political clash. Whether this majoritarian judiciary is peculiar in Taiwan, or it is common among new democracies, remains not crystal clear so far. It is possible, however, that courts in new democracies around the globe would behave differently than their Western counterparts. Further studies would clarify this puzzle.

168 FRIEDMAN, supra note 22, at 260.
169 PERETTI, supra note 22, at 80-132.
170 See Jiunn-rong Yeh & Wen-Chen Chang, The Emergence of East Asian Constitutionalism: Features in Comparison, 59 AM. J. COMP. L. 805, 823-31 (2011) (arguing that the Constitutional Court of Taiwan is cautious and reactive, rather than being active or aggressive); Ginsburg, supra note 31, at 154.