Article

The Birth and Rebirth of the Judicial Review in Taiwan－Its Establishment, Empowerment, and Evolvement

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ABSTRACT

This paper first briefly introduces several major models that explain the emergence of judicial review in an attempt to find one that best elucidates the situation in Taiwan. Yet, owing to its particular political history, no single model can fully explain the development of judicial review in Taiwan. Rather, different models may be used to account for different stages. During the foundational stage, the Court was subservient to the authoritarian regime. During its transition stage, the Court regained authority and began to function like a court that insurance theory presupposes. Owing to the changeable political environment and the lack of an unchallengeable authority, the need for a fair and apolitical arbitrator increased, a fact which explains the increase in judicial power. Besides, political manipulation, the Court also expanded its power actively and cautiously, even when society was highly divided after 2000. In new democracies, the tendency of judicialization has provided the Court with more opportunities to intervene in political decision-making processes. Nonetheless, this may spawn unintended political conflict that threatens to damage the integrity and authority of the judiciary.

Keywords: *Taiwanese Constitutional Court, Judicial Review, Constitutional Interpretation, Insurance Theory, Hegemonic Preservation*

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I. FOREWORD

Why do we have the judiciary, a branch that has "no influence over either the sword or the purse"?[1] A simple answer may be that we want to solve disputes in a civilized way and these calls for the involvement of a third party. This answer explains the biggest part of the daily work that courts undertake. But the power of a judiciary is evidently broader and stronger than that. In most countries, democratic or authoritarian,[2] the judiciary also plays a role as a guardian of human rights that may invalidate the collective decisions of the administrative or legislative branches. This has always been regarded as the most controversial power wielded by the judiciary.[3] Why do we invest this ostensibly least dangerous branch with the most dangerous power of judicial review that seems to be counter-majoritarian at first glance?[4]

The emergence of judicial review and its rapid spread along with democratization around the globe in the last century are puzzling. Generally speaking, there have been three waves of judicial proliferation, each of which occurred in a different period and place.[5] Taiwan, the Republic of China, embarked on its inexorable journey towards democratization in 1987, the year that the longest period of martial law in world history was terminated. However, the Constitution of the Republic of China[6] (the Constitution) was enacted early in 1947 and its main text was never revised during the martial law period, a fact worthy of note given that there are now twelve constitutional amendments. The Taiwanese Constitutional Court (the Court), one of the oldest constitutional courts in Asia, was established at the same time the constitution was promulgated. In fact, not long after its founding, the Republic of China was embroiled in a civil war, and it was

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1. THE FEDERALIST NO. 78 (Alexander Hamilton).

2. *See generally* GRETCHEN HELMKE, COURTS UNDER CONSTRAINTS: JUDGES, GENERALS, AND PRESIDENTS IN ARGENTINA (2004); Martin Shapiro, *Courts in Authoritarian Regimes*, *in* RULE BY LAW: THE POLITICS OF COURTS IN AUTHORITARIAN REGIMES 326, 329-30 (Tom Ginsburg & Tamir Moustafa eds., 2008); *but see* Lisa Hilbink, *Agents of Anti-Politics: Courts in Pinochet's Chile*, *in* RULE BY LAW: THE POLITICS OF COURTS IN AUTHORITARIAN REGIMES 102, 104-11 (Tom Ginsburg & Tamir Moustafa eds., 2008).

3. MARTIN SHAPIRO & ALEC STONE SWEET, ON LAW, POLITICS, AND JUDICIALIZATION 142 (2002).

4. *But see* 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); GERALD ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? 13 (2d ed. 2008); David S. Law, *A Theory of Judicial Power and Judicial Review*, 97 GEO. L.J. 723, 745-78 (2009) (arguing that judicial review is not counter-majoritarian because of its monitoring and coordinating functions).

5. *See* Tom Ginsburg, *The Global Spread of Constitutional Review*, *in* THE OXFORD HANDBOOK OF LAW AND POLITICS 81, 82-88 (Keith E. Whittington et al. eds., 2008); MICHEL ROSENFELD, THE IDENTITY OF THE CONSTITUTIONAL SUBJECT: SELFHOOD, CITIZENSHIP, CULTURE, AND COMMUNITY 119-20 (2010).

6. Constitution (1947) (Taiwan).

then that the Constitution was promulgated. The power of the Constitution was soon partly and indefinitely suspended by The Temporary Provisions. Needless to say, the function of judicial review, inter alia, was seriously constrained. Not until the lift of the martial law decree in 1987 did the Constitutional Court gradually regain its authority.

Due to the political cataclysm of 1949, the reasons why the Taiwanese people adopted and recognized judicial review ordained in the Constitution were not properly articulated. This leads to many puzzles that survived long beyond the founding era, including but not limited to the status of the Judicial Yuan, the issue of the legitimacy of judicial review in Taiwan, and the role of the Constitutional Court after democratization. Finally in 2001 with *Interpretation No. 530*, the Justices of the Constitutional Court, Judicial Yuan clearly characterized themselves as "the highest judicial organ in charge of civil, criminal, administrative cases, and in cases concerning disciplinary measures against public officials."[7]

Besides, much scholarly literature has analyzed these issues and generated illuminating discussion.[8] For example, Hwang has argued that the Judicial Yuan should be the final court of all lawsuits, and that a concrete and decentralized judicial review is "the very essence of judicial duty."[9] Furthermore, concrete review can effectively alleviate the counter-majoritarian concern of judicial review and enhance its legitimacy.[10] On the other hand, Lee has pointed out that although the model of the Supreme Court of the United States was indeed taken into consideration during the founding era, it was rejected by the Constituent National

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7 J.Y. Interpretation No. 530 (2001) (Taiwan), *available at* http://www.judicial.gov.tw/constitutionalcourt/EN/p03_01.asp?expno=530.

8. *See, e.g.*, Jau-Yuan Hwang, *Ssufa Weihsien Shencha te Chihtu Hsuantse yu Ssufayuan Tingwei* [*Choosing a New System of Judicial Review for Taiwan: Some Reflections on the Status of Judicial Yuan*], TAITA FAHSUEH LUNTSENG [NTU L.J.], Sept. 2003, at 55; Chien-Liang Lee, *Tafakuan te Chihtu Pienke yu Ssufayuan te Hsienfa Tingwei* [*Reform of the Institution of the Grand Justices and Constitutional Status of the Judicial Yuan: An Analysis Based on the 1997 Constitutional Reform*], TAITA FAHSUEH LUNTSENG [NTU L.J.], Jan. 1998, at 217; Jiunn-rong Yeh, *Hsienkai yu Taiwan Hsienfa Pienchien te Moshih* [*Towards a model-building on Taiwan's Constitutional Change after 1997 Constitutional Reform*], TAITA FAHSUEH LUNTSENG [NTU L.J.], Jan. 1998, at 7; Jau-Yuan Hwang, *Ssufa Weihsien Shencha te Chengtanghsing Chengi* [*Legitimacy of Judicial Review: A Preliminary Analysis of Theories and Approaches*], TAITA FAHSUEH LUNTSENG [NTU L.J.], Nov. 2003 at 103; Jiunn-rong Yeh, *Chuanhsing Fayuan te Tzuwo Tingwei—Lun Hsienfachehshih tui Hsiuhsienchichih te Yinghsiang* [*The Role of Transitional Court: On the Interactions between Constitutional Interpretations and Constitutional Revisions*], TAITA FAHSUEH LUNTSENG [NTU L.J.], Nov. 2003, at 29; DENNIS TE-CHUNG TANG, *Chuanli Fenli yu Weihsien Shencha* [*Judicial Review and Separation of Powers*], *in* CHUANLI FENLI HSIN LUN (2): WEIHSIEN SHENCHA YU TUNGTAI PINGHENG [A NEW PERSPECTIVE ON SEPARATION OF POWERS (2): JUDICAIL REVIEW AND DYNAMIC BALANCE] 75, 75-123 (2005).

9. *See* Hwang, *Ssufa Weihsien Shencha te Chihtu Hsuantse yu Ssufayuan Tingwei*, *supra* note 8, at 24-31, 34-35.

10. *Id.* at 37-38.

Assembly and is no longer applicable to the Judicial Yuan.[11] In addition to these disputes over the courts proper institutional role, Yeh has contended that functionally the role of the Constitutional Court changed from the transitional-court model to the ordinary-court model during the past few decades.[12] These arguments focused on various facets of judicial review and provide us with insightful viewpoints. However, most of them have concentrated on more recent developments of the Constitutional Court, and have not put much emphasis on the origin of judicial review itself. In this paper, I address the theories of the establishment of judicial review, and the applications of these theories to the Taiwanese context.

This paper is not intended as a complete, panoramic overview of the Constitutional Court or judicial review. Rather, my central arguments are as follows. First, an examination of political concerns provides the best, though by no means only, explanations of the birth and rebirth of judicial review in Taiwan. Secondly, justices are politicians in robes, and they exercise the power of judicial review to aggrandize themselves. From the era of its establishment, judicial review was a product of the negotiation among various political parties. During the Temporary Provision era, the justices and their interpretations functioned mostly as decorations for an authoritarian regime. This is not to say that the judiciary was totally toothless at that time. Some interpretations did pave a road for future changes, but generally speaking, most interpretations were quite obedient to the executive branch. After democratization, things were different. A functioning judicial review is indispensible not only for ensuring a system of checks and balances among branches, but also for protecting the interests of different parties. During the authoritarian period, the dominant rulers needed a submissive court so that they could monopolize political power without the risk of condemnation. Ironically, after democratization, it is a functional court that may protect them from retaliation and maintain their past interests. Justices know this, and they have skillfully exercised their interpretive authority in a way that has been welcomed both by the ruling and opposition parties. This resulted in an expansion of their power during and after the transitional period. This sort of development is especially evident when a society is divided by ideology. In these cases constitutional courts are especially apt to strategically exercise their power of judicial review to maintain the stability of society and the authority of its interpretations.

This paper suggests that the establishment of judicial review in 1947 in mainland China and its reinvigoration after 1987 in Taiwan were predicated

11. *See* Lee, *supra* note 8, at 233-45.

12. *See* Yeh, *Chuanhsing Fayuan te Tzuwo Tingwei —Lun Hsienfachehshih tui Hsiuhsienchichih te Yinghsiang*, *supra* note 8, at 49-54.

on different reasons. Although the main text has never been revised, the Constitution has in essence undergone substantial modification through the enactment of the amendments. Under two sets of different international, social and political conditions, politicians during the post-constitutional stage after 1947 and after period of democratization after 1987 separately sought to maximize their interests through the establishment of judicial review. These intricate calculations and behaviors must be discussed carefully in various contexts. In a sense, we may say that judicial review was established twice separately in 1947 and after 1987.

This paper will be divided into five parts. The first is the introductory part which lays out a general framework for the rest of the paper. In the second part, I will briefly introduce some leading theories in an attempt to elucidate the establishment of judicial review and the expansion of judicial power. The third part will discuss the reasons why judicial review was founded, constrained, and rejuvenated in Taiwan. During the forty years spanning 1947 to 1987, the Kuomintang (KMT) had always been the ruling party in the Republic of China. But, cries for democratization grew stronger and stronger over time. The reasons why judicial review was "reestablished" after democratization cannot be properly understood without understanding the attitude of the KMT. The fourth part describes the interaction of the Constitution Court with other political branches after democratization. At this fully-fledged functioning stage, the role of the Constitutional Court in political arena still merits discussion. The Court has strategically expanded its power, but also faced much backlash in the process of expansion. The fifth part is the conclusion.

II. DIFFERENT MODELS OF JUDICIAL REVIEW

Much ink has been spilled over this issue of why systems of judicial review that constrain popularly-elected legislatives are established. Much debate has revolved around the perceived proclivity of this institutional design to create a so-called counter-majoritarian dilemma. Some scholars have compared this arrangement with the part of the Odyssey in which Ulysses is firmly bound to the mast of his ship so as to prevent him from being enchanted by the song of the Sirens. Others believe that the establishment of judicial review can only be explained from both legal and political perspectives.[13] Traditional legal theories tend to approach this problem either by distinguishing the procedures of law-making, [14]

13. Mark A. Garber, *The Problematic Establishment of Judicial Review*, *in* THE SUPREME COURT IN AMERICAN POLITICS: NEW INSTITUTIONALIST APPROACHES 28, 29 (Cornell Clayton & Howard Gillman eds., 1999).

14. *See* BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 266-94 (1991).

advocating judicial minimalism,[15] or reinforcing democratic representation.[16] These approaches, however, still imply the existence of self-contradictory decisions made by the people. Indeed, whose interests is it that are truly protected through the establishment of judicial review? Is it those of political elites or lay people? If we revisit the landmark *Marbury*,[17] the answer seems to be clearer. Arguably, it was Chief Justice John Marshall, rather than Madison, who substantively "won" the case (to say nothing of the poor Marbury).[18] Throughout the process of building a judicial review system,[19] the entrenchment of personal interests of political elites is usually masqueraded as the protection of fundamental rights. If so, what is the rationale behind the establishment of judicial review in Taiwan? The following paragraphs will provide some possible explanations for the origin of judicial review.

A. *Demand-Side Models*

There are at least two kinds of, in Tom Ginsburg's words,[20] demand-side models of judicial review. I will call them the "right-based theory" and the "need-based theory." Proponents of the right-based theory regard a constitution as a contract between the people and the sovereign. People collectively hand over some basic rights to the state and entrust it with the duty to protect these fundamental rights.[21] Therefore, drafters of constitutions usually want to enshrine some fundamental rights in basic documents that may serve as the supreme law of the land in case the government should infringe their rights after its establishment. However, the people are also concerned that these fundamental rights may be sacrificed by future generations for short-term interests. Hence, they usually try to "lock in commitments over indefinite time periods,"[22] and choose to adopt a constitutional review system as a guarantee. When fundamental rights are infringed by the legislative or administrative branch as a consequence of

15. *See* CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT 16-19, 25-36, 61-72 (1999).

16. *See* JOHN HART ELY, DEMOCRACY AND DISTRUST 77-88, 101-04 (1980).

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

18. *See* ROBERT G. MCCLOSKEY, THE AMERICAN SUPREME COURT 25-28 (4th ed. 2010); ROBERT LANGRAN, THE SUPREME COURT: A CONCISE HISTORY 14-16 (2004).

19. *But see* Garber, *supra* note 13, at 31-34 (arguing that *Marbury* "did not establish the judicial power to declare laws unconstitutional in this legal sense"); Mary Sarah Bilder, *Idea or Practice: A Brief Historiography of Judicial Review*, 20 J. POL'Y HIST. 6, 7-25 (2008) ("Marshall did not invent judicial review. Judicial review developed from a long-standing English practice of reviewing the bylaws of corporations for repugnancy to the laws of England.").

20. Ginsburg, *supra* note 5, at 90.

21. *But see* RUSSELL HARDIN, LIBERALISM, CONSTITUTIONALISM, AND DEMOCRACY 85-90 (1999) (emphasizing the differences between a constitution and a contract).

22. SHAPIRO & SWEET, *supra* note 3, at 142.

some short-term temptation, a court may serve as a watchman to remind the people of their violations. This is presumed possible because courts are supposed to be less influenced by political interests and motivations.[23] In addition, after the horrible experience of World War II, constitutional review has increasingly been regarded as an indispensible checking mechanism to safeguard human rights since the notion of democracy as majority rule is no longer as reassuring. Since courts wield the power to protect minority rights, the empowerment of a court is justified and strengthened as time goes by.

Need-based theorists, on the other hand, focus on the need for an independent and active judiciary. In a political system that is "weak, decentralized, or chronically deadlocked," the role of judges becomes pivotal and their power expands.[24] This argument differs from the previous one because it is the state, and not the people, that needs a functioning judiciary. Hence, some scholars point out that a court is "the only institutional mechanism to monitor distrusted politicians and decision-makers."[25]

These demand-side arguments face several incisive criticisms. First of all, the contractarian line of thought is more imagination than reality. In other words, it is normative rather than positive.[26] The most troublesome criticism is the aforementioned counter-majoritarian difficulty. Since a court obviously has less democratic support than a congress, it is assumed that the will and interests of the people are best represented by the legislature, which undergoes normal and repeated elections, and not by expert judges. Moreover, these models fail to account for the variation in institutional design.[27] To be more specific, for example, why do politicians choose to invest this power to courts but not other institutions? Some countries, such as the People's Republic of China and France, indeed intentionally choose to invest the power of constitutional review to other parts of the administrative or legislative branches. Finally, these models have difficulty accounting for the timing of the development of judicial review. That is, for why judicial review is established at a certain time and not during another period.[28]

B. *The Institutional Economics Model*

As mentioned above, demand-side theories do not explain why most

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23. RAN HIRSCHL, TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM 32-34 (2004).

24. *Id.* at 34-35.

25. *Id.* at 35.

26. TOM GINSBURG, JUDICIAL REVIEW IN NEW DEMOCRACIES: CONSTITUTIONAL COURTS IN ASIAN CASES 23 (2003).

27. Ginsburg, *supra* note 5.

28. *See* Ran Hirschl, *The Political Origins of Judicial Empowerment Through Constitutionalization: Lessons from Four Constitutional Revolutions*, 25 LAW & SOC. INQUIRY 91, 99-100 (2000).

drafters would invest a court, rather than other branches, with the power of constitutional review. The institutional economics model elucidates the origin of judicial review and the expansion of judicial power from a utilitarian perspective. Thus, the reason judicial review develops may be quite simple: courts are inexpensive compared to other alternatives.[29] For example, some scholars hold that judicial review functions as a fire alarm system.[30] Vis-a-vis creating and maintaining an expensive police patrol system, providing for an information-conveying judiciary is a much more efficient means of supervising bureaucratic agencies and preventing unfavorable behavior.

Moreover, an independent judiciary equipped with constitutional review also increases a regime's credibility and secures foreign investment since laws and adjudications are more predictable.[31] Therefore, it may serve as proof that a government's resolve to uphold and implement its constitution. A court under this line of thought performs the function of signaling, that is, telling others that the regime is credible and provides a suitable environment for investment.[32] According to this model, the judiciary and the judicial review stem from an economic calculation of cost and benefit.[33] Setting up a court not only efficiently reduces the domestic cost of bureaucracy, but also effectively improves a country's reputation for economic security.

C. *The Insurance Model*

The Insurance model of judicial review emphasizes the diffusion of political power. When a political environment is unstable, judicial review functions as an insurance mechanism for potential political losers.[34] Since no one knows for sure which party will become the dominant one after the post-constitution stage, politicians tend to prefer a political framework with judicial review to protect them should they become the political minority

29. HIRSCHL, *supra* note 23, at 37-38; GINSBURG, *supra* note 26, at 26.

30. Mathew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms*, 28 AM. J. POL. SCI. 165, 166 (1984); Tom Ginsburg, *Administrative Law and the Judicial Control of Agents in Authoritarian Regimes*, *in* RULE BY LAW: THE POLITICS OF COURTS IN AUTHORITARIAN REGIMES 58, 63 (Tom Ginsburg & Tamir Moustafa eds., 2008).

31. HIRSCHL, *supra* note 23, at 37.

32. Hilton L. Root & Karen May, *Judicial Systems and Economic Development*, *in* RULE BY LAW: THE POLITICS OF COURTS IN AUTHORITARIAN REGIMES 304, 304-09 (Tom Ginsburg & Tamir Moustafa eds., 2008).

33. Gordon Silverstein, *Singapore*: *The Exception that Proves Rules Matter*, *in* RULE BY LAW: THE POLITICS OF COURTS IN AUTHORITARIAN REGIMES 73, 77 (Tom Ginsburg & Tamir Moustafa eds., 2008).

34. GINSBURG, *supra* note 26, at 25; Rebecca Bill Chavez, *The Rule of Law and Courts in Democratizing Regimes*, *in* THE OXFORD HANDBOOK OF LAW AND POLITICS 63, 67-69 (Keith E. Whittington et al. eds., 2008); Francisco Ramos Romeu, *The Establishment of Constitutional Courts: A Study of 128 Democratic Constitutions*, 2 REV. L. & ECON. 103, 107-09 (2006).

themselves after elections. Thus, winners cannot take all, and losers still retain the possibility to challenge the majority.[35] With this model, a capricious political situation and the diffusion of power are prerequisites for the building up of a strong judicial review.[36] The principle difference between commitment theory[37] and insurance theory is that insurance theory focuses on the losing parties, while commitment theory underscores the willingness of the dominant party.[38] The way these models conceive of the role of judges and the way they interpret laws varies as well.[39]

The design of judicial review built on the insurance model has several characteristics. In general, people tend to have more access to the constitutional court since it is designed with the interest of political losers in mind from the very beginning.[40] Also, the effect of the court's decisions tends to be stronger. Courts may nullify unconstitutional statutes and exercise quasi-legislative power from time to time.[41] In regard to the mechanism by which judges are appointed, Ginsburg distinguishes four appointing types: single-bodied appointments, professional appointments, cooperative appointments, and representative appointments.[42] Among them, courts preferred by the insurance theory are not likely to be composed of judges appointed by a single-body appointing mechanism. Besides, the term of the judges tend to be longer as this is a cardinal factor determining judicial independence,[43] and an independent judiciary is especially important for the prospective losers. Finally, the court size tends to be larger since it would be harder for a dominant party to control a larger and

35. *See* Tom Ginsburg & Zachary Elkins, *Ancillary Powers of Constitutional Courts*, 87 TEX. L. REV. 1431, 1439-40 (2009).

36. In a similar vein, Ramseyer argues that an independent court is possible only when the ruling party is likely to lose and the election will continue in foreseeable future. J. Mark Ramseyer, *The Puzzling (In)dependence of Courts: A Comparative Approach*, 23 J. LEGAL STUD. 721, 722 (1994); *see also* Matthew C. Stephenson, *"When The Devil Turns. . .": The Political Foundations of Independent Judicial Review*, 32 J. LEGAL STUD. 59, 72-73 (2003); Ran Hirschl, *The New Constitutionalism and The Judicialization of Pure Politics Worldwide*, 75 FORDHAM L. REV. 721, 747 (2006) (discussing the "Party Alternation Model" which predicts that the more dominant a political party is, the less independent courts will be); David S. Law, *The Anatomy of A Conservative Court: Judicial Review in Japan*, 87 TEX. L. REV. 1545 (2009) (arguing that the conservative political environment and the dominance of LDP lead to the most conservative constitutional court in the world); REBECCA BILL CHAVEZ, THE RULE OF LAW IN NASCENT DEMOCRACIES: JUDICIAL POLITICS IN ARGENTINA 14-17 (2004) (arguing that competitive political environment is a necessary condition for the rule of law).

37. For example, the commitment theory argues that a dominant political party still has the incentive to build up a strong judicial review since the latter is an evidence to prove the dominant party's commitment to eternalize the constitution and protect human rights.

38. GINSBURG, *supra* note 26, at 29.

39. *See* Shannon Roesler, *Permutations of Judicial Power: The New Constitutionalism and the Expansion of Judicial Authority*, 32 LAW & SOC. INQUIRY 545, 557 (2007).

40. GINSBURG, *supra* note 26, at 36-40.

41. *See id*. at 40-42.

42. *See id*. at 40-46.

43. *See id*. at 46-47.

diversified court.[44]

D. *The Hegemonic Model*

Some scholars argue that the interaction among political elites is not the only reason behind the emergence of judicial review. The judiciary itself and entrepreneurs also contribute to the germination of the expansion of judicial power. In other words, judicial review and judicial empowerment are strategic interplays between political elites, economic elites, and judicial elites.[45] This is quite different from previous theories in terms of the people who participate in judicial empowerment since other theories focus only on the behavior of political actors. The hegemonic model of judicial review, in contrast, offers a panoramic view that shows the conflux of different dynamics.

It is not difficult to realize why a judiciary would contribute to the establishment of judicial review. Despite concerns over the presumed anti-democratic character of judiciaries, judicial review undoubtedly enhances their power, giving the least dangerous branch more checking power against other branches.

As for economic elites, the rationale here is similar to that of the institutional economic model mentioned above. The constitutionalization of economic rights, such as property rights, is essential to the development of a robust market.[46] It is also a means of securing an "open market, economic deregulation, anti-statism, and anti-collectivism."[47] The design and practice of judicial review by independent courts further ensure these protections, providing guarantees for economic elites against any instability of economic liberties.[48]

From the viewpoint of political elites, judicial review maintains the validity and reliability of status quo political framework. Anyone who wants to challenge their power must first recognize and obey the rules set up by current authorities. It is thus a way to preserve or enhance their political hegemony "by insulating policy-making processes from the vicissitudes of democratic politics."[49]

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44. *See id*. at 47-48.
45. HIRSCHL, *supra* note 23, at 11-12.
46. CHAVEZ, *supra* note 36, at 17-20.
47. GINSBURG, *supra* note 26, at 43.
48. *See generally* TAMIR MOUSTAFA, *The Politics of Domination: Law and Resistance in Authoritarian States*, *in* THE STRUGGLE FOR CONSTITUTIONAL POWER: LAW, POLITICS, AND ECONOMIC DEVELOPMENT IN EGYPT 19, 21-24 (2007).
49. HIRSCHL, *supra* note 23, at 43.

III. THE CASE OF THE CONSTITUTIONAL COURT, JUDICIAL YUAN

The Constitution of the Republic of China was enacted in 1946 and its main text had never been directly revised. Unlike its American counterpart, the power of judicial review was clearly prescribed in the main text from the first day it was enacted. At that time, the KMT firmly controlled both mainland China and a majority of representatives of the Constituent National Assembly. According to some historical evidence, there were two versions of draft constitution—the Double Five Draft and the Political-Consultative Draft—discussed in the assembly. The KMT preferred the former, since it was modeled exclusively in accordance with the political theory of Sun Yat-sen, the founding father of the Republic of China.[50] It might seem as though the former draft, which was preferred by a dominant party, would have been adopted. Surprisingly, however, the KMT finally comprised and passed the latter version.

After that, because of the civil war between the KMT and the Chinese Communist Party (CCP), the National Assembly passed the Temporary Provisions Effective During the Period of Communist Rebellion (Temporary Provisions) on April 18, 1948. Not long after its promulgation, many of the substantive provisions of the Constitution were suspended by the Temporary Provisions. After the civil war, the KMT lost control of mainland China and retreated to Taiwan. They did not forget to bring the Constitution——a symbol of legitimacy—with them, but after this point, the extent to which the Constitution was applied further deteriorated. In addition to the Temporary Provisions, the Nationalist Government issued the Martial Law Decree, which was not lifted until July 14, 1987 in Taiwan. This was issued in accordance with the mandates of martial law rule, which extensively aggrandized the power of the executive branch, or to be more specific, the president Chiang Kai-shek. Hence, the judiciary became at best nothing but a rubber stamp, which was quite deferential to the dictatorship until 1987.[51] Not surprisingly, the justices all but ceased to fulfill the obligation of judicial review. Not until the lift of the Martial Law Decree in 1987 and the repeal of the Temporary Provisions in 1991 did the judiciary regain its vitality. After that, Taiwan began its transition to democracy, and the judiciary, being a political actor, played a cardinal role at that time. The judiciary assumed more functions than merely being the champion of human rights, and the interaction between the judiciary and the other two branches should also be

50. *See* Wen-Chen Chang, Transition to Democracy, Constitutionalism and Judicial Activism: Taiwan in Comparative Constitutional Perspective 87 (June, 2001) (unpublished J.S.D. dissertation, Yale Law School) (on file with the author).

51. GRAHAM HASSALL & CHERYL SAUNDERS, ASIA-PACIFIC CONSTITUTIONAL SYSTEMS 47-48 (2002).

noted. I will distinguish between three different constitutional moments: the stage of foundation, the stage of transition, and the stage of division[52]. Then, I will analyze how the Constitution was separately created and reinvigorated after the forty-year suspension. Each stage had its own factors that contributed to the recognition of the constitution and judicial review in diverse political contexts.

A. *Foundation: Before 1947*

1. Background

The Constitution of the Republic of China, enacted on December 25, 1946, was formally promulgated on January 1, 1947, and took effect on December 25 of the same year. The Constitutional Court, Judicial Yuan, which was then known as the Council of Grand Justices,[53] is the court that is responsible for the interpretation of the Constitution in accordance with the Articles 78,[54] 171,[55] and 173[56] of the Constitution. However, the term "Constitutional Court" never appears in the text of the Constitution, and the Additional Articles of the Constitution of the Republic of China. Yet, according to the original intent of the drafters of the Constitution, the Judicial Yuan was to play the same role as the Supreme Court of the United States.[57] Chang Chun Mai, the person who is regarded as most influential in enacting the Constitution, elaborated this point in his speeches as well.[58]

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52. The Author borrows the idea of a constitutional moment from Bruce Ackerman, who proposes a "dualist" approach to constitutional interpretation—an approach that claims that America has witnessed two types of decisions: foundational ones made by the American people and more ordinary ones made by their representatives. A constitutional moment is a period of popular development of principles that results in revolutionary reform. ACKERMAN, *supra* note 14, at 6.

53. The official name changed in 1993 when Constitutional Interpretation Procedure Act was enacted. Constitutional Interpretation Procedure Act (1948) (amended 1993) (Taiwan), *available at* http://www.judicial.gov.tw/constitutionalcourt/en/p07_2.asp?lawno=73.

54. Constitution, art. 78 (1947) (Taiwan) ("The Judicial Yuan shall interpret the Constitution and shall have the power to unify the interpretation of laws and orders.").

55. *Id.* art. 171 ("Laws that are in conflict with the Constitution shall be null and void. When doubt arises as to whether or not a law is in conflict with the Constitution, interpretation thereon shall be made by the Judicial Yuan.").

56. *Id.* art. 173 (stipulating that "The Constitution shall be interpreted by the Judicial Yuan").

57. Lawrence Shao-Liang Liu, *Judicial Review and Emerging Constitutionalism: The Uneasy Case for the Republic of China on Taiwan*, 39 AM. J. COMP. L. 509, 515 (1991); HUA-YUAN HSUEH, MINCHU HSIENCHENG YU MINTSUCHUI TE PIENCHENG FACHAN—CHANG CHUNMAI SSUHSIANG YENCHIU [THE DEVELOPMENT OF DEMOCRATIC CONSTITUTIONALISM AND NATIONALISM—A RESEARCH ON CHANG CHUN MAI'S THINKING] 195-96 (1993); TAFAKUAN SHIHHSIEN SHIHLIAO [HISTORY DOCUMENTS OF JUDICIAL YUAN INTERPRETATIONS] 27 (Secretariat of Judicial Yuan ed. 1998) [hereinafter History Documents of Judicial Yuan Interpretation]; Symposium, *Judicial Review in New Democracies: Constitutional Courts in Asian Cases*, NTU L. REV., Sept. 2008, at 165-66 (2008); Lee, *supra* note 8, at 235.

58. It is interesting to note that in the prologue of this book, Chang compared this collection of his speeches to The Federalist Papers. CHUN-MAI CHANG, CHUNGHUAMINKUO MINCHU HSIENFA

As mentioned above, the Constitution was enacted during a turbulent era. In 1932, the KMT made a resolution to draft the Constitution, and convened the Constituent National Assembly. In 1933, the Legislative Yuan established a Constitution Draft Committee, and the Nationalist Government promulgated the Double-Five Draft on May 5, 1936.[59] However, with the eruption of the armed conflict between Japan and China, this draft, although amended later in 1940, was never to be put into effect. The progress of constitutionalization in China was forced to a halt.

In 1945, the year that Japan formally surrendered and World War II finally ended, the KMT and the CCP, accompanied by U.S. ambassador Patrick Hurley, held negotiations in Chongqing. They decided to hold the Political Consultative Conference to discuss the termination of the Tutelage Era and the practice of constitutionalism in mainland China. On January 10, 1946, thirty-eight representatives, affiliated with the KMT, the CCP, and other small parties, such as the Democratic League and the Young China Party, participated in the Political Consultative Conference held in Chongqing. Chang Chun Mai, a representative of the Democratic League, participated in the Conference on January 16. One of the main issues at hand was to revise the aforementioned Double-Five Draft.[60] At the Conference, the representatives agreed upon twelve principles aimed at revising the Double-Five Draft, and decided to establish the Constitution Drafting Committee. By the end of April, the committee had roughly completed the so-called Political Consultative Draft according to these twelve principles.

However, the domestic armed conflict between the KMT and CCP intensified, and the KMT decided to convene the Constituent National Assembly by itself, a decision that violated the consensus that had been reached during the Political Consultative Conference.[61] Consequently, the CCP decided to boycott the Constituent National Assembly and refused to recognize the Constitution later.[62] An intense civil war broke out thereafter. Chang Chun Mai, the leader of Social Democratic Party, still attended the Constituent National Assembly after making a bargain with Chiang Kai-Shek. Finally, the KMT and other two parties, the Social Democratic

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SHIHCHIANG [TEN SPEECHES CONCERNING THE CONSTITUTION OF REPUBLIC OF CHINA] 97-98 (1971).

59. RECORDS OF THE NATIONAL ASSEMBLY 317 (Secretariat of the National Assembly ed. 1946); Jyh-pin Fa, *Constitutional Developments in Taiwan: The Role of the Council of Grand Justices*, 40 INT'L & COMP. L. Q. 198, 199 (1991).

60. CHUAN-CHI MIAO, CHUNGKUO CHIHHSIENSHIH TZULIAO HUIPIEN [THE COMPILATION OF INFORMATION CONCERNING THE CHINESE CONSTITUTIONAL MAKING HISTORY] 590-91 (1989).

61. HSUEH, *supra* note 57, at 186.

62. *Id.* at 186-87; MIAO, *supra* note 60, at 595; Yueh-sheng Weng, *Ssufayuan Tafakuan Chiehshih yu Taiwan Minchuchengchih chi Fachihchui chih Fachan* [*Interpretations of the Constitutional Court and the Developments of Rule of Law and Democratic Constitutionalism in Taiwan*], 178 TAIWAN FAHSUEH TSACHIH [TAIWAN L. J.] 1, 2 (2011).

Party and the anti-communist Young China Party, joined the Constituent National Assembly. The Assembly was composed of representatives that came from different occupational groups, political parties, and provinces, including Taiwan. Needless to say, the KMT was the dominant party. In spite of Chiang's open support for Chang's Political-Consultative Draft, representatives of the KMT still preferred the Double-Five Draft.[63] Chang was angry and threatened to quit the Constituent National Assembly.[64] Due to the pressure of the united boycott that came from the other two parties in the Assembly, the KMT gave way to Chang's proposal. Chiang, leader of KMT, and Sun Ke, son of Sun Yat-sen, publicly supported Chang's version of the draft constitution and criticized the Double-Five Draft.[65] Eventually, the Political-Consultative Draft was adopted by the Constituent National Assembly. Since Chang played a pivotal role in the creation of the twelve principles and drafting of the Constitution, some scholars have thus contended that he was substantively the founding father of the Constitution.[66]

2. *Analysis*

Certainly, there is a difference between the enactment of a constitution and the adoption of judicial review. There are many alternatives institutional designs that may effectively and efficiently ensure that a constitution will be faithfully obeyed, and judicial review is only one of them. What then, lead to the inclusion of judicial review in the Constitution enacted in 1947? Working from the insurance model, Ginsburg argues that two factors may account for the adoption of judicial review at the time. The first is domestic. Politicians passed the Constitution out of the desire to buy insurance through establishing a fair and impartial judicial review to make sure that all constitutional rights would be guaranteed since they might have lost their power afterwards in that tumultuous era.[67] The second factor is international. That is, "the ideology of modernization that underpinned the desire to rule through a constitution in the first place."[68]

This may be true. I would like to suggest, however, that other factors, both historical and theoretical, may better account for the birth of the judicial review in the Republic of China. On the one hand, from a historical perspective, judicial review was not mentioned in the twelve principles.[69]

63. *See* Chang, *supra* note 50, at 87-90.
64. HSUEH, *supra* note 57, at 188.
65. *Id.* at 189.
66. *Id.*
67. GINSBURG, *supra* note 26, at 109.
68. *Id.* at 116.
69. HSUEH, *supra* note 57, at 174-76.

The only principle regarding the judiciary focused on the status of Judicial Yuan, the nomination and approval of justices, and the independence of judges. For this reason, Jau-Yuan Hwang has argued that "the power of judicial review might not even [have been] an issue at all for the major political parties in China at the time."[70] He has expressed doubt that "either the KMT or CCP would even think of using the judicial power as leverage on the political branches."[71] The fact that Chang, chairman of a small party, had so much leeway to draft the Constitution indicated precisely the indifference the KMT felt toward the Constitution itself, let alone the power of judicial review.

Beside the twelve principles, the KMT did have other alternatives, and they were able to adopt their preferred one. The Double-Fifth Draft, drafted in accordance with Sun Yat-sen's political theory, was discussed in the Constituent National Assembly, a convention over which the KMT enjoyed majority control. Nevertheless, the KMT compromised with the Social Democratic Party and Young China Party in the hope of accelerating the process of the constitution-making. They did so simply because Chiang, leader of KMT, wanted to accumulate more external military support and internal legitimacy in order to fight the CCP.[72] By democratically enacting a constitution and, most importantly, recognizing the power of judicial review which was drafted largely by opposition parties to supervise himself, Chiang might be able to claim that the KMT he led was tolerant and willing to negotiate, factors which significantly differentiated it from Fascist or Leninist parties, such as the CCP. Also, he might have stood to gain foreign economic aid that came from anti-communist allies. In a nutshell, the adoption of judicial review did not stem from the fear that he would lose power in the future, but from his will to consolidate his already strong political influence. This account deviates from the standard assumptions of insurance theory.[73]

Neither from a theoretical perspective, did the system of judicial review set out in 1947 fit into the framework of the insurance model. For instance, people had limited access to the Constitutional Court. During the first term, only national and local government agencies were entitled to petition the Constitutional Court due to the Regulations Governing the Adjudication of the Council of the Grand Justices. The Constitutional Court was at best the legal counsel of the Nationalist Government, and certainly a far cry from the

70. Symposium, *supra* note 57, at 166.

71. *Id.*

72. *See* Chang, *supra* note 50, at 89.

73. *See, e.g.*, Michael C. Davis, *Constitutionalism and New Democracies*, 36 GEO. WASH. INT'L L. REV. 681, 686 (2004) (reviewing TOM GINSBURG, JUDICIAL REVIEW IN NEW DEMOCRACIES: CONSTITUTIONAL COURTS IN ASIAN CASES (2003)).

guardian of constitutional rights.[74] From judicial statistics, we may easily see that during the first three terms of the justices, only one decision was petitioned by individuals.[75] And, during the first term, the start of judicial review in mainland China, of 226 petitions that sought for constitutional protection, not a single was put forth by individuals. This too runs contrary to the insurance model because no insurance may be secured unless there is an unimpeded path to the Court.

Moreover, the mechanism of appointment may indicate the intent of politicians as well. Ginsburg writes:

> An example that is close to [single-body appointment mechanisms] is the Council of Grand Justices in Taiwan, whose members are appointed by the president from a list of nominees prepared by a committee he picks. Approval is required by the legislature, but because the president was historically the head of the largest political party, this was not an effective check, and the mechanism was a de facto single-body appointment mechanism.[76]

With single-body appointment mechanisms, there is little chance, if any, that the judiciary will independently shoulder the responsibility maintaining checks and balances, a function that is the precondition for the insurance model to work. The results of the early interpretations proved that the justices were quite obedient to the executive branch. Additionally, the possibility of reappointment was also detrimental to the independence of the justices. And, size of the court is another factor that sheds light on the KMT's attitude at the time of the establishment judicial review. Since court size was not provided for in the Constitution itself,[77] the Nationalist Government promulgated the Organic Act of Judicial Yuan on March 31, 1947 which stipulated in article 3 that the Judicial Yuan should have nine grand justices.[78] Although the number of justices was increased to seventeen in later revisions, only ten really served as the first-term justices starting on July 14, 1948. Subsequently the mainland soon became embroiled in the civil war and only five justices retreated to Taiwan with the KMT. Since the quorum for passing interpretation had not been reached, the president

74. Weng, *supra* note 62, at 4.

75. Wen-Chen Chang, *The Role of Judicial Review in Consolidating Democracies*, 2 ASIA L. REV. 73, 79 tbl.2, 82 tbl.3 (2005); History Documents of Judicial Yuan Interpretation, *supra* note 57, at 486 fig.8.

76. GINSBURG, *supra* note 26, at 42-43.

77. Article 79, section 2 of the Constitution only prescribed that "The Judicial Yuan shall have **a number of** Grand Justices to take charge of matters specified in Article 78 of this Constitution, who shall be nominated and, with the consent of the Control Yuan, appointed by the President of the Republic." (emphasis added by author).

78. Liu, *supra* note 57, at 516.

nominated new candidates in 1952. At that time, there were only nine justices.[79] That is, it was comparatively a small court that was easily influenced by the dominant political party.

The numbers of constitutional interpretations and their results reflected the shaky status of justices and the impotence of judicial review as well. Generally speaking, justices of the Judicial Yuan may exercise two kinds of interpretative power: uniform interpretation and constitutional interpretation.[80] We may observe that justices made fewer constitutional interpretations than uniform interpretations, which means that justices emphasized the uniform application of statues and regulations rather than the protection of constitutional rights.[81] Furthermore, even when they did exercise their constitutional interpretation power, they rendered few unconstitutional findings.[82] Almost all constitutional interpretations recognized the statutes or regulations in question as consistent with the Constitution. The justices did not dare to challenge the Nationalist Government, and consequently people gradually lost their confidence in the judiciary, a situation that has been called "low equilibrium of judicial review."[83]

The international factor also played a role at the time. The decision to include judicial review was indeed an imitation of the Supreme Court of the United States.[84] Sun Ke, then-President of the Legislative Yuan, clarified that the jurisdiction of the Judicial Yuan in the draft Constitution was to extend to all cases arising under the Constitution, including civil, criminal, and administrative cases as well as uniform and constitutional interpretations. This was distinctly different from the role of the Judicial Yuan before the draft.[85] Nevertheless, since judges in normal and administrative courts did not exercise the power of judicial review, the jurisdiction of the Judicial Yuan was intentionally limited due to concern that the functions of uniform and constitutional interpretations might be paralyzed with the caseload burden that came from civil, criminal, and administrative controversies.[86]

After the promulgation of the Constitution on January 1, 1947, the Organic Act of Judicial Yuan was promulgated on March 31 of the same year. It is worthy of note that the Organic Act still stipulated that the Judicial

79. History Documents of Judicial Yuan Interpretation, *supra* note 57, 55-56.
80. Chang, *supra* note 75, at 76-78; Liu, *supra* note 57, at 518.
81. Chang, *supra* note 75, at 77 tbl.1; Fa, *supra* note 59, at 207; History Documents of Judicial Yuan Interpretation, *supra* note 57, 490 tbl.4, 491 fig.12.
82. Chang, *supra* note 75, at 84-85 & tbl.5.
83. GINSBURG, *supra* note 26, at 73-74.
84. *See supra* note 57.
85. Lee, *supra* note 8, at 235.
86. *Id.* at 237.

Yuan was responsible for all cases, regardless of the original intent mentioned above. Not surprisingly, this law faced adamant opposition from the Supreme Court. The Nationalist Government compromised and revised the Organic Act in accordance with the original intent of the framers on December 25, 1947, the exact day that the Constitution was put into effect.[87] From that point, the Court only took charges of matters "specified in Article 78 of this Constitution"–that is, interpreting the Constitution and unifying the interpretation of laws and orders. And, judges of normal and administrative courts were prohibited from exercising the power of judicial review. This centralized model of judicial review was consonant with the interests of KMT because "the small number of justices [made] political control easier."[88]

In sum, the judicial review established in 1947 did not aim to protect human rights at that time. In light of historical records and related literature, the argument for a contract theory-based explanation for judicial review in Taiwan seems flimsy here. Moreover, from the historical and normative perspectives, judicial review did not stem from politicians' desire to buy political insurance either. For the ruling KMT members, the international factor did contribute to the inclusion of the judicial review. It was a kind of propaganda that showed international society that they stood under the banner of democratic alliance, siding with other liberal and progressive countries rather than with authoritarian regimes. Most important of all, they could draw an ideologically distinct line between themselves and the CCP. This was especially true when the Nationalist Government retreated to Taiwan and foreign aid was much needed. Domestically, the Constitution was also "made for national inclusion against the backdrops of warlordism and localism after war."[89] It was not enacted out of the fear that KMT would lose the election. Therefore, it seems fair to say that the establishment of judicial review in 1947 cannot be explained by the insurance model.[90] On the contrary, it was enacted out of the KMT's political commitment, a commitment not only to the opposition parties, but also to foreign and domestic society. Furthermore, little evidence, if any, shows that economic or judicial elites played a substantial role in the progress of constitutional law-making. Therefore, this paper holds that it was international pressure and domestic need, rather than the protection of people's fundamental rights, which resulted in the establishment of judicial review in 1947. This need did

87. *Id.* at 237-38.

88. GINSBURG, *supra* note 26, at 117.

89. Wen-Chen Chang, *East Asian Foundations for Constitutionalism: Three Models Reconstructed*, NTU L. REV., Sept. 2008, at 111, 132-33.

90. *See* Thilo Tetzlaff, *Kelsen's Concept of Constitutional Review Accord in Europe and Asia: The Grand Justices in Taiwan*, NTU L. REV., Sept. 2006, at 75, 102.

not come from politicians' heightened willingness to buy insurance during a chaotic period, but rather came from the desire to prolong and guarantee their monopoly on political power. Given the aforementioned compromises in the Constituent National Assembly, it was still the willingness of the dominant political party that actively contributed to the birth of judicial review, and not the unpredictability of future elections or the cooperation with elites in other domains.

B. *Transition: After 1987*

1. *Background*

During the party-state era, the Taiwanese economy developed at an amazing rate, which had a direct and dynamic impact upon social change.[91] Similar to other developing countries, these changes finally resulted in an escalating appeal for political reform, which eventually led to the abolishment of the Martial Law Decree and Temporary Provisions.[92] After the abolishment of the Martial Law Decree on July 15, 1987 and the annulment of the Temporary Provisions on May 1, 1991, the pace of democratization gathered speed and the role of the judiciary changed rapidly. The strongman died, so to speak, and his past authority to which everyone had submitted suddenly disappeared. The succeeding KMT chairman Lee could not claim similar authority due to a power struggle inside the KMT itself. Facing external challenges from the growing Democratic Progressive Party (DPP) and internal strife, after 1987 the KMT in Taiwan was not as commanding as the KMT had been in mainland China had been forty years prior. This lame giant had to negotiate and even yield to opposition parties to maintain its clout. Taiwan gradually transformed itself from an authoritarian regime to a liberal democracy. Many radical changes happened continuously, be they political, economic, or social.

At that time, political power diffused and the foundation of the KMT regime grew shaky.[93] The national executive power, and to be more specific, presidential power, shifted twice.[94] As mentioned above, the KMT won the

91. *See generally* Murray A. Rubinstein, *Taiwan's Socioeconomic Modernization, 1971-1996, in* TAIWAN: A NEW HISTORY 366, 377-95 (Murray A. Rubinstein ed., 1999).

92. *See* Murray A. Rubinstein, *Political Taiwanization and Pragmatic Diplomacy: The eras of Chiang Ching-Kuo and Lee Teng-Hui, 1971-1994, in* TAIWAN: A NEW HISTORY 436, 439-47 (Murray A. Rubinstein ed., 1999).

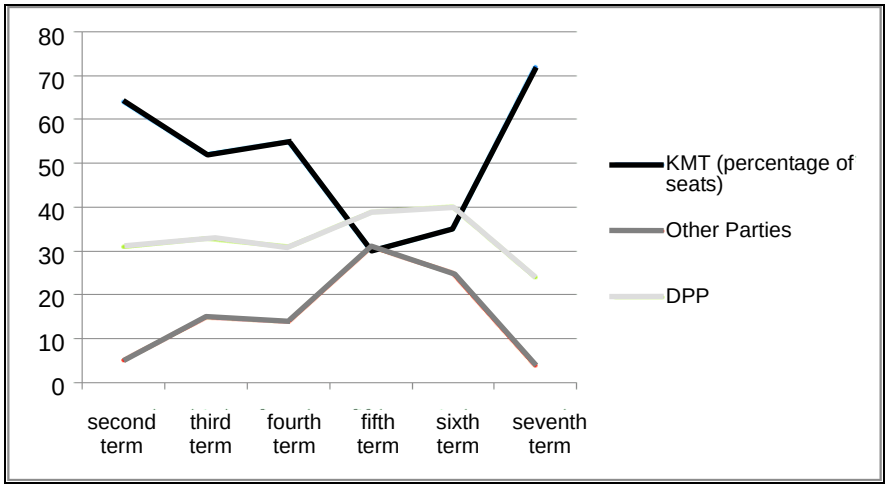
93. *See generally* SIMON LONG, TAIWAN: CHINA'S LAST FRONTIER 180-202 (1991) (sketching the political reform in Taiwan after 1986).

94. From the text of the Constitution and the Additional Articles, Taiwan is regarded mostly as embracing a French semi-presidential system. Roughly speaking, the president controls the decision-making power over external issues, such as national security and foreign affairs, while the president of the Executive Yuan controls decision-making power over domestic affairs. However, the

first direct presidential election in 1996. Four years later in 2000, the DPP won the next presidential election, the first time the KMT was defeated in a national election. In addition, the DPP also won several seats in local elections for county magistrates.[95] The KMT resumed its control over the executive power in 2008. On the whole, however, these electoral results conveyed a significant signal that the KMT was no longer as dominant as it was before.

The KMT was no longer the biggest political party in Congress. We may say that legislative power diffused after the democratization as well. In 1992, the election for the second-term of legislators was held, and the DPP came to control one-third of the seats. It is obvious that political power started to diffuse, and more and more non-KMT political actors began to share decision-making power. In 1995, the third-term election of legislators was even more competitive. The DPP took control of more seats than it had three years before, and the New Party also won about 13% of seats in its first election.[96] From the following graph, it is clear that no single political party is sure to win the next election. This is precisely the scenario described by the insurance model.

Figure I: Percentage of Seats in Legislative Yuan after the First Term



Source: Central Election Commission, Executive Yuan, Taiwan

president of the Executive Yuan is in reality a staff member of the president's team since the latter controls the nomination power of the former. Although Article 53 of the Constitution stipulates that "[t]he Executive Yuan shall be the highest administrative organ of the State", in fact the substantive highest administrative officer in Taiwan is the President, rather than the president of the Executive Yuan. From past experience, the president of the Executive Yuan, formally the highest executive officer, has made few, if any, decisions contradictory to the president's will.

95. *See* Rubinstein, *supra* note 92, at 449.

96. ,*The List of Party Proportion in the 1995 Legislative Election*, CENTRAL ELECTION COMM'N, http://db.cec.gov.tw/pdf/B1995005.pdf (last visited Mar. 24, 2012).

In spite of the emergence of the DPP, this cataclysmic diffusion of political power was also partly the result of a chaos within the KMT. Simply put, the KMT, which is a political party composed of mainlanders and local elites, encountered cleavage. During the later stage of President Chiang Ching-Kuo's (the son of Chiang Kai-Shek) rule, the KMT intentionally promoted local Taiwanese elites of all fields in order to localize and legitimize the KMT to counter the longstanding perception of some Taiwanese that it was a foreign political party. Former President Lee Teng-Hui is precisely the best example.[97] At the beginning, he was promoted because of his province of origin as well as his expertise in agriculture, but climbed his way to the top of the KMT step by step. After Chiang Ching-Kuo passed away, he became the chairman of the KMT and the president of Taiwan. Some mainlanders in the KMT were worried about their fading power and clout inside the KMT, and thus decided to challenge Lee. This fractionalization appeared inside the KMT in late 1989.[98] This scenario is further evidenced by the apostasy of some KMT members. In 1993, some members of the KMT defected and established the New Party, which was regarded as a pro-reunification political party. What's more, in the first presidential election in 1996, in addition to the KMT's and DPP's presidential candidates, two other candidates, Lin and Chen, were former KMT members as well.[99] Due to this power struggle within the KMT, Lee chose to negotiate with opposition parties in order to consolidate his political power.

On June 21, 1990, the landmark *Interpretation No. 261* was promulgated. It held that "[t]he Central Government is further mandated to hold, in due course, a nationwide second-term election of the national representatives, in accordance with the spirit of the Constitution, the essence of this Interpretation and the relevant regulations, so that the constitutional system will function properly."[100] In 1991, the Additional Articles of the Constitution of The Republic of China were enacted, the first time that the Constitution was amended. After that, the Constitution was amended six times within fifteen years.

In general, the framework of the Constitution changed radically as a whole. An examination of the remodeling of judiciary may provide us more hints as to how this occurred. For example, the reappointment of justices was no longer possible after the 1997 amendments. This was intended to

97. ZACHARY ELKINS ET AL., THE ENDURANCE OF NATIONAL CONSTITUTIONS 174 (2009).

98. *Id.* at 450.

99. Lin was former president of Judicial Yuan and Chen was the former president of Control Yuan. In fact, Lin himself is a local Taiwanese but his vice-president candidate, Hao, is a mainlander who serves as the minister of National Defense and former president of Executive Yuan.

100. J.Y. Interpretation No. 261 (1990) (Taiwan), *available at* http://www.judicial.gov.tw/constitutionalcourt/en/p03_01.asp?expno=261.

"insulate the justices somewhat and enhance the policy space for independent decision making."[101] Moreover, the Amendments granted the justices the power to impeach the president and dissolve unconstitutional parties, a power that allows the judiciary to keep in check the executive and legislative power.[102] In addition, the proposed budget submitted annually by the Judicial Yuan may not be eliminated or reduced by the Executive Yuan.[103] Nor could the Legislative Yuan constitutionally delete the budget appropriated as a specialty premium for the Justices.[104] Access to the Constitutional Court was expanded considerably.[105] In the past, only the Supreme Court and Administrative Court had the right to petition the Grand Justices Council for the interpretation of statutes.

2. *Analysis*

How did the expansion of judicial power happen? From the thumbnail histories, we might say that the political environment after democratization has been uncertain and amorphous. It was this precarious environment that gave birth to the constitutional amendments and the expansion of judicial power discussed above. Facing the threat of an emerging opposition party and needing to claim internal legitimacy at the juncture of democratic transition, the KMT chose to revise the Constitution. The Constitutional Court was thus vested with a wide array of powers, such as the power to impeach the president and dissolve unconstitutional parties.[106] It was indeed a clever choice for both the KMT and former president Lee Teng-Hui. By doing so, the KMT properly alleviated political strife and peacefully responded to the bottom-up pressure for democratization and constitutionalization. In sum, the constitutional amendments were adopted not only as insurance, but also as propaganda to bolster its legitimacy even after democratization. As Wen-Chen Chang aptly described, "[f]aced with unprecedented political turbulence, the dominant political party in the authoritarian regime needed to do something in response to demands of the opposition as well as the society . . . [C]onstitutional courts are unexpectedly empowered to enter into political centers."[107]

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101. GINSBURG, *supra* note 26, at 73-74.

102. Constitution, Additional Articles, art. 5(4) (1991) (amended 2005) (Taiwan).

103. *Id.* art. 5(6).

104. J.Y. Interpretation No. 601 (2005) (Taiwan), *available at* http://www.judicial.gov.tw/constitutionalcourt/en/p03_01.asp?expno=601.

105. *See* Nuno Garoupa, Veronica Grembi & Shirley Ching-ping Lin., *Explaining Constitutional Review in New Democracies: The Case of Taiwan*, 20 PAC. RIM L. & POL'Y J. 1, 8-13 (2011).

106. For further discussion, *see* Tom Ginsburg, *Beyond Judicial Review: Ancillary Power of Constitutional Courts*, *in* INSTITUTIONS AND PUBLIC LAW: COMPARATIVE APPROACHES 225, 233-34 (Tom Ginsburg & Robert A. Kagan eds., 2005).

107. Symposium, *supra* note 57, at 170.

Moreover, since the political environment had become chaotic and unpredictable, an impartial third party was required to intervene. No one with whom everyone has agreed in the past can ever play the role of authoritative arbiter.[108] It is under these political circumstances that the judiciary gains its authority as an institution with the final say. Through constitutional revision and constitutional petition, courts are delegated, sometimes even asked, to deal with politically polarizing issues.[109] This tendency of judicialization is especially evident when there is a political gridlock.[110] The controversy over nuclear power plant in *Interpretation No. 520* is one of the best examples of this dynamic in the context of Taiwan.[111]

Together with political manipulation, judicial activism also plays a role in the expansion of judicial power. Given the maintenance of an abstract review system, judges in lower courts at present are permitted by the Constitutional Court to petition for interpretation when they suspect with reasonable assurance that the constitutionality of a statute is not clear after democratization.[112] In regard to the justices themselves, the scope and validity of their decisions has expanded considerably. The justices have even challenged the constitutionality of statutes with constitutional status, such as the Temporary Provisions in *Interpretation No. 261*, and the 1999 constitutional amendments in *Interpretation No. 499*. This attitude would have been unimaginable in earlier decades when even statutes and regulation were rarely declared unconstitutional. We might say that with the expansion of judicial power, the justices become more active when facing thorny issues and more cases were petitioned to them. This reciprocal-causal situation has been called a "high equilibrium" of judicial review.[113]

Nonetheless, without enough popular support, a constitutional court cannot place its activism on solid ground. Based on insurance theory explanations, politicians may still attack the judiciary from time to time when they are ruled against. If the legitimacy of the Court had relied solely

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108. Ran Hirschl, *The "Design Sciences" and Constitutional "Success"*, 87 TEX. L. REV. 1339, 1351-52 (2009).

109. Jiunn-rong Yeh has pointed out that democratization would empower the judiciary and facilitate judicialization in at least three ways – empowerment, trust, and spillover. *See* Jiunn-rong Yeh, *Democracy-driven Transformation to Regulatory State: The Case of Taiwan*, NTU L. REV., Sept. 2008, at 31, 48-49 (2008).

110. *See* C. Neal Tate, *Why the Expansion of Judicial Power? in* THE GLOBAL EXPANSION OF JUDICIAL POWER 27, 28-33 (C. Neal Tate & Torbjörn Vallinder eds., 1995); CARLO GUARNIERI & PATRIZIA PEDERZOLI, THE POWER OF JUDGES: A COMPARATIVE STUDY OF COURTS AND DEMOCRACY 182-83 (2002).

111. *See* Tom Ginsburg, *Constitutional Choices in Taiwan: Implications of Global Trends* 35-36 (Ill. Pub. Law and Legal Theory Research Papers Series, Research Paper No. 06-01, Jan. 18, 2006), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=877154.

112. J.Y. Interpretation No. 371 (1995) (Taiwan), *available at* http://www.judicial.gov.tw/constitutionalcourt/en/p03_01.asp?expno=371

113. GINSBURG, *supra* note 26, at 74, 128-34; Fa, *supra* note 59, at 207-08.

on the politicians' subjective will—that is, politicians cooperating with the judiciary only when it is beneficial to their interests—then the Court could not have been as potent as it was during this time. The concept of tolerances interval may provide some theoretical elucidation from another angle.[114] Generally speaking, every political actor is assumed to have his or her own preferred positions, that is, policy preferences.[115] All actors in the political arena vote for policies that are close to their ideals and disagree with those that do not fit their preferences. However, these actors are not unfettered in their ability to challenge those policies that displease them, and their challenges are usually not costless.[116] According to the logic of cost-benefit analysis, therefore, political actors will only challenge those that deviate too much from their preferences. Thus, the term tolerances interval refers to the interval around which "each of [political actors'] ideal points such that they would be unwilling to challenge a Court decision placed within that interval."[117] This may partly explain why the Court during this transitional period encountered relatively small resistance from the other two branches. On the one hand, by opening the gate of the Constitutional Court and rendering a series of Interpretations that protected fundamental rights during this period,[118] the Court gradually entrenched its position as the guardian of citizens' constitutional rights. On the other hand, by issuing some Interpretations that were consistent with popular eagerness for democratization, such as the aforementioned *Interpretation Nos. 261* and *499*, the Court also became the most trusted branch among the three. Both of these developments tended to increase the cost and risk at which the executive and the legislative branches could challenge the Court's decisions.

After the 1991 amendments, the Constitution was amended another six times. The enactment of these amendments represented both a political tool for an uncertain society to reestablish stability and consensus, and evidence of politicians' desire to retain their power. Some scholars have characterized this as the emergence of transitional constitutionalism.[119] The frequency reflects the unstable balance among political parties and implies that the political arena has moved from regular elections to the conventions of constitutional law-making. At this stage, I believe that the insurance theory and the hegemonic model both properly account in part for why politicians

114. I would like to thank one anonymous reviewer for pointing this out to me.

115. *See* Lee Epstein et al., *The Role of Constitutional Courts in the Establishment and Maintenance of Democratic Systems of Government*, 35 LAW & SOC'Y REV. 117, 127-28 (2001).

116. The costs here may include, according to Epstein et al., case salience, case authoritativeness, public policy preferences, and public support for the court. *See id.* at 129-30.

117. *Id.* at 128-29.

118. *See infra* IV, A-B.

119. For more discussion about transitional constitutionalism, *see* Jiunn-rong Yeh & Wen-Chen Chang, *The Changing Landscape of Modern Constitutionalism: Transitional Perspective*, NTU L. REV., Mar. 2009, at 145.

actively empowered the development of judicial review. Tolerances interval explains why politicians tolerated the rebirth of judicial review during the democratic transition period in Taiwan.

C. *Division: 2000-2008*

1. *Background*

In 2000, the DPP candidate Chen Shui-bian won the presidential election and became the first non-KMT president in history. For the first time, the KMT lost its control of the executive in a national election and became the opposition party in Taiwan. Despite its defeat in the presidential election, the KMT, or at least the "pan-blue" alliance maintained firm control of the legislature during the eight years of Chen's presidency,[120] Because of this, the executive and legislative were separately controlled by two adversarial parties, which both claimed to represent the popular will. It is hardly surprising that a political stalemate formed and society was soon divided ideologically. This antagonism was further aggravated by the so-called 319 Shooting during the 2004 presidential election. During Chen's presidency, many major constitutional disputes arose,[121] including but not limited to those over the nuclear power plant case, the investigation power of the Legislative Yuan, the nomination power of the Premier, the scope of presidential immunity and secret privilege, the consent power of Legislative Yuan, and the referendum controversy. It is fair to say that all of these cases resulted in serious social cleavages at that time. Facing this unprecedented deadlock between the two branches, it is intriguing to analyze how the judiciary, the third branch, chose to exercise its power.

In addition to these constitutional cases, the Constitution was once again amended in 2005. Many provisions therein were constitutionally important, but if we concentrate on the interaction among the three branches, the only change that directly impacted the balance of the three powers was that the Constitutional Court gained the power to adjudicate motions initiated by the Legislative Yuan to impeach the president or vice president. From this Amendment we may see that after two decades of democratization, the judicial branch, especially the Constitutional Court, had garnered substantial

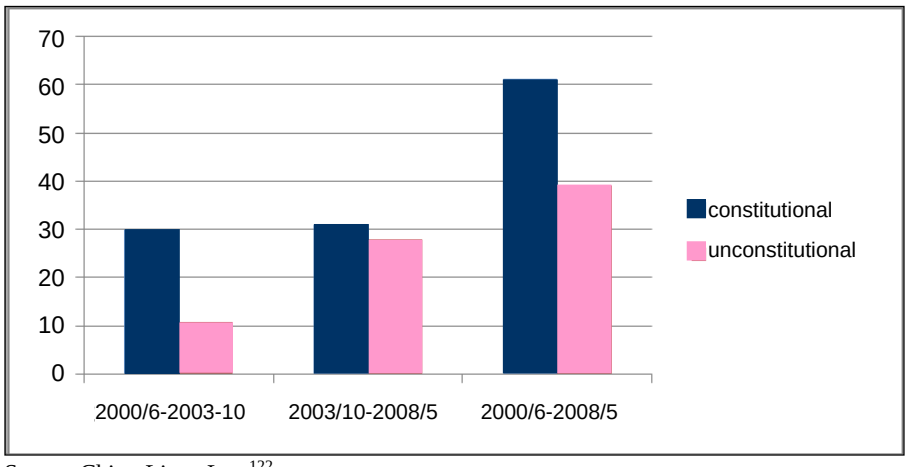
120. The pan-blue alliance is a political coalition that consists of the KMT, the New Party, and the People First Party. Almost all members in the New Party and People First Party are former KMT members.

121. *See* Jiunn-rong Yeh, *Tsungtungchih yu Fenlieh Shehui:Taiwan yu Nanhan Hsiehfa Fayuan te Pichiao Yenchiu* [*Presidentialism and Divided Society: Comparing Constitutional Court Decisions in Taiwan and South Korea*], 40 NTU L.J. 459, 480-84 (2011) (pointing out that more constitutional controversies, especially those concerning governmental system and separation of powers, emerged during this time than they did during other periods).

support both from citizens and the political parties. It was no longer a politically biased rubber stamp of the autocracy; rather, it had become a trustworthy institution that could fulfill its duty to check the other branches even with neither purse nor sword.

Furthermore, during the eight years of divided government, the Constitutional Court rendered 143 interpretations (from *Interpretation No. 508*, decided on June 9, 2000, through *Interpretation No. 642*, decided on May 7, 2008). Among them, 100 were in response to petitions by citizens. It is also worth noting that among these 100, sixty-one were declared constitutional, which means that the Constitutional Court ruled against the petitioners, that is, the citizens. At first glance, it may seem that the Constitutional Court during this time made little progress in striking down laws that encroach upon human rights. But upon further notice, we see that as of October 1, 2003, the Interpretations were no longer decided by the Justices of the sixth term. Instead, starting with *Interpretation No. 567*, interpretations were decided by Justices nominated by the new executive power, that is, by DPP President Chen. The timing is important for this is the first time Justices were not nominated by a KMT president. From Figure II below, we may see that in the time the new Justices assumed office through the end of President Chen's second term, fifty-nine Interpretations appealed by citizens were made. Among those fifty-nine decisions, twenty-eight were declared unconstitutional, which means that almost fifty percent of the decisions ruled in favor of citizens.

Figure II: Cases Appealed by Citizens (May 20, 2000–May 19, 2008)



Source: Chien-Liang Lee.[122]

122. Chien-Liang Lee, *Jenchuan Weihuche te Liushih Huiku yu Shihtai Tiaochan: Shihtan Tafakuan Jenchuan Chiehshih te Fantoshu Kunchu* [*60 Years Retrospect and the New Challenge as Human Rights Guardian: Exploring the Counter-Majoritarian Difficulty of Grand Justices'*

2. *Analysis*

After a cursory examination of political and constitutional change during the right years, we find that many major controversies occurred during those eight years. This background provided a perfect opportunity for the Constitutional Court to exercise its power of judicial review and thus further entrench its position in the governmental system. As mentioned above, on October 1, 2003, President Chen nominated new Justices. In addition to the influence of these nominations on human rights decisions, it is also intriguing to analyze whether this change in personnel invested with judicial power lead to different understandings of the separation of powers and checks and balances.

Before discussing specific cases, it should be noted that during these eight years, forty-three Interpretations concerning appeals from central and local governments were rendered, which means that about thirty percent of those cases were appealed by governments. Compared to the fifth term and the first six years of the sixth term, this ratio is indeed higher because only about twenty-five percent of Interpretations were based on appeals by governmental officials at that time.[123] This corroborates the observation that in a highly ideologically divided society, the trust between political parties is weak, if not nonexistent, and a detached, politically-neutral arbitrator is very much required to prevent an otherwise functional government from being paralyzed by clashes between the executive and legislative branches. More cases are brought to the courthouse by politicians, and correspondingly the Court is expected to shoulder more responsibilities and still respond in a timely manner. These factors caused the increase of Interpretations related to separation of powers.

With respect to some of the most controversial Interpretations during this period, it seems that although the Constitutional Court cautiously prevented itself from being dragged into the political conflict between the other two branches, this was not successful every time. The nuclear power plant case is the first cardinal case that related to separation of powers the Court encountered in this period. During the 2000 presidential campaign, the issue of nuclear power plants was harshly debated. The then-DPP presidential candidate Chen promised to halt construction of the fourth nuclear power plant if elected. After winning the presidential election, he

Interpretations of Human Rights], *in* 6(2) HSIENFACHIEHSHIH CHIH LILUN YU SHIHWU TILIUCHI HSIATSE [CONSTITUTIONAL INTERPRETATION: THEORY AND PRACTICE] 467, 545-49 (2009).

123. *Judicial Yuan*, Statistics of Interpretations from the First Term to the Sixth Term, http://www.judicial.gov.tw/constitutionalcourt/uploadfile/E100/%E7%AC%AC%E4%B8%80%E5%B1%86%E8%87%B3%E7%AC%AC%E5%85%AD%E5%B1%86%E5%A4%A7%E6%B3%95%E5%AE%98%E4%BD%9C%E6%88%90%E8%A7%A3%E9%87%8B%E4%B9%8B%E7%B5%B1%E8%A8%88%E6%95%B8%E6%93%9A%E8%A1%A8.htm (last visited Dec. 22, 2011).

ordered the Executive Yuan to withhold implementation of the statutory bill that had already been passed and reconsidered by the Legislative Yuan. In this case, the Court arguably rendered an ambiguous decision that did not declare unequivocally whether the decision not to implement the budget was constitutional. Instead, the Court emphasized that many constitutional approaches, such as a no-confidence vote or legislation for an isolated case, could be chosen to resolve major political conflicts in the system of democratic representation, and that "all related agencies should then negotiate a solution based upon the meanings and purpose of this Interpretation, or to select a proper channel within the current constitutional mechanism to end the stalemate."[124] Mindful that an assertive decision might embarrass both branches and escalate the political confrontation, the Court adopted a process-centric approach which prevented itself not only from engaging in direct confrontation with other two branches, but also from being embroiled in political conflict.[125] In addition, although the Court claimed that the judiciary had no authority to decide which approach might best solve the controversy in question, both branches were obligated to act in accordance with the Constitutional Court's exposition of the Constitution. Judicial supremacy was thus implicitly entrenched even in the context of politically divided society.

Another example is the Special Commission case. In *Interpretation Nos. 585* and *633*, cases that relate to the constitutionality of Act of the Special Commission on the Investigation of the Truth in Respect of the 319 Shooting, the Constitutional Court twice struck down that law on substantial grounds. It found that most of the investigative powers vested by the provisions went beyond the ambit of legislative power.[126] The Special Commission indeed was supposed to be a Special Prosecutor or Independent Counselor that may exercise the power to prosecute because the Legislative Yuan did not trust the Minister of Justice in a case in which the incumbent President was involved. The Legislative Yuan did not deny this. However, facing this politically sensitive case, the Constitutional Court cunningly

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124. J.Y. Interpretation No. 520 (2001) (Taiwan), *available at* http://www.judicial.gov.tw/constitutionalcourt/p03_01.asp?expno=520.

125. *See* Yeh, *supra* note 109, at 52; Yeh, *Chuanhsing Fayuan te Tzuwo Tingwei — Lun Hsienfachehshih tui Hsiuhsienchichih te Yinghsiang*, *supra* note 8, at 52; Yeh, *supra* note 121, at 493-94.

126. For related discussions, see Yeong-Chin Su, *Chiao Taishou Shih te Fenchuan, Sa Kouhsieh Pan te Jenchuan* [*Prefecture Chiao's Idea of Separation of Powers; Excessively Emphasized Human Rights*], 70 TAIWAN FAHSUEH TSACHIH [TAIWAN L.J.] 38 (2005); Bruce Yuan-Hao Liao, *Lun Lifa Yuan Tiaochachuan te Chiehhsien yu Fanwei* [*On the Limitation and Spectrum of the Investigative Power of Legislative Yuan*], 78 TAIWAN FAHSUEH TSACHIH [TAIWAN L.J.] 83 (2006); Tsi-Yang Chen, *Lun "319 Chiangchi Shihchien Chenhsiang Tiaocha Tepieh Weiyuanhui Tiaoli" chih Weihsienhsing* [*On the Constitutionality of the "Act to Form a Special Investigative Committee in Search of the Truth of 319 Gun Shot"*], 125 YUEHTAN FAHSUEH TSACHIH [TAIWAN L. REV.] 48 (2005).

distorted the original intent of the Legislative Yuan,[127] trying to maintain the constitutionality of the Act at issue as much as possible by arguing "[t]he SCIT should be categorized as a special commission designed to assist the Legislative Yuan in exercising investigation power. Therefore, it is not an organization that does not belong to any constitutional organ, nor is it a hybrid organ that exercises the legislative, executive, judicial and control powers simultaneously."[128] Thus, the Special Commission was defined by the Court as a subordinate commission of the Legislative Yuan that may constitutionally assist the Legislative Yuan exercising the investigation power with minor revision of the Act. By undercutting the power of the commission on the one hand and retaining the possibility of its constitutionality in the future, the Court spared no effort in striking a balance between executive and legislative power, such as not to unnecessarily rile either. Nevertheless, these two Interpretations still provoked the Legislative Yuan and resulted in backlash.[129] Still, it is obvious that the Court, aware of the political impasse, strategically exercised its interpretive power to maintain its integrity and avoid an unbearable constitutional disaster at the same time.

Given concerns over possible retaliation from the legislative and executive branches, the Court consistently reminded the two branches of its most effective weapon for checks and balances – its interpretive authority that "shall be binding upon every institution and person in the country."[130] *Interpretation No. 627* was exactly the Taiwanese analog of *United State v. Nixon.*[131] The petitioner, that is, then-President Chen, argued in his petition that, inter alia, Article 52[132] of the Constitution should be interpreted most broadly, vesting him with absolute immunity from criminal procedures, including those that may directly and indirectly distract him from his public duties. In other words, due to the status and duties of the President, the criminal procedure's interests in the determent and punishment of crime should yield to the President's claim of privilege. Secondly, the evidence in this case fell into the category of absolute state secretes privilege, which

127. Justice Tzong-Li Hsu articulated and disagreed with the majority opinion's intentional distortion in his dissenting in part opinion in J.Y. Interpretation No. 585. J.Y. Interpretation No. 585 (2004) (Hsu, Tzong-Li J., partly dissenting) (Taiwan), *available at* http://www.judicial.gov.tw/constitutionalcourt/uploadfile/C100/%E6%8A%84%E6%9C%AC585.pdf.

128. J.Y. Interpretation No. 585 (2004) (Taiwan), *available at* http://www.judicial.gov.tw/constitutionalcourt/en/p03_01.asp?expno=585.

129. *See infra* Part IV C.

130. J.Y. Interpretation No. 185 (1984) (Taiwan), *available at* http://www.judicial.gov.tw/constitutionalcourt/en/p03_01.asp?expno=185.

131. United States v. Nixon, 418 U.S. 683 (1974).

132. Article 52 of the Constitution stipulates that "The President shall not, without having been recalled, or having been relieved of his functions, be liable to criminal prosecution unless he is charged with having committed an act of rebellion or treason." Constitution, art. 52 (1947) (Taiwan).

means that either the Taipei district court or the Constitutional Court should be deferential to the President's judgments not to publicize them. Thirdly, the President had no obligation to testify either in his own criminal case or in that involving another person.[133] By rejecting these broad interpretations of Article 52 of the Constitution of the President, the Court, like its American counterpart, implicitly reaffirmed "that it is the province and duty of this Court to say what the law is with respect to the claim of privilege presented in this case."[134]

Also, *Interpretation No. 601* is another example of the Court's reiteration of its interpretive supremacy in explicating laws. In this case, the Court, faced with the prospect of reprisal from the legislative branch, maintained that it should have the final say over whether Justices themselves fall under the category of "judges" prescribed in Article 81 of the Constitution and thus should be entitled to guaranteed salaries.

In addition to the aforementioned cases, there were many other controversial cases in respect of separation of powers, including but not limited to *Interpretation Nos. 613, 632,* and *645*. These decisions that occurred during the eight years of Chen's term showed that the Court did not interpret the Constitution mechanically regardless of the fact that society was politically divided. The Justices had to be politically neutral, which would prevent them from becoming embroiled in head-to-head conflicts between the two branches. This could protect the Court from being attacked by either the sword or the purse to some extent. What was more important was that by doing so, they could claim the position of the only and final arbitrator that everyone else must to succumb to even in the context of political controversies in which the Court usually lacks judicable standards. After all, as observed by McClosky, "the Court's position would ultimately depend on preserving its difference from the other branches of government. The Congress and the presidency would always have roots in the power structure of [the] society, while the Court must find its support in the popular belief that the judiciary stands apart and defends the fundamental law."[135] At the same time, the Justices had to be fully conscious of political developments as well, which prevented them from interpreting the Constitution mechanically. This awareness may have prompted the Court to conciliate various viewpoints from different branches and maintain the stability of the whole country and along with it the legitimacy to intervene the policy-making process in the future.[136]

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133. J.Y. Interpretation No. 627 (2007) (petiton) (Taiwan), *available at* http://www.judicial.gov.tw/constitutionalcourt/uploadfile/C100/%E6%8A%84%E6%9C%AC627.pdf

134. *Nixon*, 418 U.S. at 705.

135. MCCLOSKEY, *supra* note 18, at 20.

136. *See* Epstein et al., *supra* note 115, at 130; Dahl, *supra* note 4, at 293.

Generally speaking, the Court during this politically divided period did demonstrate the Justices' shrewdness, as they asserted their supremacy in some cases while exhibiting the judicial restraint in others. By exercising its interpretive power strategically, the Court led the purview of judicial power to be expanded. Just as McCloskey has remarked, a Court "often gains rather than loses power by adopting a policy of forbearance."[137] The power to adjudicate the impeachment of the president initiated by the Legislative Yuan, which presents a classical conflict between the executive and the legislative power, is a good example of this.

IV. STRATEGIC WAYS THE COURT EXPANDED ITSELF

This paper has suggested that the establishment and empowerment of judicial review at different stages was for different reasons. However, whether we regard judicial review as a byproduct of political conflict, a symbol of national legitimacy, or an indispensible mechanism to protect human rights, the judiciary itself, being one actor in the political arena, functions dynamically and strategically.[138] Courts in nascent democracies are all the more so since political, economic, and social conditions are in rapid transition. If taken to the extreme, they may even totally deviate from the track presupposed by the politicians. Therefore, judicial development after democratization is particularly worth of notice.

In the face of this rapid transition, a court not only has to respond, but must also accustom itself to these changes, which can be regarded as a double-edged sword for a court. On the one hand, these changes are tough challenges to an old court since it may no longer be trusted unless it duly responds to the needs of politicians and citizens in a timely manner.[139] On the other hand, these changes are also opportunities for a court to expand its power and claim its supremacy. Namely, a court must be brave enough to nullify unconstitutional laws enacted in the past to build its authority in new era while still careful enough not to invite backlash or destructive reprisal from other branches. The Constitutional Court faced these challenges in Taiwan as well. After democratization, it did gradually establish its authority as an independent and competent institution that has the final say over

137. MCCLOSKEY, *supra* note 18, at 30.

138. *See* LEE EPSTEIN & JACK KNIGHT, THE CHOICES JUSTICES MAKE 139-77 (1998) (arguing that before rendering any decision, justices must take the reactions of the President, the Congress, as well as the people into account); Micheal McCann, *How the Supreme Court Matters in American Politics: New Institutionalist Perspectives*, *in* THE SUPREME COURT IN AMERICAN POLITICS 63, 69-76 (Howard Gillman & Cornell Clayton eds., 1999) (articulating five general ways how the Supreme Court of U.S. shapes the terms of strategic interaction).

139. *See* Romeu, *supra* note 34, at 107.

constitutional issues.[140] However, it also faced backlash from Congress, the executive branch, and even the Supreme Court. In the following paragraphs, I will discuss how the Constitutional Court evolved from a rubber stamp into a guardian of fundamental rights, and how it faced backlash as a result of the expansion of judicial power. From a political science perspective, the Court strategically and successfully, expanded its power through various approaches.

A. *Guardian of Constitutional Rights*

The best and fastest way for a court in a nascent democracy to establish its reputation and reinforce the people's confidence is for it to make itself more accessible and more dedicated to rights review. Multiple reasons may account for this. Generally speaking, cases regarding constitutional rights are less politically sensitive in the usual scenarios. Compared to issues related to the separation of powers that directly challenge the allocation of power, a court takes a lower risk when it adjudicates cases concerning fundamental rights. In addition, it is natural that the more opportunities citizens have to appeal to a court, the more likely they will depend on a court as arbitrator. When people are accustomed to choosing a court as their arbitrator, they implicitly recognize its authority and judgment and will return to the court when they are engaged in a dispute the next time around. Through repetition of this behavior, a path-dependent psychology is formed, and a court thus gains its reputation. This is especially the case when petitioners do win occasionally when they appeal. Therefore, it is predictable that a court established after political struggle will choose to hear more cases about human rights. Constitutional courts are no exception.

During the Constitutional Court's first three terms, only one Interpretation came from citizens, and the Court ruled against the appellant. Access to the Court during authoritarian era was quite restricted, to say nothing of the protection of human rights. From the fourth term, however, there were twenty-three cases appealed by citizens—a significant growth compared to the previous term.[141] Among them, one ruled in the appellant's favor, which was also a break through at that time. After democratization, decisions appealed by citizens increased enormously, and now these cases constitute the bulk of the Court's docket. In the fifth term, the Court made 110 decisions appealed by citizens, five times more than the fourth term. In the sixth term, there was again steady growth: 151 decisions appealed by citizens were made.[142]

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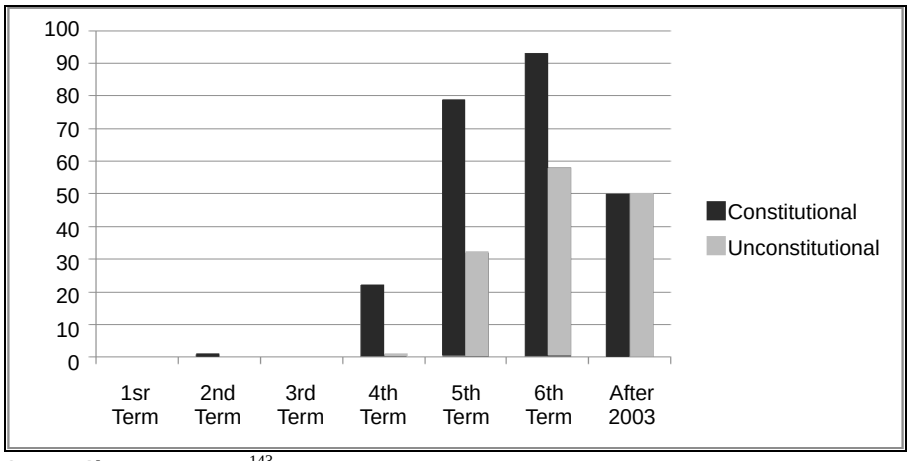
140. *See* Ginsburg, *supra* note 111, at 30.
141. Lee, *supra* note 122, at 535-49; Fa, *supra* note 59, at 207.
142. After 2003, there is no "seventh term" since justices serve for a non-renewable, staggered

Figure III: Cases Appealed by Citizens



Source: Chien-Liang Lee.[143]

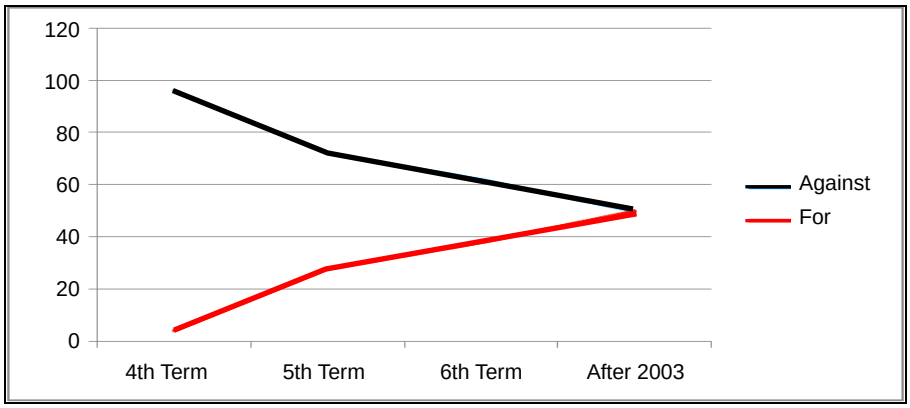
In spite of the increase in decisions appealed by citizens, the percentage of decisions ruled in favor of citizens, rather than the for government, also grew steadily. That is, the Constitution Court denounced more and more laws as unconstitutional that infringed fundamental rights after the lift of the Martial Law Decree. From the beginning of the fifth term, it is apparent that Justices have ruled against the government increasingly frequently as time goes by.[144] Or conversely, more and more citizens successfully had their rights entrenched by the Constitutional Court. In the fourth term, ninety-six percent of decisions appealed by citizens were ruled in the government's favor. After that, the rate decreased to seventy-two in the fifth term, and to sixty-two in the sixth term. After 2003, it became almost fifty-fifty. From Figure II, it is clear that the tendency is quite manifest.

term of eight years independent of the order by which each Justice is appointed to office.

143. The Interpretations made after the publication of Lee's article are also calculated and incorporated in the figure by this paper. Lee, *supra* note 122, at 535-49.

144. Since there was only one decision appealed by citizens in the first three terms, it might not be helpful to count it in if we want to see the tendency of decisions from the perspective of percentage.

Figure IV: Ratio of Decisions For – Against the Appellants (Citizens)



Source: Chien-Liang Lee.[145]

In addition, the Court has also actively opened the gate for judges in lower courts to petition the Court. In the past, only judges of the Supreme Court and Supreme Administrative Court could petition the Constitutional Court, as stipulated in article 5, section 2 of the Constitutional Interpretation Procedure Act to limit the qualification of appellants. If citizens wanted to petition the Constitutional Court, they had first to exhaust all available remedies, which was always time-consuming and meaningless. In *Interpretation No. 137*, the Court firstly encountered this problem. In that Interpretation, the Court did not dare to directly challenge the applicability of administrative orders of statutory interpretation handed down by government agencies, even if judges believe that the administrative orders in question were not authoritative. The Court vaguely, and with cowardice, contended that judges should "give a lawful and legitimate legal opinion on a controversy which requires an accurate judicial interpretation."[146]

However, this stance changed after democratization. In *Interpretation No. 216*, which was made in the same year as the lifting of the Martial Law Decree, the Court substantively changed the meaning of Interpretation No. 137, arguing that "Administrative rules . . . [and] [o]rdinances issued by a judicial administration involving legal issues in the business of adjudication are merely references for judges, who again, are not bound thereby in the course of adjudication."[147] From the perspective of checks and balances, the Court announced in this case that administrative rules are not binding to judges. Whether these orders are issued by executive agencies or judicial

145. Lee, *supra* note 122, at 535-49.

146. J.Y. Interpretation No. 137 (1973) (Taiwan), *available at* http://www.judicial.gov.tw/constitutionalcourt/en/p03_01.asp?expno=137.

147. J.Y. Interpretation No. 216 (1987) (Taiwan), *available at* http://www.judicial.gov.tw/constitutionalcourt/en/p03_01.asp?expno=216.

administration, every judge can refuse to apply them if he or she believes they contravene the law. In *Interpretation No. 371*, the Court further specified that article 5, section 2 of the Constitutional Interpretation Procedure Act enacted by the legislative branch was unconstitutional. Every judge, asserted the Court, should have the power to challenge statutes when he or she "with reasonable assurance, has suspected that the statute applicable to the case is unconstitutional . . ."[148]

We might regard this development as the steady progress of human rights protections since people need not exhaust all available remedies to petition the Court so long as they can convince judges of lower courts that laws at issue are unconstitutional. Alternatively, this could also be seen as a tool for the judiciary to recapture its power in interpreting laws. In summary, in order to reestablish its legitimacy and bolster confidence among citizens, the Court started to review more cases appealed by citizens than it had in past decades, and ruled for the citizens much more frequently. The more cases it ruled for the citizens, the more likely citizens would be to believe that injustices imposed upon them can be redressed in the Court. This consensus is exactly the foundation from which the authority of the Court stems.

Still, we must nevertheless appreciate that in the process of increasing access to the Court, conflicts among government branches will inevitably occur. This is because the opportunity for citizens to challenge the government is also the opportunity for the judiciary to examine the legality and constitutionality of legislative and executive behaviors. By declaring these behaviors unconstitutional, be it statutes or administrative regulations, the Court not only wins popular support, but also announces its supremacy over other government agencies in the name of rule of law. After all, "[i]t is emphatically the province and duty of the judicial department to say what the law is . . . This is of the very essence of judicial duty."[149]

B. *Expansion through Interpretations*

After democratization, one strategy the Court adopted to expand its power was through interpretation. This can be further divided into two parts: the scope of Interpretations and the validity of Interpretations.

1. *Scope of Interpretations*

The scope of interpretation directly influences the domain of judicial

148. J.Y. Interpretation No. 371 (1995) (Taiwan), *available at* http://www.judicial.gov.tw/constitutionalcourt/en/p03_01.asp?expno=371.

149. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177-78 (1803).

review, indicating the limit of judicial power. In this regard, there were two cardinal expansions of the scope of judicial review after democratization. The first, the vertical one, is the reviewability of the Constitution and the Amendments themselves. In *Interpretation No. 261*, the Court declared the Temporary Provisions, a statue with quasi-constitutional status, unconstitutional. That was the first case in which the Court declared a quasi-constitutional statute unconstitutional.

In Interpretation No. 499, the Court went further and declared the 1999 Constitutional Amendments unconstitutional. In that case, the Court maintained that some principles were "of the most critical and fundamental tenets of the Constitution as a whole."[150] Because the constitutional amendments conflicted with these basic tenets, they were found unconstitutional. This interpretation spawned much controversy at that time since the Constitutional Court was supposed to interpret the Constitution, not enact or revise it—a traditional way of thinking that believes there is a distinct line between interpreting and legislating. In addition, there was another issue as to whether there is an inner limit for constitutional amendments and, if there is, why we should be bound to a limit put in place by people of earlier generations. I will not recap all the related debates in this paper. Rather, what I hope to highlight here is the expansion of judicial power in terms of the scope of judicial review. These two Interpretations controversially expanded the scope of judicial review to the Constitution, which would have been inconceivable during the authoritarian period.

In addition, the Court also expanded the scope of judicial review horizontally in at level of statutes. There is no doubt that the Court may review the constitutionality of all statutes and regulations in the abstract. However, whether the Court may review statutes that had not been challenged in any specific case was once an issue that was not properly answered. Some scholars argued that to maintain a passive and minimal judiciary, the Court should only review the constitutionality of statutes challenged by appellants. If not, the Court might function as a super legislative branch that has the power to actively and intensively review all statutes enacted by the Legislative Yuan. In *Interpretation No. 445*, however, the Court clearly maintained that "[t]he foregoing are merely some examples of the interpretations made by this Court, which should be sufficient to explain that the scope of constitutional interpretation is not always limited to the purport of a petition."[151] In this Interpretation, the Court also cited *Interpretation Nos. 216, 289, 324, 339, 396,* and *436* as precedents, in an

150. J.Y. Interpretation No. 499 (2000) (Taiwan), *available at* http://www.judicial.gov.tw/constitutionalcourt/en/p03_01.asp?expno=499.

151. J.Y. Interpretation No. 445 (1998) (Taiwan), *available at* http://www.judicial.gov.tw/constitutionalcourt/en/p03_01.asp?expno=445.

attempt to portray its decision as a mere exercise in *stare decisis*. It seems that the earliest precedent cited by the Court was made in 1987, the year that the Martial Law Decree was abolished.

2. *Validity of Interpretations*

In the authoritarian era, the Court seldom plainly declare a statute at issue to be unconstitutional, and the validity of interpretations was usually challenged. Roughly speaking, two reasons may account for this. The first came from the threat of the dictatorship while the second came from the tension between the Constitutional Court and the Supreme Court[152]—that is, which institution was to be more authoritative in interpreting civil and criminal laws. Therefore, for those cases that were on the verge of being unconstitutional in the future, they might issue *admonitory decisions*.[153] For those unconstitutional findings, they might issue a *simple declaration* without nullifying directly the unconstitutional laws for fear of provoking the executive and legislative branches.[154]

In 1988, the first year after the Martial Law Decree was lifted, the Court issued *Interpretation No. 224*, in which it clearly nullified a statute enacted by the Legislative Yuan on constitutional grounds for the first time in history.[155] After that, the number of simple-declaration findings decreased sharply after democratization. Contrarily, the number of void decisions and void-with-deadline decisions increased over time.[156] By rendering void-with-deadline decisions, which may serve as a kind of safety buffer, the Court expanded its power prudently.[157]

Regarding tension between the Constitutional Court and the Supreme Court, the situation changed during the late stage of the authoritarian era. In *Interpretation No. 177*, the Constitutional Court declared a precedent inconsistent with the Constitution and should no longer be upheld. In *Interpretation Nos. 185 and 188*, the Constitutional Court maintained that the Interpretations, be they constitutional interpretations or unified

152. It seems to be a commonplace feature of centralized judicial review, especially in new democracies. *See* Lech Garlicki, *Constitutional Courts versus Supreme Courts*, 5 INT'L J. CONST. L. 44, 63-65 (2007). Another parallel example is Korea. *See* Tom Ginsburg, *The Constitutional Court and the Judicialization of Korean politics*, *in* NEW COURTS IN ASIA 145, 153-55 (Andrew Harding & Penelope Nicholson eds., 2010).

153. Chang, *supra* note 75, at 84.

154. *Id.* (identifying the differences between the simple declaration, void decisions, and void-with-deadline decisions).

155. J.Y. Interpretation No. 224 (1988) (Taiwan), *available at* http://www.judicial.gov.tw/constitutionalcourt/en/p03_01.asp?expno=224.

156. Jiunn-rong Yeh, The Politics of Unconstitutionality: An Empirical Analysis of Judicial Deadlines and Political Compliance in Taiwan 7 (June 24, 2011) (unpublished manuscript). *available at* http://www.iias.sinica.edu.tw/upload/conferences/20110624/p20110624-1a.pdf.

157. *Id.* at 12-17.

interpretations, should be "binding upon every institution and person in the country, and each institution shall abide by the meaning of these interpretations in handling relevant matters . . . precedents which are contrary to these interpretations shall automatically be nullified."[158] After these three Interpretations, we may fairly say that the authority of the Court as well as its Interpretations had become entrenched.[159]

After its authority had been established, the Court even clearly instructed institutions how to redress the constitutional defects in concrete cases. To name a few, in *Interpretation No. 624*, the Court instructed that "[i]n order to serve the constitutional purpose first above mentioned, . . . a claim for state compensation may be filed according to the Act of Compensation for Wrongful Detentions and Executions within two years as of the date of this Interpretation if the requirements set forth in Article 1 of said Act are satisfied prior to the amendment to said Article 1 or the enactment and enforcement of any law regulating the compensation for wrongful detentions and executions resulting from military trials."[160] In this case, the Court not only declared the statute in question offensive to the Constitution, but also designated an alternative for the appellants to file suits.

In *Interpretation No. 627*, the Court contended that "[p]rior to the issuance of any ruling by the special tribunal, the enforcement of the original disposition or ruling should stay. The applicable provisions of the Code of Criminal Procedure should apply to the rest of the objection or interim appeal proceedings."[161] In this case, the Court expanded the scope of application of the Code of Criminal Procedure.

In *Interpretation No. 641*, the Court maintained that "[t]he competent authority shall consider the sales price, sales quantity, actual profits earned from selling rice wine at a higher price, negative impact on the market stability and other relevant factors in these individual cases for the purpose of deciding the adequate amount of fine that should be imposed in each case."[162] In this case, the Court asked the relevant agency to consider certain factors before enacting new regulation.

In *Interpretation No. 677*, the Court mentioned that "[t]he related governmental agencies shall promptly implement appropriate regulations on the release of prisoners in accordance with this Interpretation. Before the

158. J.Y. Interpretation No. 185 (1984) (Taiwan), *available at* http://www.judicial.gov.tw/constitutionalcourt/en/p03_01.asp?expno=185.

159. Interview with Yueh-sheng Weng, former President of Judicial Yuan (July 6, 2011).

160. J.Y. Interpretation No. 624 (2007) (Taiwan), *available at*. http://www.judicial.gov.tw/constitutionalcourt/en/p03_01.asp?expno=624.

161. J.Y. Interpretation No. 627 (2007) (Taiwan), *available at*. http://www.judicial.gov.tw/constitutionalcourt/en/p03_01.asp?expno=627.

162. J.Y. Interpretation No. 641 (2008) (Taiwan), *available at* http://www.judicial.gov.tw/constitutionalcourt/en/p03_01.asp?expno=641.

statute is amended, prisoners shall be released before noon on the day their prison terms are ended."[163] In this case, the Court itself enacted a new rule that prescribed when prisoners should be released.

These decisions indicate that the expansion of judicial power has increased over time through various approaches in the name of human rights protection and rule of law. Not only did the Court repeatedly use its judgments to amend the loopholes, which is regarded as quasi-legislation; it also expanded the scope and enhanced the validity of judicial review through its Interpretations. This sort of judicial involvement and law-making mechanism never took place before democratization. Frankly, the development of judicial power did protect human rights against governmental encroachment, which is hard to deny. But it also led to unexpected results.

C. *Backlash*

As discussed above, the Court intentionally expanded its power through various approaches. Gradually, the Court stopped being a rubber stamp or pawn of the ruler, and instead became a functioning and progressive institution. Despite its cautiousness,[164] nevertheless, some interpretations incited considerable backlash from other government agencies.[165] This backlash did not stem from the intense power struggle between political parties, which is common in new democracies, inasmuch as the justices seem "to be fairly insulated from main party interests" after democratization.[166] Instead, it resulted from interactions with other branches during the process of judicialization and democratic transition. The backlash came not only from the legislative and executive branches, but also from the Supreme Court, a court that used to have the final say over civil and criminal issues.

1. *Legislative Reprisal*

Over the history of judicial review, the Court has encountered retaliation

163. J.Y. Interpretation No. 677 (2010) (Taiwan), *available at* http://www.judicial.gov.tw/constitutionalcourt/en/p03_01.asp?expno=677.

164. *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).

165. This is by no means peculiar to Taiwan Constitutional Court. Similar situations happened in the American context as well. The Supreme Court of the United States faced congressional and executive attack after its landmark desegregation case—*Brown v. Board of Educcation.*, 349 U.S. 294 (1955); *See* ROSENBERG, *supra* note 4, at 74-82; Gerald Rosenberg, *Judicial Independence and the Reality of Political Power*, 54 REV. POL. 369, 376-77 (1992) (identifying ten types of proposals to attack the judicial branch).

166. Garoupa et al., *supra* note 105, at 33-34.

from the legislative branch three times. These instances of backlash were reactions to three different decisions made in different terms. To be more specific, the three decisions were *Interpretation Nos. 76*, *499*, and *585*.

In *Interpretation No. 76*, the Court ruled that "[a]lthough some of their approaches to the exercise of power, such as a regular annual assembly, quorum and resolution by the majority are not the same as those of parliaments of democratic nations, the National Assembly, the Legislative Yuan and the Control Yuan, from the perspective of the nature of their statuses and functions in the Constitution, should be considered as equivalent to the parliaments of democratic nations."[167] In other words, legislative power and privilege that had been monopolized by the Legislative Yuan before this decision was thereafter shared by the National Assembly and the Control Yuan. The Legislative Yuan was vexed and revised the Constitutional Interpretation Procedure Act, raising the quorum for passing interpretations.[168] Thus, it would substantively become more difficult for the Court to issue any decisions in the future.

In *Interpretation No. 499*, the Court declared the 1999 constitutional amendments enacted by the National Assembly unconstitutional.[169] This time the National Assembly, not the Legislative Yuan, was the organ to be displeased. Hence, the National Assembly amended the Constitution in 2000, prescribing "[t]he provisions of Article 81 of the Constitution and pertinent regulations on the lifetime holding of office and payment of salary do not apply to grand justices who did not transfer from the post of a judge."[170] This provision not only deprived the Justices of related protection but also left a constitutional controversy—whether or not Justices are to be regarded as judges as referred to in Chapter Seven of the Constitution.

In *Interpretation No. 585*, another politically contentious case, the Court ruled that the Legislative Yuan, by enacting the Act of the Special Commission on the Investigation of the Truth in Respect of the 319 Shooting, went beyond the scope of its legislative authority.[171] In this case, most critical articles of the Act were declared unconstitutional because of a variety of constitutional defects. In response, the Legislative Yuan curtailed the budget appropriated as a specialty premium for the Justices. This time, the Justices fought back. In *Interpretation No. 601*, they argued that "[t]he Justices are nominated by the President of the Republic and appointed by the

167. J.Y. Interpretation No. 76 (1957) (Taiwan), *available at* http://www.judicial.gov.tw/constitutionalcourt/en/p03_01.asp?expno=76.

168. *See* Liu, *supra* note 57, at 525; Fa, *supra* note 59, at 202-03.

169. J.Y. Interpretation No. 499 (2000) (Taiwan), *available at* http://www.judicial.gov.tw/constitutionalcourt/en/p03_01.asp?expno=499.

170. Constitution, Additional Articles, art. 5(1) (1991) (amended 2005) (Taiwan).

171. J.Y. Interpretation No. 585 (2004) (Taiwan), *available at* http://www.judicial.gov.tw/constitutionalcourt/en/p03_01.asp?expno=585.

same upon confirmation by the Legislative Yuan, and are judges under Article 80 of the Constitution."[172] Therefore, "no constitutional organ may diminish the salary of a judge for grounds other than those subject to disciplinary action."[173]

2. *Executive Disobedience*

During the authoritarian era, the judiciary had little leverage over the executive branches. Decisions were usually passively ignored. For instance, both the prosecutors and judges of the lower courts—that is, the district courts and high courts—were subordinate to the Ministry of Justice, Executive Yuan, rather than Judicial Yuan in the past. In *Interpretation No. 86*, which was rendered in 1960, the Court asked that "[i]n view of the fact that different levels of courts and subsidiary courts below the High Court inclusively hold the judicial power over trials of civil and criminal litigation, these courts shall be subordinate to the Judicial Yuan."[174] Nevertheless, the *simple declaration* was not complied with until 1980.[175]

Furthermore, in *Interpretation No. 166*, the Court argued that "[t]he police sanctions of administrative detention and forced labor stipulated by the Act Governing the Punishment of Police Offences are sanctions on physical freedom. In order to comply with the requirements of Article 8, Paragraph 1, of the Constitution, these sanctions shall be promptly administered by courts based on legal process."[176] However, the executive branch refused to revise the provision in question.[177] After democratization, the Court declared the law inconsistent with the Constitution again in *Interpretation No. 251* after ten years.[178] This time, the Court issued a *void-with-deadline decision* instead of a *simple declaration* as it had done previously. The executive branch complied this time, revising the law that same year.

The percentage of full compliance with void-with-deadline decisions is amazingly high. Politicians indeed are obedient to the deadlines in most cases.[179] However, there are still some cases in which the executive

172. J.Y. Interpretation No. 601 (2005) (Taiwan), *available at* http://www.judicial.gov.tw/constitutionalcourt/en/p03_01.asp?expno=601.

173. *Id.*

174. J.Y. Interpretation No. 86 (1960) (Taiwan), *available at* http://www.judicial.gov.tw/constitutionalcourt/en/p03_01.asp?expno=86.

175. *See* Liu, *supra* note 57, at 526-27; Fa, *supra* note 59, at 206.

176. J.Y. Interpretation No. 166 (1980) (Taiwan), *available at* http://www.judicial.gov.tw/constitutionalcourt/en/p03_01.asp?expno=166.

177. *See* Fa, *supra* note 59, at 206.

178. J.Y. Interpretation No. 251 (1990) (Taiwan), *available at* http://www.judicial.gov.tw/constitutionalcourt/en/p03_01.asp?expno=251.

179. Yeh, *supra* note 156, at 18.

branches as resisted passively in additional to the *Interpretation No. 251*. For example, in *Interpretation No. 366*, the Court asserted that Article 51 of the Criminal Code "create unnecessary restrictions on the people's freedoms and rights . . . should therefore be reviewed and revised accordingly"[180] Nevertheless, the Ministry of Justice refused to revise it until the promulgation of *Interpretation No. 662*. In that Interpretation, the Court reiterated the holding of Interpretation No. 366, and this time the Court nullified the related provisions directly without setting another deadline.

The revision of the Act for the Prevention of Gangsters is another good example that vividly portrays the reluctance of the executive branch to obey the decision. This time, it was Ministry of the Interior that resisted revising the Act comprehensively until it was declared unconstitutional three times by the Court in *Interpretation Nos. 384*,[181] *523*[182] and *636*.[183]

3. *Judicial Resistance*

In the past, whether the supremacy of the Constitutional Court was limited to constitutional issues was once a contentious question. Similar to Interpretations rendered by the Constitutional Court, the Supreme Court also issued its own precedents articulating the meaning and application of civil and criminal laws.[184] Not until *Interpretation Nos. 177*,[185] *185* and *188* did the Constitutional Court solidify its supremacy in interpreting laws, including but not limited to the Constitution.[186] In fact, *Interpretation No. 177* is the first case in which the Constitutional Court manifestly nullified a precedent made by the Supreme Court. The Supreme Court was dissatisfied with the aforementioned interpretations and petitioned the Constitutional Court, giving birth to the *Interpretation No. 209*.[187] In that case, the

180. J.Y. Interpretation No. 366 (1994) (Taiwan), *available at* http://www.judicial.gov.tw/constitutionalcourt/en/p03_01.asp?expno=366.

181. J.Y. Interpretation No. 384 (1995) (Taiwan), *available at* http://www.judicial.gov.tw/constitutionalcourt/en/p03_01.asp?expno=384.

182. J.Y. Interpretation No. 523 (2001) (Taiwan), *available at* http://www.judicial.gov.tw/constitutionalcourt/en/p03_01.asp?expno=523.

183. J.Y. Interpretation No. 636 (2008) (Taiwan), *available at* http://www.judicial.gov.tw/constitutionalcourt/en/p03_01.asp?expno=636.

184. The precedent here is not a former adjudication made by the Supreme Court in the literal sense. It is an abstract regulation irrelevant to any concrete cases that prescribes the application and interpretation of laws. It is binding and decisions contradict to Precedents would be reversed by High Courts or the Supreme Court.

185. J.Y. Interpretation No. 177 (1982) (Taiwan), *available at* http://www.judicial.gov.tw/constitutionalcourt/en/p03_01.asp?expno=177.

186. *See* Liu, *supra* note 57, at 532-33 (arguing that this interpretation "removed any doubt whether the Council had the features of a de facto 'supreme court' . . . and 'is a significant step in consolidating the power of the Council within the judicial system'").

187. J.Y. Interpretation No. 209 (1986) (Taiwan), *available at* http://www.judicial.gov.tw/constitutionalcourt/en/p03_01.asp?expno=209.

Constitutional Court reiterated and complemented its position in *Interpretation No. 188*.

In *Interpretation No. 530*, a case related to the original design of the Judicial Yuan, the Court emphasized that "[i]n order to be consistent with the intent of the framers of the Constitution that considered the Judicial Yuan as the highest judicial adjudicative organ, the Organic Act of Judicial Yuan, the Court Organic Act, the Organic Act of Commission on the Disciplinary Sanction of Functionaries must be reviewed and revised in accordance with the designated constitutional structure within two years after the date of this Interpretation."[188] Ten years have passed, but judicial reform has not yet been put into practice partly due to the vehement objection of some judges in the Supreme Court.

It was *Interpretation No. 582* that resulted in the most momentous clash between the Constitutional Court and the Supreme Court.[189] In this Interpretation, the Court declared two precedents issued by the Supreme Court unconstitutional. After the promulgation of this Interpretation, the Supreme Court held a conference and openly expressed their disagreement and disappointment. The Supreme Court voiced its opinion that this Interpretation distorted the meaning of the two void precedents and encroached upon their jurisdiction, in what amounted to public criticism of the Court and this Interpretation. Judges of the Supreme Court even claimed that they would refuse to adjudicate all related cases concerning the two Precedents. This was the first time the Supreme Court expressed an attitude of open confrontation toward the Constitutional Court. Eventually, they petitioned the Constitutional Court for further clarification of the scope and effect of the said Interpretation and the Court issued *Interpretation No. 592* in response.[190]

V. CONCLUSION

Why do Taiwanese people recognize judicial review? What has accounted for the establishment, empowerment, and evolvement of judicial review over the past seventy years? In this paper, I briefly introduced several major models that explain the emergence of judicial review and tried to find the most persuasive one. Among them, I focused on the insurance theory since it is the only one that clearly includes Taiwan Constitutional Court as

188. J.Y. Interpretation No. 530 (2001) (Taiwan), *available at* http://www.judicial.gov.tw/constitutionalcourt/en/p03_01.asp?expno=530.

189. J.Y. Interpretation No. 582 (2004) (Taiwan), *available at* http://www.judicial.gov.tw/constitutionalcourt/en/p03_01.asp?expno=582.

190. J.Y. Interpretation No. 592 (2005) (Taiwan), *available at* http://www.judicial.gov.tw/constitutionalcourt/en/p03_01.asp?expno=592.

one of the examples in its gloss. Due to the political cataclysm after the enactment of the Constitution, the constitutional subject was radically changed.[191] For this reason, I think two phases must be discussed separately.

During the foundation stage, the KMT held absolute power in the Constituent National Assembly, and they did have their favored draft of the constitution that was written in accordance with Sun's political thinking. Eventually, they compromised and gave way to opposition parties in the hope of expediting the process of constitutional law-making and winning more domestic as well as international support. Instead of being an example of the insurance model, the Constitution stemmed from politicians' political calculation to eliminate their main adversary—the CCP. That is, the KMT collaborated with other non-influential opposition parties to eliminate their strongest enemy. This is an account that underscores the political calculation of the dominant parties, rather than that of weaker parties. In this regard, it departs from the assumptions of the insurance theory. After the promulgation of the Temporary Provisions and the KMT's retreat in 1949, much of the substantive content of the Constitution was suspended and judicial review did not shoulder the responsibilities it was supposed to.

During the transition stage, the Court regained its power and began to function like a constitutional court that the insurance theory envisions. This situation might have resulted from many political and social conditions. To name a few, the dominant KMT was at the time host to an internal power struggle, and, in fact, it did split into three parties – the so-called pan-blue Coalition. The opposition party, the DPP, won an increasing number of seats in local as well as national elections. The constitutional amendments thus provided a chance for all political parties to negotiate and reallocate political power. Owing to a variable and unpredictable political environment and the lack of an unchallengeable authority, such as the strongman in old authoritarian regime, the need for a fair and apolitical arbitrator increased. The Court was thus empowered. I think, then, that the insurance theory is applicable here.

In addition to political manipulation, the Court also expanded its power actively. Throughout the process of increased judicial involvement, however, courts in new democracies need to be more prudent than usual when exercising the power of judicial review.[192] The Court, while careful, still faced much backlash from other branches. This was especially manifest after democratization in Taiwan since the Court faced more highly contested

191. Here I borrow the term "constitutional subject" from Michel Rosenfeld's book. For a detailed definition and further discussion, *see* Rosenfeld, *supra* note 5, at 41-45 (2010).

192. *See* Martin Shapiro, *Judicial Review in Developed Democracies*, *in* DEMOCRATIZATION AND THE JUDICIARY: THE ACCOUNTABILITY FUNCTION OF COURTS IN NEW DEMOCRACIES 7, 18 (Siri Gloppen, Roberto Gargarella & Elin Skaar eds., 2004).

issues than before. On the one hand, the tendency of judicialization provided the Court with more opportunities to intervene in political decision-making processes that had been monopolized by the executive and legislative branches. On the other hand, it at times tended to invite unintended political disaster that damages the integrity and authority of the judiciary. The judicial review in Taiwan has been full-fledged, but there are still more challenges for the Court to overcome. I hope this paper may shed some light on future discussion of judicial review and its practice before and after democratization in Taiwan.

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臺灣司法違憲審查的誕生與再生
——創設、賦權與發展

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摘 要

為什麼臺灣人會認同司法違憲審查？在過去七十年間，什麼因素促成臺灣司法違憲審查的創建、賦權與發展？這是本文所要討論的主要問題。本文一開始簡要介紹幾個解釋司法違憲審查的理論模型，並試圖尋找最吻合臺灣司法違憲審查的理論。然而由於過去臺灣的政治劇變，沒有一個理論可以完整地解釋臺灣的司法違憲審查發展，不同的理論模型只能說明不同階段的臺灣司法違憲審查。在創建時期，憲法法院非常順從，但在轉型時期，如同保險模型所預測的，憲法法院逐漸取回應有的權力與權威。政治環境的不穩定以及缺少過去不容質疑的威權，人們渴望有一個公平且中立的裁決者，而憲法法院正好順勢而起。除了政治操作外，即便是在社會高度分裂的2000年之後，憲法法院也積極、並謹慎的擴張其權力。然而在新興民主國家的脈絡下，司法違憲審查的運作必須特別小心。在一方面來說，司法化的傾向提供憲法法院絕佳的機會參與政治決策的過程，但在另一方面，這也可能造成損及憲法法院威信的政治危機。

關鍵詞：臺灣憲法法院、司法違憲審查、憲法解釋、保險理論、權威留存