THE *BROWN* MOMENT IN TAIWAN: MAKING SENSE OF THE LAW AND POLITICS OF THE TAIWANESE *SAME-SEX MARRIAGE CASE* IN A COMPARATIVE LIGHT

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The Taiwan Constitutional Court (TCC) recently issued a landmark decision in Interpretation No. 748 (the Same-Sex Marriage Case*), declaring the definition of marriage as a gender-differentiated union of a man and a woman under the Civil Code unconstitutional and setting the stage for Taiwan to become the first in Asia to legalize same-sex marriage. This decision has been compared to* Obergefell v. Hodges*. However, reading* Obergefell *in the broad context of the gay rights movement and the role of judicial review in Taiwanese constitutional politics, we challenge this analogy. Due to the discrepancy between the social movement and the law in the fight for constitutional rights for gays and lesbians in Taiwan, the* Same-Sex Marriage Case *is Taiwan's* Brown v. Board of Education *moment in her constitutional law and politics. To make sense of the law and politics of the* Same Sex Marriage Case*, we evaluate its political context and the text and style in its reasoning. We observe a discrepancy between law and politics in the pursuit of the constitutional rights of gays and lesbians in Taiwan. The rise of same-sex marriage to the top of the antidiscrimination agenda resulted from the continuous effort of gay rights activists, while the TCC watched this movement from the sidelines until the* Same-Sex Marriage Case*. This case thus mirrors* Brown *in two respects. First, the role of the TCC has been publicly questioned after its* Brown*-like contentious decision on the issue of same-sex marriage. Second, the text and style of the* Same-Sex Marriage Case *is evocative of the exceptional brevity, managed unanimity, and scientific rationality in* Brown*. Echoing the* Brown *Court, the TCC attempts to manage judicial legitimacy through judicial style, while anticipating the political reaction to its ruling in light of its historic intervention in gay rights issues by tackling the fundamental question of same-sex marriage head-on*.

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I. INTRODUCTION

On May 24, 2017, the Taiwan Constitutional Court (TCC)[1] issued a landmark decision on the rights of gays and lesbians in *Interpretation No. 748* ("the *Same Sex Marriage Case*").[2] The

[1] The TCC is not an official designation. Instead, the TCC functions in the form of the Council of Grand Justices of the Judicial Yuan (the Council of Grand Justices). Yet the TCC has become what the Council of Grand Justices is known as to the public and its observers. We shall come back to this point *infra* text accompanying notes 222-32. The Judicial Yuan is the umbrella governing body of judicial administration, which is one of the five highest constitutional powers under Taiwan's quintipartite separation of powers system. The other four powers are the Legislative Yuan (Legislature or Parliament), the Executive Yuan (the National Administration), the Control Yuan (Ombudsmanship) as well as the Examination Yuan. For an introduction to the judicial organization in Taiwan, see generally Wen-Chen Chang, *Courts and Judicial Reform in Taiwan: Gradual Transformations towards the Guardian of Constitutionalism and Rule of Law*, *in* ASIAN COURTS IN CONTEXT 143, 145-51 (Jiunn-rong Yeh & Wen-Chen Chang eds., 2014).

[2] J.Y. Interpretation No. 748 (2017), http://www.judicial.gov.tw/constitutionalcourt/p03_01_1.asp?expno=748 [hereinafter Interpretation No. 748]. A detailed press release in English can be downloaded at http://jirs.judicial.gov.tw/GNNWS/NNWSS002.asp?id=267570. All the references to the TCC case law are based on its original Chinese version made available on the TCC official website at http://www.judicial.gov.tw/constitutionalcourt/p03.asp. Unless specified otherwise, all English renderings in this Article are ours to make them more readable. As the TCC is organically part of the Judicial Yuan (J.Y.), the TCC decision is formally styled as J.Y. Interpretation. For the purpose of elegance, we simply refer to the official case report as Interpretation with its serial number. Also, formally speaking, the TCC's decision takes the form of an interpretation. As its interpretations result from referrals or petitions prompted by constitutional or other legal disputes, the TCC effectively rules on disputes through interpretations. Thus, we use "interpretation," "ruling," "judgment," and "decision" interchangeably when referring to the TCC case law.

TCC declared the governing provisions of the Taiwanese Civil Code on the marriage institution unconstitutional for essentially restricting marriage to opposite-sex couples.[3] By granting a remedial grace period, the TCC effectively stalled the preceding declaration of unconstitutionality for two years, allowing the Legislative Yuan (Parliament) time to sort out the required legal framework for same-sex marriage. Anticipating a likely delay in required legislation from the parliamentary procedures beyond the two-year time frame, the TCC further decreed that should Parliament fail to legislate same-sex marriage, the current Civil Code would extend to same-sex couples, despite the family structure being institutionally conceived according to the model of opposite-sex marriage.[4] The TCC paved the way for legalization of same-sex marriage in Taiwan through this landmark decision.

The *Same-Sex Marriage Case* not only adds Taiwan to the few jurisdictions where same-sex marriage is legally recognized through judicial ruling,[5] it also blazes the trail for marriage equality for same-sex couples in Asia.[6] That is a truly remarkable development as it shows how far Taiwan has moved away from a traditional patriarchal Confucian society under a quasi-military dictatorship to one of the most tolerant, liberal countries in the world over the past three decades. The *Same-Sex Marriage Case* illustrates the transcendental value of antidiscrimination. Antidiscrimination and marriage equality are no longer only part of the hegemony of Western constitutionalism, they are opening new frontiers in Asia.[7]

Though the *Same-Sex Marriage Case* has been praised as the Taiwanese version of

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http://www.judicial.gov.tw/constitutionalcourt/EN/p03_01.asp?expno=748.

[3] Interpretation No. 748, *supra* note 2.

[4] *Id*; *see also* Ming-Sung Kuo & Hui-Wen Chen, *Responsibility and Judgment in a Muted 3-D Dialogue: A Primer on the Same-Sex Marriage Case in Taiwan*, INT'L J. CONST. L. BLOG (May 26, 2017), http://www.iconnectblog.com/2017/05/responsibility-and-judgment-in-a-muted-3-d-dialogue-a-primer-on-the-same-sex-marriage-case-in-taiwan/.

[5] *See* Daniel Toda Castán, *Marriage Equality and the German Federal Constitutional Court: The Time for Comparative Law*, VERFBLOG, July 11, 2017, https://dx.doi.org/10.17176/20170711-120227 (listing the TCC among the constitutional courts or supreme courts of South Africa, Mexico, Brazil, and the United States with respect to the legal recognition of same-sex marriage by judicial review).

[6] *See*., *e.g*., Chris Horton, *Court Ruling Could Make Taiwan First Place in Asia to Legalize Gay Marriage*, N.Y. TIMES, May 25, 2017, at A6.

[7] *See*, *e.g*., Emily Rauhala, *In Historic Decision, Taiwanese Court Rules in Favor of Same-Sex Marriage*, WASH. POST, May 24, 2017, https://www.washingtonpost.com/world/in-milestone-decision-taiwan-court-rules-in-favor-of-same-sex-marriage/2017/05/24/bf7aa370-405b-11e7-9851-b95c40075207_story.html?utm_term=.3b4606f3979a.

Obergefell v. Hodges,[8] it is no less controversial than other groundbreaking judicial rulings of various jurisdictions around the globe. At the outset, it is worth noting that the same-sex marriage issue has long been central to the Taiwanese gay rights movement and the rallying call for the movement's opposition.[9] Since its promulgation, the *Same-Sex Marriage Case* has prompted intense political reactions and raucous social counter-mobilization.[10] It is too early to forecast how the forthcoming legalization of same-sex marriage will pan out amidst the post-ruling politics in Taiwan. Nevertheless, we are certain that the *Same-Sex Marriage Case* is destined for greatness in the world of comparative constitutional law and politics. Thus, in this Article, we aim to make sense of the law and politics of the *Same-Sex Marriage Case* in light of the jurisprudence of the Supreme Court of the United States ("the Supreme Court") so that its historic meaning in comparative constitutionalism can be duly appreciated.

The *Same-Sex Marriage Case* deserves close study for two reasons. First, it enriches the understanding of the potential and limitation of the court's role in facilitating fundamental changes in the marriage institution. Outside of the United States, only South Africa and a number of jurisdictions in Canada and Latin America ushered in same-sex marriage through judicial decisions before the TCC.[11] The pool of activist judicial genes, if you will, in this regard is very small. Taiwan's addition not only increases the number of examples in the general studies of the court-driven legalization of same-sex marriage, but also augments the sample's genetic diversity, as it provides an instance from East Asia.

Second, the *Same-Sex Marriage Case* foreshadows a foundational shift in comparative studies of the legitimacy of judicial review in Taiwan. It has been argued that the TCC metamorphosed from a weakling under the martial-law rule into a strong court through a series of bootstrapping rulings on separation of power issues, opening the path for Taiwan's transition

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[8] *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015). *Cf*. Geoffrey Yeung, *First in Asia – Taiwan's Marriage Equality Ruling in Comparative and Queer Perspectives*, OXHRH BLOG, July 6, 2017, http://ohrh.law.ox.ac.uk/first-in-asia-taiwans-marriage-equality-ruling-in-comparative-and-queer-perspectives (emphasizing the "notable similarities between the reasoning of [the *Same-Sex Marriage Case*] and that of *Obergefell v. Hodges*).

[9] *See infra* Part II.

[10] *See infra* Part IV. B.

[11] *See* Castán, *supra* note 5; Peter W. Hogg, *Canada: The Constitution and Same-Sex Marriage*, 4 INT'L J. CONST. L. 712, 715-16 (2006) (discussing the role of the Canadian Supreme Court and provincial courts in the legalization of same-sex marriage).

to constitutional democracy.[12] The TCC set itself apart from other constitutional courts and the equivalent by pivoting its legitimacy more on the steering of politically charged inter-departmental conflicts than on the protection of fundamental rights.[13] We hasten to add that the TCC has been a reliable and consistent guardian of fundamental rights since the early days of democratization. Our point here is that the TCC has been more a trend follower than a trailblazer in the protection of fundamental rights and it is in the politics of interdepartmental conflicts that the TCC has engaged in bootstrapping and thus given itself legitimacy.[14] Yet, given the highly contentious character of the debate over same-sex marriage, the *Same-Sex Marriage Case* indicates a point of departure, putting the TCC's role in fundamental rights issues and its legitimacy to the test. Viewed thus, the *Same-Sex Marriage Case* brings fresh perspectives to comparative studies of the legitimacy of judicial review.

Our thesis is that, due to the discrepancy between the social movement and the law in the fight for the constitutional rights for gays and lesbians in Taiwan, the *Same-Sex Marriage Case* marks Taiwan's *Brown*,[15] not *Obergefell*, moment in her constitutional law and politics. On its face, in terms of subject, doctrine, and argument, the *Same-Sex Marriage Case* mirrors *Obergefell*. Yet a closer look suggests otherwise. It is necessary not only to consider its broader political context but also to take account of the text and the style of judicial reasoning. What is characteristic of its broader political context is the discrepancy between law and politics in the pursuit for the constitutional rights of gays and lesbians in Taiwan. The rise of same-sex marriage to the top of the antidiscrimination agenda resulted from the continuous effort of gay rights activists, while the TCC watched the gay rights movement from the sidelines until the *Same-Sex Marriage Case*. It is apparent that the immediate politics following the *Same-Sex*

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[12] For the meaning of bootstrapping in this context, *see* Ming-Sung Kuo, *Moving towards a Nominal Constitutional Court? Critical Reflections on the Shift from Judicial Activism to Constitutional Irrelevance in Taiwan's Constitutional Politics*, 25 WASH. INT'L L.J. 597, 604 (2016); *see also* Stuart Minor Benjamin, *Bootstrapping*, 75 LAW & CONTEMP. PROBS. 115, 116-17 (2012) (defining the concept of bootstrapping).

[13] *See* RAN HIRSCHL, TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM 30 (2004).

[14] *See generally* Chien-Chih Lin, *Majoritarian Judicial Review: The Case of Taiwan*, 9 N.T.U. L. REV. 103 (2014); *cf.* Kuo, *supra* note 12, at 598-601 (alluding to the TCC's focus on separation of powers issues in the stage of democratic transition).

[15] *Brown v. Bd. of Ed. of Topeka, Shawnee Cty., Kan.*, 347 U.S. 483 (1954).

Marriage Case is reminiscent of *Brown*.[16] We shall further argue that the *Same-Sex Marriage Case* turns out to be *Brown*-esque not only through the post-ruling politics but also its judicial style,[17] which is evocative of the exceptional brevity, managed unanimity, and scientific rationality in *Brown*. Echoing the *Brown* Court, the TCC attempts to manage judicial legitimacy through judicial style in the *Same-Sex Marriage Case* as it expects its legitimacy will be confronted by the political reaction to its ruling by opening intervention in gay rights issues and tackling the fundamental question of same-sex marriage head-on.

Our argument is structured as follows. Following this Introduction in Part I, we recap the prehistory and history of the *Same-Sex Marriage Case* in Part II. In addition to summarizing the petitions leading to the consolidated ruling in the *Same-Sex Marriage Case*, we shall situate the decision in its political prehistory. This goes all the way back to the inception of the gay rights movement in the 1980s when one of the petitioners, Mr. Chia-Wei Chi,[18] raised the issue of same-sex marriage for the first time in Taiwanese history. With its (pre)historical context revealed, we take a close look at the *Same-Sex Marriage Case* in Part III, arguing that its doctrinal framework and underlying legal principle suggest a certain parallelism with *Obergefell*, despite the TCC's practice of unattributed reference.[19] In Part IV, we depart from the digest of doctrine and principle for an analysis of the unusual judicial style of the *Same-Sex Marriage Case* in light of the TCC's conventional practice. We shall discuss why the *Same-Sex Marriage Case* marks the *Brown*, not *Obergefell*, moment in the TCC history, suggesting that Taiwan will be entering a new era of constitutional law and politics as the legitimacy of the TCC comes into the limelight. We conclude in Part V that the discrepancy between law and politics in the constitutional fight for the equal rights of gays and lesbians in Taiwan inevitably preconditions the *Same-Sex Marriage Case* and thus turns it into the TCC's *Brown* moment.

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[16] *E.g.*, Jerome A. Cohen, *What Taipei's Same-Sex Ruling Can Teach China*, SOUTH CHINA MORNING POST, May 29, 2017, http://www.scmp.com/comment/insight-opinion/article/2096077/taiwans-landmark-ruling-same-sex-marriage-highlights-gulf; Chien-Chih Lin, *Analysis:* J.Y. Interpretation No. 748*, The Same-Sex Marriage Case in Taiwan*, BLOG OF IACL, AIDC, July 2, 2017, https://iacl-aidc-blog.org/2017/07/02/analysis-j-y-interpretation-no-748-the-same-sex-marriage-case-in-taiwan/.

[17] For the meaning of judicial style, see Jean Louis Goutal, *Characteristics of Judicial Style in France, Britain and the U.S.A.*, 24 AM. J. COMP. L. 43 (1976).

[18] Surnames of all the Taiwanese authors cited in this Article and the interested parties in the debate surrounding same-sex marriage in Taiwan are placed behind their given names.

[19] *See infra* text accompanying notes 172-73.

II. THE PATH TOWARDS THE *SAME-SEX MARRIAGE CASE*

The consolidated *Same-Sex Marriage Case* results from two separate constitutional petitions to the TCC regarding the legal definition of marriage. At the core of the constitutional controversy is article 972 of the Civil Code, which governs the agreement to marry.[20] Though the Civil Code provides for no definition of marriage, it does refer to "male and female" as the contracting parties to the required agreement to marry prior to entering into marriage in the foregoing Agreement to Marry Provision. And an agreement to marry had long been interpreted as being contracted between a male and a female, resulting in the legal recognition of heterosexual marriage only. Against this background arose the constitutional petitions leading to the *Same-Sex Marriage Case*.

The first petitioner in the *Same-Sex Marriage Case* is the Taipei Municipal Government (TMG). Under a newly elected mayor who had run as an independent,[21] the TMG collided with the Ministry of the Interior and the Ministry of Justice (of the Executive Yuan, the National Administration) over the constitutionality of the Agreement to Marry Provision. The long-held official position was that the Agreement to Marry Provision as interpreted above raised no constitutional issues under the constitutional provision of general freedom of action (article 22) or equal protection (article 7).[22] The TMG differed. As the statutory municipality entrusted with the remit of marriage registration, the TMG requested the Ministry of the Interior to refer the dispute to the TCC in July 2015 and the National Administration later obliged in November of the same year.[23] The second petitioner is Mr. Chia-Wei Chi. As suggested in Part I, Mr. Chi is a

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[20] The Civil Code article 972 provides, "An agreement to marry shall be made between the male and female contracting parties thereto of their own volition." To show why that provision in its Chinese original is ambiguous, we adopt our own translation as indicated above instead of subscribing to the English version available at the official website of the Ministry of Justice, http://law.moj.gov.tw/Eng/LawClass/LawAll.aspx?PCode=B0000001.

[21] *See infra* text accompanying notes 56-58.

[22] *See* THE CONSTITUTION OF THE REPUBLIC OF CHINA art. 7 (1947) (Taiwan), "All citizens of the Republic of China, irrespective of sex, religion, race, class, or party affiliation, shall be equal before the law" and *id.* art. 22, "All other freedoms and rights of the people that are not detrimental to social order or public welfare shall be guaranteed under the Constitution," *available at* http://law.moj.gov.tw/Eng/LawClass/LawAll.aspx?PCode=A0000001. Notably, the official position was indicated for the first time in an interpretive circular of 1994 issued by the Ministry of Justice resulting from the second petitioner of the consolidated *Same-Sex Marriage Case*, Mr. Chia-Wei Chi's meeting with the Ministry of the Interior in 1994. Interpretation No. 748, *supra* note 2, ¶ 8. For the background of that interpretive circular, see *infra* text and accompanying notes 30-31.

[23] Interpretation No. 748, *supra* note 2, ¶ 1. The National Administration made the referral on behalf of its subordinate Ministry of the Interior in accordance with Sifayuan Dafaguan Shenli Anjian Fa (司法院大法官審理案

veteran activist in the gay rights movement in Taiwan and had petitioned the Parliament for the legalization of same-sex marriage as early as 1986.[24] Continuing his fight for marriage equality and other rights for gays and lesbians, he applied to a household agency for marriage registration with a man other than his partner again in 2013.[25] After that latest unsuccessful attempt,[26] Mr. Chi took his case to the Taipei High Administrative Court (THAC). Eventually the case worked its way through the two-tier judicial review of agency adjudication in 2014 and Mr. Chi petitioned the TCC to intervene in August 2015. The TCC admitted these two petitions in November 2016 and January 2017, respectively.

The two constitutional petitions leading to the consolidated ruling in the *Same Sex Marriage Case* raise intriguing questions: Why did the TMG suddenly dispute the Ministry of the Interior and the Ministry of Justice in 2015 in regard to the constitutionality of the Agreement to Marry Provision? Was it simply the new mayor's one-man initiative? Was it part of a progressive agenda or the product of a calculating political move? Why did Mr. Chi wait almost one year before launching his constitutional fight instead of petitioning the TCC immediately following the Supreme Administrative Court's (SAC) rejection of his appeal in September 2014? The answers to these questions hold the key to making sense of the *Same Sex Marriage Case*. Yet, to answer these questions, we need to rewind the case history a bit and examine its political history. We can divide constitutional politics of the same-sex marriage issue and the changing role of the TCC in it in three periods (1986-2000, 2001-2015, and 2016--) and discuss how they

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件法) [CONSTITUTIONAL INTERPRETATION PROCEDURE ACT], article 5 section 1 paragraph 1, available at http://law.moj.gov.tw/LawClass/LawAll.aspx?PCode=A0030159.

[24] Interpretation No. 748, *supra* note 2, ¶ 8; Chia-Wei Chi (祁家威), Zheng Qu Tong Xing Lian Hun Pei Ren Quan De Man Man Chang Lu (爭取同性戀婚配人權的漫漫長路) [The Long Struggle for Same-Sex Couples' Right to Marriage], *in* Da Fa Guan, Bu Gei Shuo Fa! (大法官，不給說法!) [JUSTICES, NO COMMENT!] 205, 207 (Min Jian Si Fa Gai Ge Ji Jin Hui (民間司法改革基金會) [Judicial Reform Foundation] ed., 2011). The fact alone belies the proposition that the marriage equality movement in Taiwan was born out of Taiwan's more recent Diverse Families movement. For that proposition, see Yeung, *supra* note 8.

[25] The amendment of the Civil Code, which had been passed in May, 2007, abolished ceremonial marriage in May, 2008 when it came into effect. Registration with the household agency has since become a requirement for a marriage to be legally recognized instead. For Mr. Chi's first attempt to marry a man under the Civil Code, see *infra* text accompanying notes 35-36.

[26] Mr. Chi also applied twice for the officiation of marriage with a man under the old Civil Code and after his second unsuccessful application, he petitioned the TCC to intervene in 2000. In a summary decision of May 2001, his petition was dismissed on grounds of admissibility. *See* Interpretation No. 748, *supra* note 2, ¶ 8.

are interrelated in each period in order.

A. *An Unmoved Court in the Breaking of a Political Taboo: 1986-2000*

Calls for legalization of same-sex marriage can be traced back to the mid-1980s when democratization in Taiwan was just setting out. This indicates that the antidiscrimination movement and the rights of gays and lesbians have long been important to the civil rights movement. As noted above, Mr. Chi, the pioneer of the gay rights movement, petitioned the Parliament, which was still filled with parliamentarians elected in China in 1948,[27] to legalize same-sex marriage in 1986, the year before lifting martial law in Taiwan. The Parliament hatefully responded that homosexuals were a minority, who broke the conventional morality for the satisfaction of their own sexual desires.[28] That was not the end of Mr. Chi and his legislative petition to recognize same-sex marriage. Soon after the Parliament's rejection of his petition, he was detained with other political prisoners without any charge for five months.[29]

Notably, though Mr. Chi was the trailblazer of the gay rights movement in Taiwan, the legalization of same-sex marriage was not the only gay rights issue on his mind. His approach to pursue equal rights of gays and lesbians by raising the issue of same-sex marriage was not shared by all gay rights activists. Thus, following his historic petition in 1986, the focus of the gay rights movement focused on concerns such as the prohibition of discrimination against AIDS patients and ending the police practice of hassling gays and lesbians.[30] During this period, Mr. Chi managed to keep fighting for same-sex marriage, although his activist comrades were generally lukewarm about this issue. In 1994 when Taiwan's democratic transition was at its full

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[27] Despite a number of elected parliamentarians being added to the 1948 Parliament after the first parliamentary election in Taiwan in 1969, most of the seats were occupied by those elected in China in 1948 until 1991. *See* Jiunn-rong Yeh, *The Cult of* Fatung*: Representational Manipulation and Reconstruction in Taiwan*, *in* THE PEOPLE'S REPRESENTATIVE: ELECTORAL SYSTEMS IN THE ASIA-PACIFIC REGION 23 (Graham Hassall and Cheryl Saunders eds., 1997). We shall discuss the issues surrounding the 1948 Parliament further *infra* text accompanying notes 367-71.

[28] Interpretation No. 748, *supra* note 2, ¶ 8.

[29] *See* Chi, *supra* note 24, at 207-10; *see also* Amber Wang, *Victory At Last for Taiwan's Veteran Gay Rights Champion,* YAHOO NEWS, May 25, 2017, https://sg.news.yahoo.com/victory-last-taiwans-veteran-gay-rights-champion-040647583.html.

[30] *See* Tsu-chieh Chien, *From "Same Sex Marriage" to "Pluralistic Family Arrangements": The Legislative Movement for Democratic Intimate Relationship*, 1 TAIWAN HUM. RTS. J. 187, 189 (2012) (article in Chinese with English title).

speed, Mr. Chi also relaunched his campaign for same-sex marriage. This time, he shifted focus to the executive branch. Mr. Chi paid a visit to a career official within the Ministry of the Interior with the suggestion that same-sex marriage could be recognized under the existing Civil Code. This time he received a more civilized response from the government official, who considered his submission interesting and agreed to refer it to the Ministry of Justice for further studies. Despite that polite encounter, the Ministry of Justice shortly concluded that the Civil Code essentially defined marriage as a gender-differentiated union between a man and a woman.[31]

Entering the late 1990s, the gay rights movement had already made substantial progress in fighting against discrimination, while Taiwan was at the height of its constitutional moment. The wide media coverage of the public celebration of the wedding between the renowned writer Mr. Yu-Shen Shu with his male partner in late 1996 cast light on the public consciousness of gay rights issues.[32] Additionally, during this period the National Administration began to commission academic research projects in relation to future antidiscrimination legislation. Though the antidiscrimination legislation did not come into effect until after 2004,[33] the legislative policy recommended by those academic research projects indicated the currency that the gay rights movement had gained in the late 1990s.[34]

In the meantime, Mr. Chi did not abandon his fight for same-sex marriage and directly challenged the definition of marriage by applying for the first official same-sex marriage in 1998.[35] To no one's surprise, he was again unsuccessful. However, Mr. Chi changed his strategy again. Following his second unsuccessful application in May 2000, Mr. Chi this time turned to

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[31] Notably, the Ministry of Justice's conclusion, which was issued as an interpretive circular, became the origin of the official position on the definition of marriage under the Civil Code. *See* Interpretation No. 748, *supra* note 2, ¶ 8.

[32] *See* Henry Chu, *In Taiwan, Gay Life Has Zest*, L.A. TIMES, May 10, 2000, http://articles.latimes.com/2000/may/10/news/mn-28479.

[33] Antidiscrimination legislation on education, which was passed in 2004, is the first antidiscrimination legislation that prohibits discrimination based on sexual orientation. *See* Hwei-Syin Chen (陳惠馨), Xingbie Pingdeng Jiaoyu Fa: Taiwan Xingbie Jiaoyu Zhi Jiwang Yu Kailai (性別平等教育法--台灣性別教育之繼往與開來) [Gender Equality Education Act: The Past, Present and Future of the Gender Education in Taiwan], 30 Xingbie Pingdeng Jiaoyu Jikan (性別平等教育季刊) [GENDER EQUITY EDUC. Q.] 115, 118 (2005).

[34] For example, taking account of the strong public reaction to a deadly campus bullying of an effeminate pupil, Yung-Zhi Yeh, in 2000, the concluding report of the commissioned project on antidiscrimination legislation concerning education later suggested that the scope of the draft legislation be extended to discrimination based on sexual orientation. *See id.* at 126-27 n.2.

[35] *See* Interpretation No. 748, *supra* note 2, ¶ 8; Chi, *supra* note 24, at 214-16.

the court instead of petitioning the Parliament or seeking audience with the National Administration. He took his case all the way to the TCC in September 2000, presenting it with the opportunity to provide constitutional guidance on the equal citizenship of gays and lesbians. The TCC responded to that call with little interest and summarily dismissed Mr. Chi's petition on grounds of admissibility in May 2001,[36] when the main opposition force, the Democratic Progressive Party (DPP), had already won the Presidency and had controlled the National Administration for almost one year.

B. *The Absent Constitutional Voice in Marriage Equality: 2001-2015*

When the TCC dismissed Mr. Chi's constitutional petition, the gay rights movement had already made much progress. President Shui-Bian Chen of the DPP pledged to build the new democracy of Taiwan on the principle of human rights after his unexpected and historic electoral victory in March 2000. One of the first benefits of the DPP government's human rights project was the draft Human Rights Bill of 2003 (hereinafter, the Bill).[37] Answering the call from gay rights activists, it provided that gays and lesbians could enter into a familial union with the legal right to adopt children.[38] Though it was unclear whether the draft Bill allowed same-sex marriage by the familial union provision, it was regarded as the first intimation of the legal recognition of same-sex marriage. Nevertheless, when the draft Bill was published in 2003, it found difficulty winning a wide range of support within and without the DPP, not only for its progressive stance on gay rights but also for other provisions. As the DPP government was already looking ahead to the 2004 presidential election, the contested draft Bill was never approved by the council of ministers with the National Administration, nor introduced in the Parliament.[39]

It is worth noting that despite the setback of the 2003 Bill, the gay rights movement

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[36] *See* Interpretation No. 748, *supra* note 2, ¶ 8; Chi, *supra* note 24, at 216-17.

[37] The Bill was drafted by the Ministry of Justice in 2001 and endorsed by the Presidential advisory committee of human rights in 2003. *See* Chien, *supra* note 30, at 189.

[38] *Id.*

[39] *See* Yanyu Qiu (邱彥瑜), Chongji Chuantong vs. Boduo Renquan: Tongzhi Hunyin Fa'an Guo Bu Guo (衝擊傳統 vs. 剝奪人權: 同志婚姻法案過不過?) [*Attacking Tradition vs. Depriving Human Rights: Will the Sam-Sex Marriage Bill be Passed?*], Gong Shi Xinwen Yiti Zhongxin (公視新聞議題中心) [PTS NEWS NETWORK], Dec. 22, 2014, http://pnn.pts.org.tw/main/2014/12/22/立院初審：衝擊傳統-vs-剝奪人權-同志婚姻法案過/.

continued to make progress under the DPP government. In the wake of a student Yung-Zhi Yeh's tragic death in 2000 there was a public cry to stop campus discrimination against students with different sexual orientations. The Ministry of Education included the elimination of all types of campus discrimination in its mandate soon after the inauguration of the DPP government in 2000.[40] Moreover, following the legislation banning campus discrimination in June 2004, after President Chen's re-election, further amendments were made to employment laws to eliminate workplace discrimination based on sexual orientation.[41] In contrast, same-sex marriage was taken off the government agenda as the DPP government lost the appetite for another divisive battle while it was bogged down by the law suits aimed at annulling the 2004 presidential election result during the first sixteen months of President Chen's second four-year term.[42]

Though the DPP government was lukewarm about the legalization of same-sex marriage, the flame of same-sex marriage remained alight and unexpectedly burned even brighter. On March 5, 2006, the film *Brokeback Mountain* by Taiwanese American Mr. Ang Lee, won the award for best director at the 78th Academy Awards. Mr. Lee's achievement made headlines in Taiwan and the huge box-office success of *Brokeback Mountain* raised the public consciousness of gay rights. Notably, Mr. Ying-Jeou Ma of the then opposition Nationalist Party (also known as Kuomintang, KMT), who had embraced the cause of gay rights during his eight-year (1998-2006) mayoralty in Taipei City, to win the support of the liberal forces for his conservative KMT, expressed his praise for the gay love story in *Brokeback Mountain*.[43] Coincidently, Ms. Bi-Khim Hsiao, a DPP parliamentarian who was a vocal supporter of the gay rights cause, held the first parliamentary hearing on the legalization of same-sex marriage in

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[40] *See* Hengda Bi (畢恆達), Cong Liangxing Pingdeng Dao Xingbie Pingdeng: Ji Ye Yongzhi (從兩性平等到性別平等：記葉永鋕) [From Sex Equality to Gender Equality: Remembering Yung-Zhi Yeh], 13 Liangxing Pingdeng Jiaoyu Jikan (兩性平等教育季刊) [SEXUALITY EQUALITY EDUC. Q.] 125, 132 (2000).

[41] *E.g.*, Hsiu-chuan Shih, *Legislature Passes Anti-Discrimination Bill*, TAIPEI TIMES, May 05, 2007, at 3; Flora Wang, *Law Tackles Job Discrimination*, TAIPEI TIMES, Dec. 20, 2007, at 2.

[42] *See* Kuo, *supra* note 12, at 614-17.

[43] Lingjia Fan (範凌嘉), Ying-Jeou Ma Hui Ang Lee Tan Duan Bei Shan: Jack Huimou Hen Miren (馬英九會李安談斷背山：Jack 回眸很迷人) [Ying-Jeou Ma Speaking with Ang Lee About Brokeback Mountain: Jack Has a Charming Smile], SINA.COM, Mar. 20, 2006 http://news.sina.com/udn/000-000-101-103/2006-03-20/2315742808.html.

Taiwan history and formally introduced a private member bill to legislate same-sex marriage.[44] That legislative bill was killed soon after it was introduced.[45] Yet its introduction, together with Mr. Ma's endorsement, meant that same-sex marriage was brought to the frontline of the fight for the equal rights of gays and lesbians, transcending the DPP-KMT divide.

The DPP government was deeply mired in corruption scandals in the last two years of its second term and had neither the political will nor the political capital to push for same-sex marriage. The executive branch's disengagement from the legalization of same-sex marriage as well as gay rights issues in general did not change after the KMT took power in May 2008, although Mr. Ma held sway from the presidential office. Facing this new political landscape, a number of advocacy groups for gender equality and gay rights co-founded the Taiwan Alliance to Promote Civil Partnership Rights (TAPCPR), the first nongovernmental organization focused on the issue of marriage equality in Taiwan, in late 2009.[46]

The concrete result of the TAPCRP's effort was the publication of the so-called "Three Bills for Diverse Families" in July 2012. Though they all advocated the amendment of the Civil Code, the TAPCRP put forward three legislative proposals to accommodate the diverse positions on the question of same-sex marriage among LGBT groups, ranging from the legalization of same-sex marriage to the creation of homosexual and heterosexual partnerships to the legal recognition of multiple-person civil unions.[47] Needless to say, the TAPCRP's accommodating approach to legislation was avant-garde and ahead of its time. However, soon after the TAPCRP published its proposals, Ms. Mei-Nu Yu, a DPP parliamentarian and long-time women's rights advocate, introduced a private member bill to amend the Civil Code article 972 to provide for same-sex marriage in December 2012.[48] Later in October 2013 another DPP parliamentarian Ms. Li-Chun Cheng subscribed to the TAPCRP's draft bill on the legalization of same-sex marriage among its three proposals and introduced it as a private

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[44] Interpretation No. 748, *supra* note 2, ¶ 9.
[45] *See id.*; Chien, *supra* note 30, at 189.
[46] *See* Chien, *supra* note 30.
[47] *See* Victoria Hsiu-wen Hsu, *Color of Rainbow, Shades of Family: The Road to Marriage Equality and Democratization of Intimacy in Taiwan*, GEO. J. INT'L AFF., Summer/ Fall 2015, at 154.
[48] Interpretation No. 748, *supra* note 2, ¶ 9.

member bill to revamp the entire opposite-sex marriage institution under the Civil Code.[49] With both legislative bills proceeding to the committee stage and the momentum for the legalization of same-sex marriage continuing to grow, the Ministry of Justice openly opposed same-sex marriage.[50] From then on, both legislative bills were stalled in parliamentary procedures while the legalization of same-sex marriage became the focus of gay rights activists but was also brought to the forefront of public debate. Facing the blocked legislative channel for the legalization of same-sex marriage, the TAPCPR suggested that it would open another front before the TCC in August 2014.[51] Both legislative bills eventually languished until the end of the Eighth Parliament in January 2016.[52]

Notably, the TAPCPR's suggestion that it would fight for the legalization of same-sex marriage before the TCC did not come out of the blue in August 2014. Nor was the Parliament the only bully pulpit for the cause of same-sex marriage. To start with, when the Parliament was prodded into action in December 2012, a judicial battle for same-sex marriage had already been launched. Mr. Ching-Hsueh Chen and Mr. Chih-Wei Kao, who had publicly celebrated their wedding in 2006, applied for marriage registration in 2011 and soon took their case to the THAC after their application was rejected. However, they withdrew their case in January 2013 partly for fear that the THAC's attempt to refer the case to the TCC would backfire, resulting in the constitutional confirmation of the heterosexual-only marriage under the Civil Code.[53] It was at this time that the champion of same-sex marriage, Mr. Chi, joined the latest round of the long legal battle for same-sex marriage. As noted in the procedural history of the *Same-Sex Marriage Case*, Mr. Chi applied for marriage registration with a man other than his partner in 2013.[54] He

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[49] *See id*.; Hsu, *supra* note 47, at 159.

[50] *See* Lii Wen, *Divisive Same-sex Marriage Bill Stalls in Legislative Yuan*, TAIPEI TIMES, Dec. 23, 2014, at 1.

[51] *See* Nick Duffy, *Taiwan: Couples Protest Same-sex Marriage Ban by Attempting to Register Partnerships,* PINK NEWS, Aug. 2, 2014, http://www.pinknews.co.uk/2014/08/02/taiwan-couples-protest-same-sex-marriage-ban-by-attempting-to-register-partnerships/.

[52] *See* Interpretation No. 748, *supra* note 2, ¶ 9.

[53] *See* Amber Wang, *Taiwan Gay Couple Drop Marriage Case*, AFP NEWS, Jan. 23, 2013, https://sg.style.yahoo.com/news/taiwan-gay-couple-drop-marriage-case-045529837.html.

[54] Ziwei Liu (劉子維), Taiwan Tonghun Tuishou Chia-Wei Chi: Wo Bushi Ziji Yao Jiehun (台灣同婚推手祁家威：「我不是自己要結婚」) [Taiwanese Same-Sex Marriage Movement's Mainstay, Chia-Wei Chi: "I Didn't Fight Because I Intended to Enter into Marriage"], BBC Zhongwen Wang (BBC 中文網) [BBC CHINESE], May 25, 2017, http://www.bbc.com/zhongwen/trad/chinese-news-40048682.

made that application to test the TCC again after Mr. Chen and Mr. Kao made their calculated retreat. Mindful of Mr. Chi's case working its way to the SAC, which later made its final judgement in September 2014, the TAPCPR suggested opening another line of attack before the TCC in August 2014 to break the blockade of same-sex marriage legislation in the Parliament.[55]

Yet, as noted above, Mr. Chi did not petition the TCC to intervene in his doomed application for marriage registration until August 2015.[56] To understand the gap between the SAC judgment and his constitutional petition, we need to look at the political landscape outside the Parliament. In early 2014 when the legislative bills on the legalization of same-sex marriage were languishing in the Parliament, Taiwan was entering its election season with important local elections coming up in December 2014. Among the hopefuls was the maverick Dr. Wen-Je Ko, who ran for the Taipei mayoralty as an independent. To win the support of progressive forces, he made a campaign pledge on marriage equality. Other candidates also expressed their support for gay rights.[57] As it turned out, Dr. Ko and other candidates who campaigned on policies friendly to gays and lesbians did not antagonize their constituents and were elected. In other words, despite the stalemate in the Parliament, the wider political landscape had already changed in favor of gay rights. As we have mentioned above, Mayor Ko made good on his campaign promise in July 2015 with the TMG's constitutional petition.[58] Correspondingly, Mr. Chi ended his long wait after the SAC judgment in September 2014 and took the case to the TCC again in August 2015. Mr. Chi put his legal case on hold to wait for the arrival of his personal constitutional moment after the political landscape shifted. Yet the TCC remained silent when two constitutional petitions on same-sex marriage came before it in November 2015. It was unclear whether the TCC would dismiss the cases again after its first dismissal almost fourteen years ago.

C. *The Sought-After Constitutional Guidance in the Last Mile: 2016-2017*

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[55] Notably, the legal counsel of Mr. Chi's case before the SAC was Ms. Victoria Hsiu-wen Hsu, a veteran gay rights activist and lawyer with the TAPCPR.

[56] *See* Interpretation No. 748, *supra* note 2, ¶ 8.

[57] *See* Andrew Jacobs, *For Asia's Gays, Taiwan Stands Out as Beacon*, N.Y. TIMES, Oct. 30, 2014, at A6.

[58] *See* Christie Chen, *Taipei City to Seek Constitutional Interpretation on Gay Marriage*, FOCUS TAIWAN, July 23, 2015, http://focustaiwan.tw/search/201507230019.aspx?q=same%20sex%20marriage.

In the heat of the campaign season in 2015, the cause of gay rights and same-sex-marriage had already become the focal point of the political debate. More and more cities and counties provided for the recognition of "partnership" for same-sex couples in the locally administered household registration, although such annotation was symbolic without legal substance.[59] Moreover, as the presidential and parliamentary elections were approaching in January 2016, no candidate could dodge the question of marriage equality. Among the numerous hopefuls for the Presidency and the Parliament, the DPP presidential candidate Ing-wen Tsai pledged to support "marriage equality."[60] When she won the Presidency by a wide margin and her DPP also secured the majority of the seats in the Parliament, it seemed that the legalization of same-sex marriage would come to pass before long.

Yet it turned out that the legalization of same-sex marriage was more of campaign fanfare than an immediate policy item to Tsai's DPP government. It was simply not high on her agenda because of lack of consensus on the issue both within and outside of her party.[61] Conversely, parliamentarians were more and more vocal about their support for the same-sex marriage movement in the new Parliament. Against this backdrop President Tsai's TCC Justice appointment in October 2016 presented itself as the unexpected catalyst for breaking the stalemate on the legalization of same-sex marriage.

President Tsai's judicial appointments were expected as five Justices were scheduled to leave office on the completion of their eight-year term at the end of October. What was unexpected was that President Tsai eventually packed the fifteen-member TCC with seven new appointments, who played a dramatic role in setting the stage for the constitutional battle over same-sex marriage. Apart from the five Justices whose term was scheduled to end, the President and the Vice President of the Judicial Yuan, who also served as the Chief Justice and the Deputy

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[59] In May 2015, Kaohsiung became the first city in Taiwan to allow same-sex couples to register partnership. As of June 2017, seventeen cities and counties have already followed suit. For further details, see *More Cities and Counties in Taiwan Introduce Gay Partnership Registry*, CHINA POST, June 7, 2017, http://www.chinapost.com.tw/taiwan/national/national-news/2017/06/07/498425/more-cities.htm.

[60] On October 31, 2015, Tsai posted a video on her Facebook page on the day of the Taiwan Pride to show her support for marriage equality. *See* Saurav Jung Thapa, *Pro-Equality Candidate Triumphs in Taiwanese Presidential Elections*, HUMAN RIGHTS CAMPAIGN, Jan. 20, 2016, http://www.hrc.org/blog/pro-equality-candidate-triumphs-in-taiwanese-presidential-elections.

[61] *See* Brian Hioe, *Efforts by Tsai Ing-wen to Wash Her Hands of the Issue of Gay Marriage?*, NEW BLOOM, Mar. 2, 2017, https://newbloommag.net/2017/03/02/tsai-gay-marriage-abandon-issue/.

Chief Justice of the TCC, respectively, decided to step down due to increasingly loud calls for their early resignation. As a result, President Tsai had the chance to reconfigure the TCC in a substantially unexpected way.[62] Considering the replacement of nearly half of the TCC Justices, it was not unreasonable to assume that the TCC would break its silence on the question of same-sex marriage. But an Act of God pushed the long-awaited change through at an accelerated pace that defied reason.

As the debate over the legalization of same-sex marriage was heating up, the seven judicial nominees were expected to face questions as to marriage equality and other issues concerning the constitutional rights of gays and lesbians in their upcoming confirmation hearing. It was also anticipated that they would dodge those questions by appealing to judicial impartiality.[63] Yet that assumption had already been upended even before the confirmation hearing started on October 13, 2016. More than half of the judicial nominees had responded to the question of marriage equality with frankness in their written answers to the questionnaires from parliamentarians.[64] Yet, when Professor Tzong-Li Hsu, who was chosen to serve as the President of the Judicial Yuan and the Chief Justice of the TCC, appeared in the first hearing session on October 13, he was mostly interrogated for his position on the relationship between Taiwan and China.[65] The question of same-sex marriage did not draw much attention. This remained so until the confirmation hearing proceeded halfway towards its scheduled conclusion on October 20.

On October 16, Jacques Picoux, a French citizen and respected retired professor of National Taiwan University, committed suicide. When news of his death broke the next day, it transpired that he had been in despair after being prevented from all the medical and other decisions about his over three-decade-long male partner at and after his partner's last moment because of their legally unrecognized relationship. Professor Picoux's tragedy galvanized public sympathy.[66]

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[62] *See* Jau-Yuan Hwang et al., *The Clouds Are Gathering: Developments in Taiwanese Constitutional Law – The Year 2016 in Review*, 15 INT'L J. CONST. L. 753, 758-59 (2017).

[63] *Id.*

[64] *See* Wei-han Chen, *NPP Releases Results of Grand Justice Nominee Survey*, TAIPEI TIMES, Oct. 17, 2016, at 3.

[65] *See* Hung-ta Cheng et al., *Hsu Offers German Model for PRC Ties*, TAIPEI TIMES, Oct. 14, 2016, at 1.

[66] *See* Nicola Smith, *Professor's Death Could See Taiwan Become First Asian Country to Allow Same-Sex Marriage*, THE GUARDIAN, Oct. 28, 2016, https://www.theguardian.com/world/2016/oct/28/professors-death-could-see-taiwan-become-first-asian-country-to-a

Parliamentarians and the TCC Justice nominees were no exception. The week-long confirmation hearing reached a climax when DPP parliamentarian, Ms. Bi-Khim Hsiao, who introduced the historic private member bill on the legalization of same-sex marriage, told the story about Professor Picoux and raised the constitutional question of marriage equality in the hearing session for Nominee Mr. Jui-Ming Huang. Professor Picoux's tragedy moved everyone. Judicial nominees were expected to respond to the constitutionality of the Civil Code with a clear answer that would eventually turn Professor Picoux's tragic death into a meaningful sacrifice for a greater cause. For the rest of the confirmation hearing, Professor Picoux's story was shared between the interrogating parliamentarians and the interrogated judicial nominees time and again. Eventually six of the seven nominees lent their support for marriage equality.[67] The public endorsement from the would-be official interpreters of the constitution breathed new life into another drive for the legalization of same-sex marriage in the Parliament.[68]

Meanwhile, the upcoming annual LGBT Pride Parade (Parade) was expected to become a popular demonstration for the cause of same-sex marriage.[69] Against this backdrop President Tsai, who had not put gay rights issues at the top of her reform agenda since her inauguration on May 20, 2016, reaffirmed her commitment to marriage equality on October 29 as the Parade was underway.[70] Yet President Tsai was not the only politician who reconsidered the position under public pressure. In light of the shift in public opinion, parliamentarians reacted with a number of new private member bills.[71] Among them was a bill to amend the Civil Code article 972 and other provisions, which was introduced by the DPP veteran parliamentarian Ms. Mei-Nu Yu and was essentially a slightly revised version of the bill that she had introduced in the previous Parliament in 2012.[72] Suddenly the same-sex marriage question dominated the political agenda.

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llow-same-sex-marriage.

[67] *See* Editorial, *Death Renews Same-sex Marriage Calls*, TAIPEI TIMES, Oct. 20, 2016, at 8.

[68] *See* Hwang et al., *supra* note 62 ; Abraham Gerber, *DPP and NPP Start Push for Same-Sex Marriages*, TAIPEI TIMES, Oct. 25, 2016, at 3.

[69] *See* Agence France-Presse, *Taiwan's Gay Pride Parade Brings Tens of Thousands to Streets*, THE GUARDIAN, Oct. 29, 2016,
https://www.theguardian.com/world/2016/oct/29/taiwans-gay-pride-parade-sees-tens-of-thousands-take-to-streets.

[70] *See id.*

[71] *See* Editorial, *Support Leans Toward Gay Marriage*, TAIPEI TIMES, Nov. 6, 2016, at 6.

[72] Notably, Justice Jui-Ming Huang, Ms. Yu's husband, later recused himself from the *Same-Sex Marriage Case*

Yet the National Administration remained quiet and unconventionally refused to introduce a government bill before the Parliament in correspondence.

Opponents of same-sex marriage reacted with homophobic anger. A series of counter-demonstrations were held with hundreds of thousands of people taking to the streets in November and December.[73] Social forces were also mobilized to rival the advocacy for same-sex marriage. As the private member bills were vetted in November, public parliamentary hearings turned into violent brawls.[74] Amidst the polemics about same-sex marriage, the seven newly appointed TCC Justices assumed office on November 1. Without further ado, the newly packed TCC resolved to take up the two constitutional petitions from the TMG and Mr. Chi in November 2016 and January 2017, respectively, after they had languished in the TCC docket for a year.[75]

All the private member bills cleared the committee stage on December 26, 2016.[76] Then they were referred to all party caucuses for a one-month-long compulsory reconciliation before it could proceed to the next parliamentary stage. Notably, all-important legislative issues would have to be resolved in the stage of second reading at the plenary session. Thus, it remained to be seen whether the private member bills to legalize same-sex marriage would receive the support of the majority of parliamentarians after they cleared the committee stage.

The final twist in the winding (pre)history of the *Same-Sex Marriage Case* came a week before the Parliament returned to business after its winter recess on February 17, 2017. On February 10, the TCC announced its admission of the two constitutional petitions and the decision to hold a public oral hearing on March 24.[77] What was significant about the TCC's announcement on February 10 was that it meant that the TCC must make its judgement by May 24, two months after the public hearing being held, according to the Constitutional Interpretation

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because of his wife's parliamentary role.
http://www.taipeitimes.com/News/taiwan/archives/2016/10/20/2003657541.

[73] *See* Abraham Gerber, *Thousands Protest Gay Marriage in Taipei*, TAIPEI TIMES, Dec. 4, 2016, at 1.

[74] *See* Jason Pan, *Same-sex Marriage Amendments Stalled*, TAIPEI TIMES, Nov. 18, 2016, at 3.

[75] *See* Hwang et al., *supra* note 62, at 759.

[76] *See* Wei-han Chen, *Committee Green-lights Same-Sex Marriage Draft*, TAIPEI TIMES, Dec. 27, 2016, at 1.

[77] *See* Yang-yu Wang & Elizabeth Hsu, *Constitutional Court to Hold Debates on Same-Sex Marriage in March*, FOCUS TAIWAN, Feb. 10, 2017, http://focustaiwan.tw/news/aipl/201702100015.aspx.

Procedure Act (CIPA) and the TCC's bylaw on public hearings.[78] In other words, the day of constitutional reckoning was fixed for same-sex marriage.

The TCC's announcement was a godsend not only to the deadlocked Parliament but also to President Tsai's oscillating government. Reflecting the conflicted state of public opinion on the legalization of same-sex marriage, parliamentarians were still divided on how to proceed with the private member bills. The compulsory reconciliation did not inch them forward, while the National Administration and President Tsai continued to deflect public calls for a corresponding government bill on same-sex marriage in the place of the private member bills.[79] Neither the DPP-controlled Parliament nor President Tsai's government would take the lead in driving the legalization of same-sex marriage. Instead, they suspended all the legislative moves on that issue and simply passed the buck to the TCC,[80] which had been absent from the debate for decades. The Ministry of Justice as well as the Ministry of the Interior's statements eventually revealed President Tsai's hesitant position on same-sex marriage in their response to the TCC's request for clarifying the Government's position. The TCC's constitutional guidance appeared to be the last hope for Mr. Chi and other gay rights activists.

The (pre)history of the *Same-Sex Marriage Case* shows that same-sex marriage did not come into focus in the struggle for the rights of gay and lesbians out of the blue. Though it had already been on the antidiscrimination agenda at the outset, it became the rallying call for gay rights advocates as a result of decades-long social movement and pressure. In contrast, the question of same-sex marriage was the first issue concerning gay rights that came before the TCC. This discrepancy preconditions the law and politics of the *Same-Sex Marriage Case*.

III. THE SHADOW OF (GREATER) *OBERGEFELL*

Obergefell is great as it completes the journey towards constitutional recognition of full

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[78] *See* Hwang et al., *supra* note 62, at 759.

[79] Premier Chuan Lin reiterated that the National Administration had no plan to introduce a government bill on same-sex marriage and would respect the Parliament's decision. *See* Wei-han Chen, *Report to Be Submitted to Legislature, Not A Law: Lin*, TAIPEI TIMES, Dec. 28, 2016, at 1; Alison Hsiao, *Gay Marriage 'Trend of the Future': Lin*, TAIPEI TIMES, Mar. 18, 2017, at 1.

[80] *See* Eddy Chang, *Taipei Watcher: After the Historical Debate, What's Next?*, TAIPEI TIMES, Apr. 2, 2017, at 1.

citizenship of gays and lesbians that was set out in *Lawrence v. Texas*.[81] As part of the progressive constitutional redemption of American homophobia that manifested itself in the infamous *Bowers v. Hardwick*,[82] Greater *Obergefell*[83] comprises *Obergefell* proper, *Lawrence*, and *United States v. Windsor*.[84] In this Part, we shall read the Taiwanese *Same-Sex Marriage Case* in light of *Obergefell*, showing that the shadow of Greater *Obergefell* pervades throughout its core reasoning.[85] Apart from the subject of same-sex marriage at issue, doctrine and principle guide our juxtaposition of the *Same-Sex Marriage Case* and *Obergefell*.

A. *Doctrine*

Obergefell v. Hodges finds the legal definition of marriage as a union between a man and a woman in several states unconstitutional. In the view of the Supreme Court of the United States, the impugned legal provisions deprived same-sex couples of their fundamental freedom (liberty) to marry and right to equal protection by excluding them from the legal institution of marriage.[86] In other words, when it comes to the question of same-sex marriage, two separate but related issues need to be addressed: the definition of the legal institution of marriage and same-sex couples' right to marry.[87] And that is exactly what lies at the core of *Obergefell*. For the present purposes, two features of *Obergefell* merit special mention in terms of doctrine. First, the Court re-construes its own jurisprudence on the definition of marriage. Acknowledging the several

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[81] *Lawrence v. Texas*, 539 U.S. 558 (2003).

[82] *Bowers v. Hardwick*, 478 U.S. 186 (1986). In *Obergefell*, Justice Kennedy traces the post-*Bowers* constitutional redemption back to *Romer v. Evans*, 517 U.S. 620 (1996). *Obergefell*, 135 S. Ct. at 2596.

[83] Laurence H. Tribe, *Equal Dignity: Speaking Its Name*, 129 HARV. L. REV. 16, 22 (2015) (describing Justice Kennedy's jurisprudence in these three cases as "the gay-rights triptych").

[84] *United States v. Windsor*, 570 U.S. 744 (2013).

[85] Specifically, apart from the one-paragraph holding, the judgment of the *Same-Sex Marriage Case* comprises nineteen paragraphs (*ratio decidendi*). Apart from the procedural history (¶¶ 1-6), the reason that the TCC resolved to hear the case (¶¶ 8-10), and the delimitation of the case law and statutory provisions concerned (¶¶ 11-12), the TCC set out the main argument in paragraphs 13-16. In the remainder, the TCC addressed the issues of remedies (¶ 17), the scope of its holding (¶ 18), and the inadmissibility of a secondary claim submitted by the TMG (¶ 19). Interpretation No. 748, *supra* note 2.

[86] *Obergefell*, 135 S. Ct. at 2604.

[87] This distinction is also recognized in the German jurisprudence and the case law of the European Court of Human Rights. *See* Anne Sanders, *Marriage, Same-Sex Partnership, and the German Constitution*, 13 GERMAN L.J. 911, 916-17 (2012) (discussing "the [individual] freedom to conclude marriage with the partner of one's choice" and "the institution of marriage" in German constitutional law); Paul Johnson, HOMOSEXUALITY AND THE EUROPEAN COURT OF HUMAN RIGHT 155-58 (2013) (discussing *Schalk and Kopf v. Austria* ([2010] ECHR 1996, 30141/04), which distinguished between the right to marriage and marriage as an institution under article 12 of the European Convention on Human Rights (ECHR)).

dicta on marriage as a union of a man and a woman in its case law, the Court emphasizes that those dicta did not express its view on the legal definition of marriage.[88] Instead, they were nothing more than "assumptions."[89] As far as doctrine is concerned, the question of whether marriage is a heterosexual-only legal union remains yet to be answered. Nevertheless, the Court leaves no stone unturned. By expressly overruling *Baker v. Nelson*, a one-line summary decision that dismissed an appeal from a Minnesota Supreme Court decision that denied same-sex couples the right to get married "for want of a substantial federal question,"[90] the Court clears all the possible precedential hurdles in its stride towards constitutional recognition of the fundamental right of same-sex couples to marry.[91]

The second doctrinal feature of *Obergefell* concerns its attitude towards the relationship between the Due Process Clause and the Equal Protection Clause. It is noticeable that the Supreme Court reaches its judgement on the unconstitutionality of the state laws providing for marriage as a union between a man and a woman on both constitutional grounds under the Fourteenth Amendment.[92] As academic commentary has pointed out, Justice Anthony Kennedy's Opinion of the Court in *Obergefell* continues his approach to the issues concerning the rights of gays and lesbians that began with his repudiation of *Bowers v. Hardwick* in *Lawrence v. Texas*.[93] Considered part of the new substantive due process jurisprudence,[94] this approach puts emphasis on the substance of rights as far as the discriminatory treatment or legal exclusion of gays and lesbians is concerned.[95] As Justice Kennedy in his Opinion of the Court in *Lawrence* indicates, to address the material harm and stigmatizing effect imposed on gays and lesbians by the discriminatory legal provisions requires going beyond the discussion of equality. This does not mean that Justice Kennedy fails to take cognizance of equality concerns or delivers

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[88] *Obergefell*, 135 S. Ct. at 2598.
[89] *Id*.
[90] *Baker v. Nelson*, 409 U.S. 810 (1972).
[91] *Obergefell*, 135 S. Ct. at. 2598.
[92] *Id*. at 2597-2604.
[93] *See* Tribe, *supra* note 83, at 22; Kenji Yoshino, *A New Birth of Freedom?* Obergefell v. Hodges, 129 HARV. L. REV. 147, 169 (2015).
[94] *Obergefell*, 135 S. Ct. at 2631 (Thomas, J., dissenting) (including *Planned Parenthood v. Casey* (505 U.S. 833 (1992)) in substantive due process cases).
[95] Yoshino, *supra* note 93, at 172-79.

his opinion for the *Lawrence* Court purely based on the substantive right to liberty.[96] Instead, he warily considers that without addressing the issue of substantive rights, the Supreme Court may end up in a *Bowers*-like situation again in which an apparently equal legal provision (providing for criminal punishment for sodomy regardless of whether the participants were homosexual or heterosexual) was upheld on the grounds of *equal* protection.[97]

This substantive right-premised approach to tackling the legal discrimination of gays and lesbians becomes even clearer in *Windsor*. In that case, Justice Kennedy condemns the federal Defense of Marriage Act (DOMA) for depriving "equal liberty" from same-sex couples under the Fifth Amendment.[98] Both the Due Process Clause and the Equal Protection Clause are expressly invoked in *Windsor*. Speaking for the Court, however, Justice Kennedy suggests that the rights protected by those two separate constitutional provisions are interlocked and mutually enhanced as "[t]he liberty protected by the Fifth Amendment's Due Process Clause contains within it the prohibition against denying to any person the equal protection of the laws."[99] Notably, Justice Kennedy's majority opinion glides from the discussion of substantive due process of liberty to that of equal protection. Though his reasoning is based on a two-pronged argument as to the issue of rights,[100] it is hard to tell where he concludes the prong of liberty and proceeds to that of equality. Seen in this light, the protection of equal liberty emerges from out of the linkage of the Due Process Clause and the Equal Protection Clause, indicating a "new equal protection."[101]

Adhering to this new approach to the legal discrimination of gays and lesbians, Justice

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[96] Though *Lawrence* is decided on the basis of the Due Process Clause, Justice Kennedy notes, "Equality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects, and a decision on the latter point advances both interests." Lawrence v. Texas, 539 U.S. at 575.

[97] *See id*. Justice O'Connor's concurring opinion in *Lawrence* illuminates this point. *Id*. at 581-84 (O'Connor, J., concurring).

[98] See Nancy C. Marcus, *Deeply Rooted Principles of Equal Liberty, not "Argle Bargle": The Inevitability of Marriage Equality After* Windsor, 23 TUL. J. L. & SEXUALITY 17, 19 (2014) (characterizing *Windsor* as an "equal liberty" opinion); Helen J. Knowles, *Taking Justice Kennedy Seriously: Why* Windsor *Was Decided "Quite Apart from Principles of Federalism"*, 20 ROGER WILLIAMS U.L. REV. 24, 25 (2015).

[99] *Windsor*, 133 S. Ct. at 2695.

[100] *Windsor* also concerns issues about federalism. For an excellent discussion on the relationship between rights and federalism in that case, see Heather K. Gerken, Windsor*'s Mad Genius: The Interlocking Gears of Rights and Structure*, 95 B.U.L. REV. 587 (2015).

[101] Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747 (2011).

Kennedy's Opinion of the Court in *Obergefell* acknowledges the "interlocking nature" of the Due Process Clause and the Equal Protection Clause.[102] Liberty and equal protection are "instructive as to the meaning and reach of [each] other" when it comes to the question of same-sex marriage.[103] It is worth noting that of the approximately nine pages in his opinion concerning substantive due process and equal protection,[104] Justice Kennedy devotes the first six pages to the fundamental freedom (liberty) of gay couples to marry.[105] More important, what follows his discussion of substantive due process is not a separate argument as to how the constitutional doctrine about the equal protection of law would apply to this case. Instead, it elaborates on the linkage of liberty and equality claims.[106] Taken together, under this synthesized approach, equal protection is virtually absorbed into liberty, serving as the qualifier of the potentially expansive substantive due process claim.[107] Liberty takes precedence over equality in the question of same-sex marriage.[108]

In the TCC's reasoning on doctrine in the *Same-Sex Marriage Case*,[109] one prior question looms large: Is there a constitutional issue at all?[110] As noted in Part II, the Taiwanese Civil Code has long been understood as recognizing heterosexual marriage only, despite the absence of the explicit definition of marriage therein, since the Agreement to Marry Provision refers to "male and female" as far as the contracting parties to the required agreement to marry are concerned.[111] Yet some activists and scholars have challenged this conventional wisdom. Reading the Agreement to Marry Provision in isolation instead of "intratextually" together with other provisions within the Civil Code,[112] they contend that the contracting parties to an agreement to marry could be interpreted as including "male and male" and "female and female"

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[102] *Obergefell*, 135 S. Ct. at 2604 (citing *Lawrence*).
[103] *Id.* at 2603.
[104] *Id*. at 2597-2605.
[105] *Id*. at 2597-2602.
[106] *Id*. at 2603-05.
[107] *See* Yoshino, *supra* note 93, at 174; Yoshino, *supra* note 101, at 800-01.
[108] *Cf.* JED RUBENFELD, REVOLUTION BY JUDICIARY: THE STRUCTURE OF AMERICAN CONSTITUTIONAL LAW 185-86 (2005) (noting that the *Lawrence* Court speaks the language of liberty rather than equality).
[109] Interpretation No. 748, *supra* note 2, ¶¶ 11-16.
[110] *Id*. ¶ 12.
[111] *See supra* note 20.
[112] *See* Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 788 (1999) ("By contrast, intratextualism always focuses on at least two clauses and highlights the link between them.").

alongside "male and female" parties.[113] With this "ingenious" exercise of statutory interpretation,[114] the difficult issue of the constitutionality of the Agreement to Marry Provision would have been avoided and same-sex couples would have been allowed to marry with the Civil Code left untouched. Instead of jumping at that invitation for "classical constitutional avoidance,"[115] the TCC "constitutionalizes" the question of same-sex marriage. Adhering to the orthodox interpretation of the Agreement to Marry Provision, the TCC paves the way for constitutional intervention where it further extrapolates the definition of marriage as a legal union of a man and a woman from other provisions of the Civil Code.[116] On this view, the entire institution of marriage as provided for in the Civil Code is designed on the assumption of a gender-differentiated union of a man and a woman.[117]

Acting on its constitutional responsibility to protect (R2P), the TCC strikes down the legal institution of heterosexual-only marriage on the grounds of the equal freedom to marry.[118] It is

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[113] This view was put forward by Professor Wen-Chen Chang in her TCC-commissioned expert testimony and presented in the public oral hearing for the Same-Sex Marriage Case. Wen-Chen Chang, Hui Tai Zi Di 12771 Hao Shengqing Ren Taibei Shi Zhengfu ji Hui Tai Zi Di 12674 Hao Shengqing Ren Chi Chia-Wei Shengqing Jieshi An Jianding Yijian(會台字第 12771 號聲請人臺北市政府及會台字第 12674 號聲請人祁家威聲請解釋案鑑定意見)[*Assessment Opinions on the Petitions for Interpretation of Petitioner No. 12771 Taipei City Government and Petitioner No. 12674 Chi Chia-Wei*], Mar. 29, 2017, available at http://www.judicial.gov.tw/constitutionalcourt/1060324/j.pdf (in Chinese).

[114] Even taking the lexical ambiguity in Chinese legal text into account, the proposed alternative reading of the Agreement to Marry Provision would still be a bit of a stretch, to say the least. The nonbinding English rendering of the Civil Code article 972 at the Ministry of Justice website (http://law.moj.gov.tw/Eng/LawClass/LawAll.aspx?PCode=B0000001) "An agreement to marry shall be made by the male and the female parties in their own [con]cord" may contribute to that alternative reading.

[115] What the canon of constitutional avoidance exactly means is ambiguous. *See generally* Caleb Nelson, *Avoiding Constitutional Questions Versus Avoiding Unconstitutionality*, 128 HARV. L. REV. 331 (2015) (suggesting that constitutional avoidance is restricted to the avoidance of constitutional questions excluding unconstitutionality). In what Professor Adrian Vermeule calls "classical avoidance," courts should not lightly interpret a statute in a way that makes it unconstitutional as far as some other interpretation is available. Adrian Vermeule, *Saving Constructions*, 85 GEO. L.J. 1945, 1949 (1997). In contrast, in its "modern" variety, constitutional avoidance means that courts should try to interpret statutes so as to avoid questions of constitutional law. For the Taiwanese equivalent to the canon of constitutional avoidance, the principle of "constitution-conformant interpretation (*verfassungskonforme Auslegung*)", which was transplanted from German jurisprudence, *s*ee Tzong-Li Hsu (許宗力), Fa Yu Guo Jia Quan Li (2) (法與國家權力（二）) [LAW AND STATE POWER, VOL. II] 183 (2007). For a discussion of "constitution-conformant interpretation" in other countries, *see* Renata Uitz, *Constitutional Courts in Central and Eastern Europe: What Makes a Question Too Political?*, 13 JURIDICA INT'L 47 (2007), available at https://www.juridica.ee/juridica_en.php?document=en/international/2007/2/132526.PRN.pub.php.

[116] Interpretation No. 748, *supra* note 2, ¶ 12.

[117] Kuo & Chen, *supra* note 4.

[118] Notably, the TCC effectively suspends the effect of unconstitutionality until after two years from the date of the decision. Interpretation No. 748, *supra* note 2, ¶ 17.

not difficult to guess that the *Same-Sex Marriage Case* is not the first time when the TCC has been asked to intervene in issues concerning marriage and family. It should also come as no surprise that the TCC has referred to the institution of marriage as existing between a man and a woman several times in its case law.[119] Mirroring its U.S. counterpart in *Obergefell*, the TCC situates its previous cases in contexts outside the debate as to whether marriage is restricted to a union of a man and a woman and emphatically declares, "The TCC has not made any Interpretation on the issue of whether two persons of the same sex are allowed to marry each other."[120] Through this, the TCC releases itself from its own past and tackles the legal definition of marriage in the Civil Code and its constitutionality with a clean slate.[121]

After distinguishing the immediate petitions before it from its case law on marriage, the TCC takes up the core doctrinal issue concerning same-sex couples' right to marry. Just like the U.S. Constitution, the constitutional document governing Taiwan does not enumerate the right to marry in its bill of rights.[122] Even so, along with other unenumerated rights, the TCC has already recognized the freedom to marry under the General Freedom of Action Provision (article 22), which is the functional equivalent of the substantive due process doctrine in the U.S.[123] Thus, echoing *Obergefell*, the *Same-Sex Marriage Case* is directed towards answering the question of whether the heterosexual-only marriage as provided for under the Taiwanese Civil Code has deprived same-sex couples' equal freedom to marry as protected by the General Freedom of Action Provision and the Legal Equality Provision (article 7).

The TCC answers that complex constitutional question affirmatively but tersely. The equal freedom to marry is conferred on same-sex couples within four paragraphs in the

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[119] *Id*. ¶ 11 (citing *Interpretation Nos. 242*, *362*, *365*, *552*, *554*, and *647*).

[120] Interpretation No. 748, *supra* note 2, ¶ 11.

[121] For further discussion on this point, *see* Kuo & Chen, *supra* note 4.

[122] *See* THE CONSTITUTION OF THE REPUBLIC OF CHINA art. 7-24 (1947) (Taiwan), *supra* note 22. Chapter II of the Constitution of the Republic of China is entitled "Rights and Duties of the People." For the purpose of communication, we substitute the more popular term "bill of rights" for it. For the convoluted history of Taiwan's working constitution (the ROC Constitution and the so-called Additional Articles, namely, Amendments), see Hwang et al., *supra* note 62, at 754-55; JIUNN-RONG YEH, THE CONSTITUTION OF TAIWAN: A CONTEXTUAL ANALYSIS 28-32, 38-48 (2016).

[123] In terms of text, the Ninth Amendment of the U.S. Constitution is closer to the General Freedom of Action Provision in Taiwan. Yet, functionally speaking, the substantive due process doctrine fares better as the analogy. *See* Yoshino, *supra* note 93, at 148-49 (noting the protection of unenumerated rights and its relationship between the Ninth Amendment and the (substantive) Due Process Clause of the Fifth and Fourteenth Amendments).

nineteen-paragraph reasoning (*ratio decidendi*) of the *Same-Sex Marriage Case*.[124] The TCC starts by interpreting the freedom to marry as including the freedom to decide whether to marry and as to whom to marry and reaffirms that freedom's constitutional basis under the General Freedom of Action Provision.[125] Continuing to note the significance of the legal recognition of the exclusive and committed union into which a couple decide to enter, the TCC thus concludes that the General Freedom of Action Provision protects the freedom to marry a partner of the same-sex.[126]

This justification merits close attention in light of the TCC jurisprudence on fundamental rights. Notably, as one of the eager embracers of the German-made principle of proportionality,[127] the TCC has effectively approached the issues concerning constitutional rights in two stages in its jurisprudence.[128] In the first stage of a rights case, the TCC defines the reach of the enumerated right or freedom at issue and it has made no exception to the cases concerning the General Freedom of Action Provision.[129] As a result of its liberal interpretation, the constitutional bill of rights has been read in a libertarian spirit so as to accommodate virtually all imaginable claims.[130] We hasten to add that this does not suggest that the TCC has produced

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[124] Interpretation No. 748, *supra* note 2, ¶¶ 13-16.

[125] *Id*. ¶ 13 (citing *Interpretation No. 362*).

[126] *Id*.

[127] *See also* Wen-Chen Chang, *The Constitutional Court of Taiwan*, *in* COMPARATIVE CONSTITUTIONAL REASONING 641, 660-62 (András Jakab et al. eds., 2017) (discussing the TCC's application of the principle of proportionality); *cf*. Cheng-Yi Huang & David S. Law, *Proportionality Review of Administrative Action in Japan, Korea, Taiwan, and China*, *in* RESEARCH HANDBOOK IN COMPARATIVE LAW AND REGULATION 305 (Francesca Bignami & David Zaring eds., 2016) (mentioning the adoption of German principle of proportionality in administrative law review in Taiwan).

[128] For the two-stage structure of prima facie rights and proportionality, see KAI MÖLLER, THE GLOBAL MODEL OF CONSTITUTIONAL RIGHTS 4-5, 178-81 (2012).

[129] *See id*. (discussing the constitutional rights as a prima facie right). For the TCC case law, *see*, *e.g.*, Interpretation No. 554 (2002), http://www.judicial.gov.tw/constitutionalcourt/EN/p03_01.asp?expno=554 (English translation) ("freedom of sexual behaviour"); Interpretation No. 580 (2004), http://www.judicial.gov.tw/constitutionalcourt/EN/p03_01.asp?expno=580 (English translation) ("freedom of contract"); Interpretation No. 603 (2005), http://www.judicial.gov.tw/constitutionalcourt/EN/p03_01.asp?expno=603 (English translation) ("right of [informational] privacy"); Interpretation No. 699 (2012), http://www.judicial.gov.tw/constitutionalcourt/EN/p03_01.asp?expno=699 (English translation) ("freedom of operating a motor vehicle or any other transportation vehicles"); Interpretation No. 712 (2013), http://www.judicial.gov.tw/constitutionalcourt/EN/p03_01.asp?expno=712 (English translation) ("freedom to adopt children").

[130] In terms of this interpretive approach in comparative constitutional law, Kai Möller even calls constitutional rights as "prima facie rights." *See* MÖLLER, *supra* note 128, at 4. For the examples in the TCC case law, see *supra*

a libertarian rights jurisprudence. Rather, following the first stage, the TCC situates the fundamental right or freedom concerned in context and decides whether the specific claim prevails in the immediate case before it according to the principle of proportionality.[131] Proportionality works as the doctrinal tool to demarcate the scope of liberally defined constitutional rights or freedoms.[132] In this light, the TCC in the *Same-Sex Marriage Case* deviates from its rights jurisprudence as it waives the second stage after inferring same-sex couples' right to freedom of marriage from the General Freedom of Action Provision.[133] Instead of entering into the proportionality-framed analysis, the TCC proceeds to the issues concerning the Legal Equality Provision.[134]

On that score, the TCC clarifies the "suspect classifications" in the Legal Equality Provision as non-exhaustive in the first place.[135] Yet, in a surprising twist, what ensues turns out to be a refracted image of *Obergefell*. Specifically, the TCC posits that the heterosexual-only marriage under the current Civil Code amounts to a discriminatory treatment of same-sex couples' freedom to marry.[136] Up to this point, *freedom* to marry, as opposed to equality, remains at the center of the doctrinal argument in the *Same-Sex Marriage Case*. Yet that is where freedom talk stops. Instead, the TCC then organizes its equality-based argument around the discriminatory harm that gays and lesbians have suffered under the current institution of heterosexual-only marriage.[137] While the reasoning about freedom to marry centers on the *subjects* of marriage, equality-based argument is directed at the *institution* of marriage. In the former, the tone of the TCC is affirmative as it speaks to the right to freedom to marry; in the latter, it sounds negative insofar as the TCC emphatically condemns the discriminatory effect of the current marriage institution on gays and lesbians by appealing to the Legal Equality

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note 129.

[131] *See* the cases cited in *supra* note 129.

[132] See MÖLLER, *supra* note 128, at 180.

[133] Kuo & Chen, *supra* note 4.

[134] *Id*.

[135] Interpretation No. 748, *supra* note 2, ¶ 14.

[136] *Id*. ¶ 15.

[137] *Id*.

Provision.[138] Despite the seeming separation, these two parts of the TCC reasoning—freedom and equality—are effectively interlocked, suggesting a new approach to the legal treatment of gays and lesbians in the TCC jurisprudence.

In light of *Obergefell*, freedom and equality can be seen as complementing each other in the *Same-Sex Marriage Case*. On this view, the equality argument in the *Same-Sex Marriage Case* is not so much a separate doctrinal analysis of the Legal Equality Provision as the evaluative yardstick for the delimitation of the freedom to marry,[139] serving as the functional equivalent of the missing proportionality analysis in the TCC reasoning. The conspicuous absence of its case law on the Legal Equality Principle casts further light on the distinctiveness of the TCC's consideration of equality in the *Same-Sex Marriage Case*. It turns out that unlike the TCC's conventional doctrine on equal protection cases, the equality-based argument is meant to be instructive as to the concrete meaning and reach of the freedom to marry in the *Same-Sex Marriage Case*.[140] Moreover, as the *Same-Sex Marriage Case* is the first case about the rights of gays and lesbians reaching the TCC, it cannot afford to disconnect the equality-based claim from that tied to (substantive) freedom. Otherwise, the TCC may end up in the embarrassing situation in future cases as Justice Kennedy had warily entertained in *Lawrence*: the equality-based claim may prevail in the fashion of levelling down the general protection of law instead of levelling up

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[138] *Id*. ¶¶ 15-16. Notably, in a textbook exercise of the constitutional doctrine of legal equality principle, the TCC departs from its U.S. counterpart. With gays and lesbians classified as a "discrete and insular minority," the TCC suggests that "classifications based on sexual orientation" are constitutionally suspect and applies "heightened scrutiny" to the issue of same-sex marriage. *Id*. ¶ 15. For the Supreme Court's ambivalence about the question of whether heightened scrutiny applies to legal classifications based on sexual orientation, *see Windsor*, 133 S. Ct. at 2683.

[139] Notably, the TCC's discussion of heightened scrutiny in relation to gays and lesbians as a discrete and insular minority suggests a classical exercise of equality principle. Interpretation No. 748, *supra* note 2, ¶ 15. Yet, whether this can be taken as the suggestion that the TCC goes so far as to subscribing to the "separation is not equal" principle as indicated in *Brown* is not without question. *Cf.* Lin, *supra* note 16 ("it is arguable whether the TCC refutes the separate-but-equal doctrine in the context of same-sex marriage"). This question becomes clear when it comes to the legislative choice as to whether a separate legal framework on same-sex marriage outside the Civil Code would be constitutionally permissible. *See* Hwang et al., *supra* note 62, at 759 (noting the debate as to whether "special legislation governing same-sex marriage vis-à-vis the revision of the marriage provision in the Civil Code is another form of statutory discrimination"). The TCC has left this issue unaddressed. In comparative perspectives, the South African Parliament adopted the Civil Union Act 2006 as the legislative response to *Minister of Home Affairs v. Fourie*, in which the Constitutional Court decided that the old Marriage Act 1961 that excluded same-sex couples from marriage was unconstitutional. 2006 (1) SA 524 (CC) (S. Afr.). For a comparative analysis of *Fourie*, *see* Holning Lau, *Marriage Equality and Family Diversity: Comparative Perspectives from the United States and South Africa*, 85 FORDHAM L. REV. 2615 (2017).

[140] Interpretation No. 748, *supra* note 2, ¶ 16.

the legal treatment of gays and lesbians.[141] Taken together, the *Same-Sex Marriage Case* reflects (Greater) *Obergefell* to the extent that freedom precedes equality while both are evolving into an interlocking constitutional doctrine in the scrutiny of the legal treatment of gays and lesbians.

To sum up, in terms of doctrine, both (Greater) *Obergefell* and the *Same-Sex Marriage Cases* enter into dialogue with its own precedential forebears and end up distinguishing themselves from the case law on the gender-differentiated definition of marriage. Also, the doctrinal implications of both lines of cases are more than the legal recognition of same-sex marriage. When it comes to the legal treatment of gays and lesbians in general, both suggest an interlocking approach to the claims concerning freedom/liberty and equality. Instead of sorting the claims into the corresponding doctrinal headings and treating them accordingly, (Greater) *Obergefell* and the *Same-Sex Marriage Case* converge on the precedence of (substantive) freedom/liberty over (formal) equality and their interlocking structure.[142] Thus emerges the constitutional right to equal liberty.

B. *Principle*

As shown above, a doctrinal parallel can be observed between *Obergefell* and the Taiwanese *Same-Sex Marriage Case*, indicating a new and synthesized approach to the dual claims of freedom/liberty and equality. It seems to be a logical move to assume that the principle underpinning the architecture of the (Greater) *Obergefell* jurisprudence also bears out the TCC's doctrinal approach in the *Same-Sex Marriage Case*. Whether this is true or not requires a closer look at both lines of cases instead of a guessing game about what lies underneath their shared doctrinal stand.

In the (Greater) *Obergefell* jurisprudence, there are two underlying components of its doctrinal synthesis of substantive due process of liberty and equal protection: the concept of

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[141] *Interpretation No. 666* (2009) is a case in point, although it is not concerned with the rights of gays and lesbians. In that case, the TCC invalidated a legal penalty aimed at the elimination of prostitution under the Legal Equality Provision for it applied to (mostly female) prostitutes only and left their (male) clients free. Despite that seemingly progressive interpretation to the effect that prostitution would be legalized, the Parliament responded to the ruling by extending the legal penalty to the clients of prostitutes to maintain the total ban on prostitution. Interpretation No. 666 (2009), http://www.judicial.gov.tw/constitutionalcourt/EN/p03_01.asp?expno=666 (English translation).

[142] *See* Yoshino, *supra* note 93, at 172-79.

dignity and the harm principle. Justice Kennedy first put forth the concept of dignity in his majority opinion in *Lawrence*. In repudiating the *Bowers* Court's characterization of the Georgian statute criminalizing sodomy as merely an instance of government regulation of sexual conduct, Justice Kennedy pointed out that the type of sexuality that Georgia intended to regulate by criminal punishment was part of two people's choice to establish a special personal relationship between them.[143] That relationship could involve intimate conduct but did not stop at that. To regulate an intimate conduct involving sexuality that took place in the private space, the Georgian law amounted to intruding into that special personal relationship between two people.[144] More important, no matter what type of sexuality such relationship might involve, the individuals who entered upon that relationship "retain[ed] their dignity as free persons."[145] That is why "*Bowers* was not correct when it was decided, and it is not correct today" in Justice Kennedy's majority opinion in *Lawrence*.[146]

That indictment of the *Bowers* Court speaks to the foundation of the (Greater) *Obergefell* jurisprudence. It lays down the principle that the respect for dignity enjoins the government from interfering in personal relationship in the private space, which is the reserved realm for personal choices.[147] Dignity and autonomy move in tandem: dignity is an innate characteristic of human beings as free agents while autonomy gives expression to dignity in the free exercise of personal choices.[148] Both dignity and autonomy continue to guide the *Windsor* Court's synthesized approach to the claims of liberty and equal protection when it assails DOMA for its "interference with the *equal dignity* of same-sex marriages" conferred by some states.[149] The principle of dignity as autonomy culminates in *Obergefell* where Justice Kennedy identified the liberty to marry as one of those "personal choices central to *individual dignity and autonomy*."[150]

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[143] *See Lawrence*, 539 U.S. at 566-67.

[144] *See also* RUBENFELD, *supra* note 108, at 185-86 (noting the centrality of autonomy in *Lawrence*).

[145] *Lawrence*, 539 U.S. at 567.

[146] *Id*. at 578.

[147] *See id*. at 567; *see also* Tribe, *supra* note 83, at 22; Reva B. Siegel, *Dignity and Sexuality: Claims on Dignity in Transnational Debates over Abortion and Same-Sex Marriage*, 10 INT'L J. CONST. L. 355, 374 (2012).

[148] *See Lawrence*, 539 U.S. at 562, 574; *see also Obergefell*, 135 S. Ct. at 2599, 2603; *Windsor*, 133 S. Ct. at 2694 ("moral and sexual choices" (citing *Lawrence*)).

[149] *Windsor*, 133 S. Ct. at 2693 (emphasis added). Notably, Professor Bruce Ackerman calls this line of argument the dignity-based anti-humiliation principle and traces it back to *Brown*. BRUCE ACKERMAN, WE THE PEOPLE, VOLUME 3: THE CIVIL RIGHTS REVOLUTION 137-40, 307-09 (2014).

[150] *Obergefell*, 135 S. Ct. at 2597 (emphasis added); *but cf. id*. at 2631 (Thomas, J., dissenting) (regarding

As discussed above, the principle of dignity as autonomy underlies Justice Kennedy's liberty-based approach to the doctrinal synthesis of the Due Process Clause and the Equal Protection Clause. Alongside the concept of dignity is the second component of the liberty-equality "double helix" in the (Greater) *Obergefell* jurisprudence:[151] the harm principle, which draws the line at government interference with liberty. Recognized as the foundations of liberal theories of criminal punishment, the harm principle has been attributed to moral and political philosopher John Stuart Mill.[152] According to Mill's liberal philosophy, the government and other societal authorities pose threat to individual independence and the idea of liberty is aimed at the delimitation of "the power which can be legitimately exercised by society over the individual."[153] Building on this foundational principle, Mill set out his famous harm principle:

> [T]he sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number is self-protection. [T]he only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent *harm* to others … The only part of the conduct of anyone for which he is amenable to society is that which concerns others. In the part that merely concerns himself, his independence is, of right, absolute. Over himself, over his own body and mind, the individual is sovereign.[154]

In other words, the government has no justification whatsoever to interfere in individual activities or interpersonal relations unless it acts to prevent harm or other forms of adverse effect that may result from individual activities or interpersonal relations from being inflicted on other members of the society.[155]

Though Justice Kennedy makes no mention of Mill or his moral philosophy in his (Greater) *Obergefell* jurisprudence, his approach to the substantive due process of liberty has been viewed as deriving from the harm principle.[156] To address the historical wrong done by *Bowers*, Justice

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"human dignity" as "innate").

[151] Tribe, *supra* note 83, at 20.

[152] David A.J. Richards, *Liberalism, Public Morality, and Constitutional Law: Prolegomenon to a Theory of the Constitutional Right to Privacy*, LAW & CONTEMP. POBS., Winter 1988, at 123, 123-24.

[153] JOHN STUART MILL, ON LIBERTY 59 (Penguin Books 1974) (1895).

[154] *Id*. at 68-69 (emphasis added).

[155] *See* Richards, *supra* note 152, at 137-41 (discussing the harm principle in Kantian terms and its relevance to the right to privacy in American constitutionalism).

[156] RUBENFELD, *supra* note 108, at 186, 189-90 (critically discussing *Lawrence*'s constitutionalization of Mill's harm principle).

Kennedy in *Lawrence* approvingly invoked the American Law Institute's (ALI) justification for not recommending criminal punishment for any consensual sexual relations conducted in the private space in its Model Penal Code of 1955.[157] One of the reasons in ALI's justification that Justice Kennedy cited to is that such a private conduct is "not harmful to others."[158] In other words, the government has no business interfering in interpersonal relations in private through sodomy law because such relations cause no harm. While *Windsor* focuses on the harm or other adverse effects that DOMA inflicted on the same-sex couples who were legally married in some states,[159] the influence of the harm principle is hard to miss in *Obergefell*. In response to those who contended that same-sex couples be excluded from the right to marry due to the alleged adverse effects on marriage from allowing same-sex couples to marry, Justice Kennedy simply observes, "[those] cases involve only the rights of two consenting adults whose marriages would pose *no risk of harm to themselves or third parties*."[160] The harm principle lays the philosophical foundations for the "new birth of freedom."[161]

Our discussion so far has shown that the concept of dignity and the harm principle lie underneath the doctrinal architecture of the (Greater) *Obergefell* jurisprudence. Now we turn focus to the Taiwanese *Same-Sex Marriage Case*. In line with its Civil Law style of judicial syllogism,[162] the TCC approaches the meaning of fundamental rights deductively.[163] Despite invoking no precedential authority, the TCC attaches freedom to marry to the concept of

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[157] *Lawrence*, 539 U.S. at 572.

[158] *Id*.

[159] *See Windsor*, 133 S. Ct. at 2693-95.

[160] *Id*. at 2606-07 (emphasis added).

[161] Yoshino, *supra* note 93.

[162] *See* MITCHEL DE S.-O.L'E. LASSER, JUDICIAL DELIBERATIONS: A COMPARATIVE ANALYSIS OF JUDICIAL TRANSPARENCY AND LEGITIMACY 4 (2004) (observing "civilian judicial decision-making" as favoring the "syllogistic" style of reasoning); *see also* FRANZ WIEACKER, A HISTORY OF PRIVATE LAW IN EUROPE 343-44 (Tony Weir trans., 1995) (describing the process of syllogistic legal reasoning in continental Europe); *see also* REINHOLD ZIPPELIUS, INTRODUCTION TO GERMAN LEGAL METHODS (Kirk W. Junker & P. Matthew Roy eds., 2008) 130-31 (discussing judicial syllogism in Germany).

[163] *Cf.* 吕太郎 (Tailang LÜ), 回顾台湾的判例制度、简议中国大陆的案例指导制度 (*Review of Taiwan's Precedent System and Brief Discussion of Mainland China's Case Guidance System*), 斯坦福法学院中国指导性案例项目 (Stanford Law School China Guiding Cases Project), Feb. 29, 2016, http://cgc.law.stanford.edu/commentaries/16-lv-tailang (observing of ordinary judicial decision-making in Taiwan that "[i]n adjudication, the thought model is using published objective law as the major premise and reaching a court decision with syllogisms in deductive logic"). For a general introduction of the TCC reasoning and argumentation, *see* Chang, *supra* note 127.

decisional autonomy.[164] Moreover, human dignity and the development of personality pivots on decisional autonomy.[165] In other words, human dignity lies at the heart of the protection of constitutional rights, underlying the interpretation of the constitutional bill of rights (including the General Freedom of Action Provision from which freedom to marry derives). Thus, for the same consideration of human dignity and as a corollary of the decisional autonomy underpinning opposite-sex couples' freedom to marry, the TCC confers the same freedom to marry on same-sex couples.[166] Q.E.D. Taken together, the principle of dignity as autonomy lies at the core of the TCC's freedom-based approach to same-sex couples' right to marry in the *Same Sex Marriage Case*.

As noted above, the harm principle sets the operational limit to government interference with personal freedom. Like its U.S. counterpart in (Greater) *Obergefell*, the TCC does not mention the harm principle by name or refer to its theoretical founder. Yet this does not mean that Millian liberal philosophy plays no role in the *Same-Sex Marriage Case*. As we have argued in Part III.A., the TCC's equality argument in the *Same-Sex Marriage Case* amounts to the doctrinal substitute for the missing principle of proportionality as the evaluative yardstick of the limits of government encroachment on same-sex couples' freedom to marry. On this part, the TCC's implicit adoption of the harm principle is discernible. Confronting the concerns raised over the indiscriminating extension of the right to marry to same-sex couples, the TCC categorically responds that the opposite-sex marriage-centered conventional morality would not

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[164] Though the TCC cites *Interpretation No. 362* to the effect that freedom to marry comprises the freedom as to whether to marry and as to whom to marry, it stops short of referring to its case law when it proceeds to the doctrinal discussion of the General Freedom of Action Provision and the Legal Equality Provision. *See* Interpretation No. 362 (1994), http://www.judicial.gov.tw/constitutionalcourt/EN/p03_01.asp?expno=362 (English translation). Notably, the TCC has adopted the concepts of decisional autonomy and human dignity as early as 1999 when it issued *Interpretation No. 479* and *Interpretation No. 485*, respectively. *See* Interpretation No. 479 (1999), http://www.judicial.gov.tw/constitutionalcourt/EN/p03_01.asp?expno=479 (English translation); Interpretation No. 485 (1999), http://www.judicial.gov.tw/constitutionalcourt/EN/p03_01.asp?expno=485 (English translation). It was not until *Interpretation No. 603* that the TCC was explicit about the importance of human dignity and decisional autonomy in the interpretation of constitutional rights. Interpretation No. 603, *supra* note 129. Following *Interpretation No. 603*, the TCC has invoked the guiding concept of decisional autonomy or human dignity in its jurisprudence concerning fundamental freedoms and rights in a number of Interpretations. For example, the TCC cites *Interpretation No. 603* in *Interpretation No. 689*. *See* Interpretation No. 689 (2011), http://www.judicial.gov.tw/constitutionalcourt/EN/p03_01.asp?expno=689 (English translation). In contrast, the TCC conspicuously leaves this long line of precedents out in the *Same-Sex Marriage Case*. Interpretation No. 748, *supra* note 2, ¶ 13. We shall come back to this point *infra* Part IV.A.3.

[165] Interpretation No. 748, *supra* note 2, ¶ 13.

[166] *Id*.

be adversely affected as a result.[167] Moreover, the General Freedom of Action Provision recognizes unenumerated rights provided that they do not *prejudice* social order or public interest.[168] Addressing that constitutional proviso, the TCC also contemplates possible harms as a consequence of the recognition of same-sex couples' freedom to marry before coming to conclusion. In the eyes of the TCC, no harm would result from the recognition of same-sex couples' freedom to marry as it would not *adversely affect* the current Civil Code provisions for marriage or *alter* the social order that has been organized around opposite-sex marriage.[169] Taken together, "adverse effect," "prejudice," and other forms of harm lie at the heart of the TCC when it gives constitutional sanction to same-sex marriage.[170] The harm principle underlies the doctrinal analysis of same-sex-couples' equal freedom to marry in the *Same-Sex Marriage Case*.

Reading the Greater *Obergefell* jurisprudence and the Taiwanese *Same-Sex Marriage Case* together, we have found a parallelism between both cases. On the one hand, they converge on the new synthesized approach to the dual claims of liberty/freedom and equality when it comes to the legal treatment of gays and lesbians; on the other, they appeal to the concept of dignity and the harm principle in laying their common doctrinal approach to fundamental rights on a philosophical foundation. Though it is the TCC's long established practice to make "blind" (or unattributed) reference to the doctrines or jurisprudence of foreign origin, it is not hard to see the jurisprudential trail of (Greater) *Obergefell* left in the *Same-Sex Marriage Case*.

Yet the sketch of the shadow of (Greater) *Obergefell* would not be complete without uncovering a puzzle buried in the jurisprudential juxtaposition of these two great cases. The puzzle is that the TCC does not completely leave *Obergefell* out but only cites it as a source of authority where it discusses the current opinion on the immutable nature of sexual orientation in medicine and psychology.[171] In other words, the TCC refers to *Obergefell* as a psychiatric expert evidence instead of as a source of jurisprudential inspiration. This discrepancy in citation falls far

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[167] *Id*. ¶ 16.

[168] *See* THE CONSTITUTION OF THE REPUBLIC OF CHINA art. 22 (1947) (Taiwan), *supra* note 22.

[169] Interpretation No. 748, *supra* note 2, ¶ 16.

[170] For the relationship between adverse effect and the harm principle, see Tatjana Hörnle, *'Rights of Others' in Criminalisation Theory*, *in* LIBERAL CRIMINAL THEORY ESSAYS FOR ANDREAS VON HIRSCH 169, 174 (A.P. Simester et al. eds., 2014).

[171] Interpretation No. 748, *supra* note 2, n.1.

short of concealing the influence of *Obergefell* on its doctrine and principle but only throws the shadowed image of (Greater) *Obergefell* into sharp relief instead. What lies behind that citational aberration? After bringing the shadow of (Greater) *Obergefell* in the *Same Sex-Marriage Case* into the limelight, we move to solving that puzzle next.

IV. IT'S *BROWN*, NOT *OBERGEFELL*

One of the core issues that every court faces is the question of applicable sources of law. This is because the legal authority that the court invokes reveals what type of court it is, and how the court persuades both the parties involved and the general public to accept its rulings.[172] In judicial decision-making, the identity and legitimacy of a court are at stake when it comes to the choice of applicable sources of law.[173] That is why high courts in many jurisdictions are reluctant to cite sources of foreign law in their formal judgements even though they do not necessarily have doubts about the benefits of referring to foreign jurisprudence and comparative law sources.[174] Through this lens, the puzzle about the TCC's citational aberration in the Taiwanese *Same-Sex Marriage Case* can be better understood. The TCC deliberately left (Greater) *Obergefell* out on the part of its reasoning that concerned doctrine and principle, but did invoke *Obergefell* in unusual length to support its psychiatric opinion. To be slightly blunter, we ultimately understand that the TCC could not refer to *Obergefell* where it dealt with questions of law.[175] When it comes to *legal* authority, regardless of whether it is binding or merely persuasive,[176] the TCC is most concerned about the identity, or rather, "purity" of its sources of

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[172] *See* PAUL W. KAHN, MAKING THE CASE: THE ART OF THE JUDICIAL OPINION 18-45 (2016).

[173] *Id*. at 48-62. For the multifaceted concept of legitimacy in judicial decisions, *see* Michael L. Wells, *"Sociological Legitimacy" in Supreme Court Opinions*, 64 WASH. & LEE L. REV. 1011, 1018-20 (2007) (noting three kinds of legitimacy: legal, sociological, and moral).

[174] *See*, *e.g*., David S. Law & Wen-Chen Chang, *The Limits of Transnational Judicial Dialogue*, 86 WASH. L. REV. 523, 558 (2011). Jeremy Waldron persuasively argues for the value of referring to foreign law in the enhancement of what he calls the modern-day ius gentium and the persuasiveness of judicial reasoning. *See* JEREMY WALDRON, "PARTLY LAWS COMMON TO ALL MANKIND": FOREIGN LAW IN AMERICAN COURTS (2012). For a critique of the *Same-Sex Marriage Case* from this perspective, see Kuo & Chen, *supra* note 4.

[175] The TCC is inconsistent with regard to the acknowledgement of foreign law, although it did cite the case law of foreign jurisdictions in its most cited case in comparative constitutional law, namely *Interpretation No. 499*, which declared the constitutional amendment of 1999 unconstitutional. Interpretation No. 499 (1989), http://www.judicial.gov.tw/constitutionalcourt/EN/p03_01.asp?expno=499 (English translation). We shall come back to this issue later.

[176] WALDRON, *supra* note 174, at 48-49, 59-62 (suggesting that foreign law or judicial judgment has the same

law so that the *Same-Sex Marriage Case* can be laid on a firm basis of legitimacy.[177]

Same-sex marriage causes controversy and divides people everywhere in the world—even more so in countries where their legality has been decided by a court. On that score, the Taiwanese *Same-Sex Marriage Case* resembles *Obergefell* and *Fourie*.[178] As our discussion of the (pre)history of the *Same-Sex Marriage Case* has further shown, the TCC was plunged into a political vortex with no precedential building blocks that would affirm the constitutional rights of gays and lesbians on which the court could rely when it decided the issue of same-sex marriage.[179] Without the support of precedential authority, the question regarding the legitimacy of TCC's decision-making became even more acute.[180] This sets the *Same-Sex Marriage Case* apart from *Obergefell*. Because legitimacy is essential for the *Same-Sex Marriage Case*, the TCC takes great pains to make a case for its decision to admit the constitutional petitions from the TMG and Mr. Chi.[181] The two-year "remedial grace period"[182] that the TCC willingly extends to the political branch is further evidence of the TCC's awareness of the controversial nature of same-sex marriage and the court's concern about the judgment's legitimacy in the general public.[183] As the question of legitimacy stands at the heart of the Taiwanese *Same Sex Marriage Case*, we need to look beyond the Greater *Obergefell* jurisprudence to understand its law and politics.

In the next Part of this Article, we move our focus from the issues that concern doctrine and principle to how the TCC has managed its own legitimacy through the style of judgment chosen

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"persuasive authority" as precedents).

[177] For the purity and identity of sources of law, *see* Frank I. Michelman, *Integrity-Anxiety?*, *in* AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS 241, 262-68 (Michael Ignatieff ed., 2005); *see also* Law & Chang, *supra* note 174, at 558-60 (reporting the interviewed TCC Justices' concern about the citation to foreign law). We shall further discuss the question of legal authority in the *Same-Sex Marriage Case infra* Part IV.A.3.

[178] *See supra* note 139 and accompanying text.

[179] *See supra* text accompanying notes 61-78.

[180] For the relationship between legal authority (including precedents) and the legitimacy of judicial review, *see* THOMAS G. HANSFORD & JAMES F. SPRIGGS II, THE POLITICS OF PRECEDENT ON THE U.S. SUPREME COURT 20-23 (2006).

[181] Interpretation No. 748, *supra* note 2, ¶¶ 8-10. *Cf*. *Obergefell*, 135 S. Ct. at 2594-97, 2605-06 (discussing the judicial decisions and politics preceding the case before it).

[182] Holning Lau, *Comparative Perspectives on Strategic Remedial Delays*, 91 TUL. L. REV. 259 (2016).

[183] Interpretation No. 748, *supra* note 2, ¶ 17.

and its embrace of nonlegal authority in the *Same-Sex Marriage Case*.[184] We first look at the judgment's style of reasoning, and then read it in light of post-ruling politics. We conclude that *Brown* is a better analogy of the law and politics of the *Same-Sex Marriage Case* than *Obergefell*, as the TCC is bracing for a *Brown* moment in its history.

A. *Managing Legitimacy through Judicial Style*

Because the style of judicial reasoning affects the legitimacy of the court and its judgment enormously,[185] we put the judicial style of the *Same-Sex Marriage Case* under scrutiny. We next identify and discuss three features of the judgment—managed brevity, virtual unanimity, and scientific authority—respectively.

1. "We could all actually read it if we wanted to"[186]

Professor Akhil Amar, a meticulous student of the U.S. Constitution and its history, told a story about the two "original" editions of the U.S. Constitution and its democratic accessibility at its bicentennial celebration.[187] One edition was written to a parchment and signed by the delegates of the Philadelphia Convention; the other was mass-printed at the American Founding but forgotten later along with all its master copies.[188] He contended that the forgotten printed

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[184] The embrace of nonlegal authority in judicial rulings can be understood as part of judicial style as it brings judicial rulings closer to the bureaucratic style of administrative regulations. *See* Robert F. Nagel, *The Formulaic Constitution*, 84 MICH. L. REV. 165, 177-78 (1985); *cf*. Wells, *supra* note 173, at 1030, 1033 (suggesting the pre-*Brown* appeal to social science in chipping away at the legitimacy of *Plessy v. Ferguson*,163 U.S. 537 (1896) as the example of the court's maintaining the sociological legitimacy of its opinions through "appearance management").

[185] KAHN, *supra* note 172, at 48-73 (discussing how judicial decisions have been styled to sustain the construct of We the People as the author and the source of constitutional legitimacy); Stephen M. Johnson, *The Changing Discourse of the Supreme Court*, 12 U.N.H. L. REV. 29, 39 (2014) ("persuasive, well-reasoned and transparent opinions also foster public confidence in the legitimacy of the judicial branch and the rule of law"); Erwin Chemerinsky, *A Failure to Communicate*, BYU L. REV. 1705, 1706 (2012) (noting the relationship between judicial legitimacy and the communicability of judicial opinion writing); Michael Serota, *Intelligible Justice*, 66 U. MIAMI L. REV. 649, 649-50 (2012) (discussing the relationship between judicial legitimacy and the persuasion and comprehension of court opinions); Patrick R. Hugg, *Judicial Style: An Exemplar*, 33 LOY. L. REV. 865, 871 (1987) (noting the importance of judicial style to the public appreciation of law).

[186] Jessica Contrera, *On Constitution Day, Putting We the People in Your Pocket*, WASH. POST, 2014, https://www.washingtonpost.com/lifestyle/style/on-constitution-day-putting-we-the-people-in-your-pocket/2014/09/16/84a93c6a-3dd0-11e4-b03f-de718edeb92f_story.html?utm_term=.6154bd3793af (interviewing and quoting Akhil Amar).

[187] Akhil Reed Amar, *Our Forgotten Constitution: A Bicentennial Comment*, 97 YALE L.J. 281, 281 (1987).

[188] *Id*. at 282-85.

edition of the U.S. Constitution is of greater importance than the parchment which has been memorably preserved in the National Archives, because the constitutional text of the printed copies was the one to which common people had access, whereas the signed parchment starting with the words "We the People" was not accessible to everyone.[189] Professor Amar's example illustrates the close relationship between mass printing and democratic accessibility. Thanks to its distinctive brevity in style, the fact that the U.S. Constitution can be printed as a pocket book rather than a multi-volume code collection further contributes to its "democratic accessibility" and "popular[ity]" so much so that it has been alluded to as what Thomas Paine called "the political bible of the state."[190] Moreover, the brevity of the U.S. Constitution in comparative perspective makes reading the Constitution no longer a daunting task that only professionals would find of interest. Rather, the U.S. Constitution is close to the people because of its brevity and accessibility.[191] Thus, "[everybody] could actually read it if [she] wanted to."[192]

Looking from outside of the U.S. political psyche, people may think that the foregoing characterization of the U.S. Constitution as the citizen's bible is a form of American civil religion,[193] or worse, a symptom of "constitutional fetishism."[194] Yet the style of constitution-writing matters beyond the aesthetics of the U.S. Constitution. To illustrate this point clearly, it is worth to recall the now-forgotten European Constitutional Treaty, also known as the EU Constitution.[195] The length and clumsiness of the text of the EU Constitution had raised eyebrows among some of its most intelligent students already before the French and Dutch

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[189] *Id*. at 286.

[190] *Id*. at 291 & n.42 (noting the democratic accessibility of the printed constitutional text in relation to Thomas Paine's discussion of the "political bible of the state").

[191] Akhil Reed Amar, *The Supreme Court, 1999 Term–Foreword: The Document and the Doctrine*, 114 HARV. L. REV. 26, 45–47 (2000); Akhil Reed Amar, *Architexture*, 77 IND. L.J. 671, 676 (2002).

[192] Contrera, *supra* note 186.

[193] *See* SANFORD LEVINSON, CONSTITUTIONAL FAITH 9–53 (1988) (discussing the U.S. Constitution as a civil religion in American society).

[194] *See* Richard D. Parker, *"Here, the People Rule": A Constitutional Populist Manifesto*, 27 VAL. U.L. REV. 531, 564–66 (1993) (noting the feature of chronic fetishism of the U.S. Constitution, constitutional law, and the Supreme Court).

[195] The formal title is "Treaty Establishing a Constitution for Europe." Treaty Establishing a Constitution for Europe, Oct. 29, 2004, 2004 O.J. (C 301), https://europa.eu/european-union/sites/europaeu/files/docs/body/treaty_establishing_a_constitution_for_europe_en.pdf.

electorates sounded the death knell for it in two successive referenda in 2005.[196] For example, Professor Joseph Weiler noted that the word count of the English version of the EU Constitution reached as high as 66,497 words (excluding the 100,000-words' worth of annexes and declarations attached to it), whereas the U.S. Constitution is only 4,600 words long.[197] According to Weiler's judgment, "[the EU Constitution] does not look like a constitution; [nor does] it…read like a constitution."[198] As it turned out, Professor Weiler's personal judgment was more of sentencing than doomsaying.[199]

The relationship between the brevity of a legal instrument and its democratic accessibility is not only of pertinence to a code or a statute, but also to a judicial ruling. Apart from the settlement of individual disputes,[200] judicial rulings function as an exercise of persuading people to accept the meaning that the court gives to the law through its rulings.[201] The issues of how to make a judicial ruling persuasive and on what criteria its persuasiveness is to be judged are both too complex to be fully addressed in this Article. Sources of legal authority, substance of reasoning and, of course, the outcome of the ruling, are some of the factors to be reckoned with regard to the persuasiveness of a ruling.[202] Citizens must read judicial rulings before they can decide whether their reasoning is persuasive. To that extent, the accessibility of judicial rulings matters to citizens in the same way as the accessibility of statutes or legal codes does. For this reason, the growing length of the Supreme Court's opinions in recent years has become under

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[196] *See* MICHAEL O'NEILL, THE STRUGGLE FOR THE EUROPEAN CONSTITUTION: A PAST AND FUTURE HISTORY 92 (2009).

[197] J.H.H. Weiler, *On the Power of the Word: Europe's Constitutional Iconography*, 3 INT'L J. CONST. L. 173, 174 (2005). In total, the Constitutional Treaty weighs in at 154,183 words. It is worth noting that annexes and declarations are integral to the E.U. Constitution in terms of its legal status as an international treaty. *Id*.

[198] *Id*.

[199] Following its electoral defeats in the French and Dutch referenda on May 29 and June 1, 2005, respectively, the EU Constitution became defunct. *See* Gráinne de Búrca, *The European Constitutional Project after the Referenda*, 13 CONSTELLATIONS 205 (2006).

[200] Serota, *supra* note 185, at 651 (noting legitimacy alongside the rule of law and the constraint of judicial interference as the primary functions of judicial rulings); Paul Howitz, *The Promise and Perils of Judicial Opinion Writing in Canadian Constitutional Law*, 38 OSGOODE HALL L.J. 101, 106 (2000) (noting functions of judicial opinions).

[201] KAHN, *supra* note 172, at 19–39; Wells, *supra* note 173, at 1040–46; Serota, *supra* note 185, at 649–50 (noting the importance of persuasion in the writing of judicial opinions).

[202] *See generally* Toni M. Massaro, *Empathy, Legal Storytelling, and the Rule of Law: New Words, Old Wounds?*, 87 MICH. L. REV. 2099 (1989) (discussing trial as an act of persuasion and its different factors).

debate.[203] The longer the opinions become, the less chance there is that people will read them through.[204] As a result, while the reasoning of the judicial rulings becomes more sophisticated in the eyes of legal professionals, ordinary citizens tend to find them less persuasive as the democratic accessibility of judicial rulings is lost.[205] In this way, the traditional role of the Supreme Court Opinion in relation to the meaning of the U.S. Constitution to citizens is deteriorated.[206] This casts shadows over the legitimacy of judicial review itself.[207]

Brown v. Board of Education is the paradigm case that illustrates the importance of the democratic accessibility of a judicial ruling to ordinary citizens in the preservation of judicial legitimacy in politically charged cases. In this Article, we will not discuss the core issue in *Brown*, namely the contentious nature of school desegregation, and the transformative implications of that ruling to the American society.[208] Despite its epoch-making status, *Brown* has raised concerns regarding the role and legitimacy of judicial review in a constitutional democracy such as the United States.[209] Since its announcement in 1954, *Brown* has been

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[203] For the tendency of the growing size of the Supreme Court Opinions, see Adam Liptak, *Justices' Opinions Grow in Size, Accessibility and Testiness, Study Finds*, N.Y. TIMES, May 5, 2015, at A17 [hereinafter Liptak, *Justices' Opinions Grow in Size*] (noting the longer but less ambiguous judicial writing and suggesting a mixed signal of accessibility); Adam Liptak, *The Roberts Court: Justices Long on Words but Short on Guidance*, N.Y. TIMES, Nov. 18, 2010, at A1 [hereinafter Liptak, *Justices Long on Words*] ("When More Can Be Less").

[204] Johnson, *supra* note 185, at 29, 36 (suggesting that the Supreme Court Opinions have become "too long and complex" to be "intelligible" and thus "boring" and "inaccessible"); Chemerinsky, *supra* note 185, at 1713 ("[The Supreme Court Opinions] have become much too long and thus far more difficult for lower courts and government officials to read and rely upon"); Daniel A. Farber, *Missing The "Play of Intelligence"*, 36 WM. & MARY L. REV. 147, 165 (1994) (noting that "judicial opinions are getting increasingly longer and more complex, yet seem to have less to say to much of their audiences"); *see also* Serota, *supra* note 185, at 657–61 (suggesting that "long-windedness" as a contributing factor to the unintelligibility and the reduced democratic accessibility of the Supreme Court Opinions).

[205] *See* KAHN, *supra* note 172, at 96–104 (noting the weakness of erudite opinions when exposed to the "plain-text" argument); Frederick Schauer, *Opinions as Rules*, 62 U. CHI. L. REV. 1455, 1459–60 (1995) (noting the substantial increase in the length of judicial opinions and suggesting that judicial opinions have become out of the reach of nonspecialists). For the relationship between length and erudition, see Kenneth Lasson, *Scholarship Amok: Excesses in the Pursuit of Truth and Tenure*, 103 HARV. L. REV. 926, 942 (1990).

[206] KAHN, *supra* note 172, at 26; Richard A. Posner, *Judges' Writing Styles (And Do They Matter?)*, 62 U. CHI. L. REV. 1421, 1431-32 (1995) (suggesting the importance of the court's appealing to the lay audience through judicial style); *but cf*. Schauer, *supra* note 205, at 1463 (questioning if lay people are the targeted audience of judicial opinions at all).

[207] Nagel, *supra* note 184, at 165, 177; BRUCE ACKERMAN, WE THE PEOPLE, VOLUME 1: FOUNDATIONS 261-94 (1991); Frank Michelman, *Law's Republic*, 97 YALE L.J. 1493, 1524–26 (1988).

[208] *See*, *e.g.*, MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 290-442 (2004) (contending that the contribution of *Brown* to the civil rights movement was indirect by intensifying the politics of dismantling Jim Crow).

[209] For the classical examples, see Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73

acclaimed for its conclusion but criticized for its reasoning.[210] For example, some commentators have indicated that *Brown* failed to lead the way out of the deep-rooted Jim Crow laws in American South;[211] others have suggested that *Brown* fell short of addressing the racial issues surrounding equal citizenship.[212] Yet *Brown* has been praised for its brevity in style.[213] The brevity of *Brown* made it more accessible to the print media,[214] which was and probably still remains to be the dominant source of published judicial decisions.[215] Because the full text of *Brown* was reported in newspapers around the United States,[216] citizens could read the decision themselves and make their own judgment regarding the reasoning of *Brown*. Moreover, the

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HARV. L. REV. 1 (1959) (criticizing *Brown* for falling short of the constitutional principle of neutrality); ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS, 56-72 (1962) (putting forward the countermajoritarian theory of judicial review in view of *Brown*); JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980) (providing a democratic justification of judicial review in the post-*Brown* debate); ROBERT A. BURT, THE CONSTITUTION IN CONFLICT (1995) (discussing how the court contributes to constitutional dialogue in a conflicted society).

[210] *See generally* WHAT *BROWN V. BOARD OF EDUCATION* SHOULD HAVE SAID: THE NATION'S TOP LEGAL EXPERTS REWRITE AMERICA'S LANDMARK CIVIL RIGHTS DECISION (Jack Balkin ed., 2001) [hereinafter WHAT *BROWN* SHOULD HAVE SAID] (collecting scholarly critiques of *Brown* from different perspectives).

[211] *See* Jack Balkin, Brown *as Icon*, *in* WHAT *BROWN* SHOULD HAVE SAID, *supra* note 210, at 3, 6–8 (noting the de facto school segregation after *Brown*); Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379, 381–82 (2011) ("[*Brown*] has required a Herculean effort—one well beyond the Court's competence—to implement comprehensively").

[212] *See*, *e.g.*, Bruce Ackerman, *Concurring*, *in* WHAT *BROWN* SHOULD HAVE SAID, *supra* note 210, at 100 (rewriting *Brown* in terms of the constitutional history of national citizenship).

[213] *See* ACKERMAN, *supra* note 149, at 134 (praising *Brown* for its accessibility to the public and contribution to broader constitutional debate); LACKLAND H. BLOOM, JR., DO GREAT CASES MAKE BAD LAW? 411 (2014); David S. Law, *A Theory of Judicial Power and Judicial Review*, 97 GEO. L.J. 723, 777 (2009); *see also* ROSALEE A. CLAWSON & ERIC N. WALTENBURG, LEGACY AND LEGITIMACY: BLACK AMERICANS AND THE SUPREME COURT 2 (2009) (noting the feature of brevity of *Brown* and its greatness); *cf.* Liptak, *Justices' Opinions Grow in Size*, *supra* note 203 (contrasting the brevity of *Brown* with The Great Gatsby-like, lengthy *Citizens United v. FEC*, 558 U.S. 310 (2010)); Liptak, *Justices Long on Words*, *supra* note 203 (contrasting the style of *Brown* with the lengthiness of *Parents Inv'd in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007)).

[214] For the relationship between the judicial opinion's brevity and its communicability through the press coverage, see LOUIS FISHER, CONSTITUTIONAL DIALOGUES: INTERPRETATION AS POLITICAL PROCESS 181 (1988).

[215] *See* JOE MATHEWSON, THE SUPREME COURT AND THE PRESS: THE INDISPENSABLE CONFLICT 349–50 (2011) (noting that "newspapers did better than television when it came to reporting the legal basis for the Supreme Court's rulings); *see also* MICHAEL A. ZILIS, THE LIMITS OF LEGITIMACY: DISSENTING OPINIONS, MEDIA COVERAGE, AND PUBLIC RESPONSES TO SUPREME COURT DECISIONS 77–96 (2015) (suggesting the importance of the reporting of the Supreme Court Opinions in national newspapers).

[216] *See*, *e.g.*, *Text of Opinion on Schools in States*, WASH. POST, May 18, 1954, at 4; *Text of Supreme Court Decision Outlawing Negro Segregation in the Public Schools*, N.Y. TIMES (May 18, 1954), ,http://politics.nytimes.com/learning/general/specials/littlerock/051854ds-text.html; *Supreme Court's Decision in U.S. School Segregation Cases*, CHICAGO TRIBUNE, May 18, 1954, at 8, http://archives.chicagotribune.com/1954/05/18/page/8/article/supreme-courts-decision-in-u-s-school-segregation-cases.

brevity of *Brown* has been applauded for its contribution to the Supreme Court's coordination function as it sent a concise message to other institutional actors.[217] Its brevity also made it easier for people with different positions to accept desegregation in schools without being disaffected by *Brown*'s otherwise complex reasoning and its implications.[218] Overall, *Brown*'s brevity in style played a crucial role in turning it into a symbol of American constitutionalism instead of merely standing as a canon to constitutional scholars.[219]

Seen in this light, the unusual brevity of the Taiwanese *Same-Sex Marriage Case* deserves a closer look, too. Before the judicial style of the *Same-Sex Marriage Case* is discussed, we need to make an aside about the style of the TCC case law, which provides the framework for the distinctiveness of the *Same-Sex Marriage Case*. Though the TCC has been considered a judicial body of specialized constitutional review rooted in the Civil Law tradition and has identified itself with the image of the German Federal Constitutional Court (GFCC),[220] its official designation, the Council of Grand Justices,[221] suggests something else.[222] Apart from the formal designation, the TCC has, however, stood in contrast to the GFCC, which has always functioned like a court since its establishment in 1951.[223] Instead, the TCC, which was inaugurated in 1948, resembles more of another variety of the Civil Law world, namely the Constitutional Council of

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[217] *See* Law, *supra* note 213, at 777–78; *cf*. Chemerinski, *supra* note 185, at 1713 ("[The Supreme Court's decisions] have become much too long and thus far more difficult for lower courts and government officials to read and rely upon").

[218] *See* Cass R. Sunstein, *Practical Reason and Incompletely Theorized Agreements*, 51 CURRENT LEGAL PROBS. 267, 293 (1998) (noting *Brown* as a case decided on "incompletely theorized agreement," which fell short of setting out principles or rules but stands as the analogy of further desegregation and other equal protection cases).

[219] Balkin, *supra* note 211, at 12; Greene, *supra* note 211, at 381; *see also* Gerald Torres & Lani Guinier, *The Constitutional Imaginary: Just Stories about We the People*, 71 MD. L. REV. 1052, 1069-70 & n.107 (2012) (suggesting the civil rights movement as part of the reconstruction of "We the People" in American constitutional imaginary).

[220] *See* Yueh-Sheng Weng (翁岳生), Xian Fa Zhi Wei Hu Zhe: Xing Si Yu Qi Xu (憲法之維護者:省思與期許) [*Guardian of Constitution: Reflection and Expectation*], *in* Xian Fa Jie Shi Zhi Li Lun Yu Shi Wu, Vol. VI (Part II) (憲法解釋之理論與實務 (第六輯) (上冊)) [CONSTITUTIONAL INTERPRETATIONS: THEORY AND PRACTICE, VOL. VI (Part I)] 1 (Fort Fu-Te Liao (廖福特) ed., 2009) (suggesting the evolution of the TCC on the model of the GFCC as the guardian of the constitution); *see also* Tom Ginsburg, *Constitutional Courts in East Asia: Understanding Variation*, 3 J. COMP. L. 80, 84 (2008) (suggesting the continuing German influence on the development of the TCC).

[221] *See* Chang, *supra* note 1.

[222] *See* YEH, *supra* note 122, at 157.

[223] *See* JUSTIN COLLINGS, DEMOCRACY'S GUARDIANS: A HISTORY OF THE GERMAN FEDERAL CONSTITUTIONAL COURT, 1951-2001, at xxxv–xlii (2015).

the French Fifth Republic, in relation to judicial decision-making.[224] Conducting its proceedings in the ambience of an advisory privy council,[225] the TCC was notably not obliged to hold any public oral hearings prior to 1993 when it was given the jurisdiction to adjudicate on the dissolution of unconstitutional parties.[226] More importantly, TCC Interpretations have been continuously rendered in a form that resembles the abstract, concise, and formalistic rulings that have long characterized the French style of judicial writing.[227]

Yet the vesting of this jurisdiction to the TCC in 1993, and also the jurisdiction to impeach the president or the vice president in 2005,[228] has subtly changed the dynamic of the court's decision-making process. The constitutional amendment only mandates the TCC to organize itself in the form of a constitutional tribunal and hold public oral hearings in cases that either involve parties who have allegedly engaged in unconstitutional activities or the impeachment of the (vice) president. However, the CIPA, which sets out the limits of TCC's jurisdiction, authorizes the TCC to apply this special procedure to other cases as well.[229] This procedure enables the TCC to at least ostensibly transform itself from a judicial council into a constitutional

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[224] Chwen-Wen Chen, *The Judicial Authority of Constitutional Courts: A Study Based on the Practices of Constitutional Judicial Review of R.O.C. and France*, *in* CONSTITUTIONAL INTERPRETATION IN THEORY AND PRACTICE, VOLUME VII at 379, 382-83 (Fort Fu-Te Liao ed., 2014) (article in Chinese with English title and abstract).

[225] Kuo & Chen, *supra* note 4.

[226] The constitutional amendment (Additional Article) of 1992 first provided for the TCC jurisdiction on the dissolution of unconstitutional parties, namely, political parties that were judged to endanger the free and democratic constitutional order. That constitutional provision (currently Amendment V, section 4) was later implemented through the CIPA, which replaced its predecessor, the Council of Grand Justices Act of 1958, in 1993. ADDITIONAL ARTICLES OF THE CONSTITUTION OF THE REPUBLIC OF CHINA, June 10, 2005 (Taiwan), http://law.moj.gov.tw/Eng/LawClass/LawAll.aspx?PCode=A0000002. It is worth noting that the last constitutional amendment of 2005 further provides for the TCC jurisdiction on the trial of the president and the vice president with the judicialization of (vice) presidential impeachment process. *Id*. Amendment I, section 10. The CIPA has not yet been changed accordingly to accommodate the impeachment trial procedures.

[227] *See* LASSER, *supra* note 162, at 245 (noting "the formalism of the official French judicial syllogism"). Legally speaking, the judicial style of the TCC Interpretations have changed several times. When the TCC was first created in 1948, its procedures were governed by its own bylaws. Its procedural self-governance lasted until the Council of Grand Justices Act was enacted in 1958. Pertaining to our present discussion, the 1958 legislation changed the style of the Interpretation by splitting it into the holding and the *ratio decidendi*. Another change that the 1958 legislation brought about in judicial style was the publication of separate opinions (dissenting only). The CIPA of 1993 further brought in the publication of concurring opinions. *See* Chang, *supra* note 127, at 672; *see also* Hwang et al., *supra* note 62, at 755-56 (noting the inauguration of the TCC in Nanjing, China in 1948).

[228] For the details, see *supra* note 226. Both jurisdictions are currently provided for in Constitutional Amendments I, section 10 & V, section 4, respectively.

[229] CIPA article 13, http://law.moj.gov.tw/LawClass/LawAll.aspx?PCode=A0030159.

court.[230] This institutional background provides the key element to understand the distinctiveness of the *Same-Sex Marriage Case* in judicial style.

Since 1993, no political party has ever been referred to the TCC for dissolution because of alleged unconstitutional activity. The TCC has neither heard any (vice) presidential impeachment proceedings since 2005. Nevertheless, the TCC has exercised its powers under the post-1993 special procedure in other cases. As Table 1 indicates, only ten out of the 440 TCC Interpretations between the period from February 3, 1993 to July 31, 2017,[231] were decided in public proceedings. The fact that the TCC organizes public oral hearings only in exceptional circumstances suggests that these ten cases are of extraordinary nature. Thus, it is the "Big Ten" that provide the reference point for evaluating the judicial style of the *Same-Sex Marriage Case*.

Table 1: Ten Judicial Yuan Interpretations involving public hearing(s)[232]

Case No.	Date of Ruling	Date of Referral/ Petition	Date of Hearing(s)	Main Issue(s) Before the TCC	Word Count of the Interpretation
334	01/14/ 1994	01/21/ 1993	12/23/1993	Shall the broad definition of the term "bond" have the same meaning as the term "bond" defined under the Central Government Development Bonds Issuance Act? (statutory uniform interpretation)	T: 1,511 H: 100 R: 1,411
392	12/22/ 1995	10/16/ 1989	10/19/1995 & 11/02/1995	Do public prosecutors have the power of pre-trial detention?	T: 12,106 H: 967 R: 11,139
419	12/31/ 1996	05/31/ 1996	10/16/1996 & 11/01/1996	Is it constitutional for the President to appoint the Vice President as the Prime Minister?	T: 14,531 H: 388 R: 14,143
445	01/23/ 1998	06/27/ 1995	12/05/1997	Are certain provisions of the Assembly and Parade Act unconstitutional?	T: 14,085 H: 1,029 R: 13,056
585	12/15/ 2004	09/15/ 2004	10/14/2004 & 10/27/2004	Is the Extraordinary Parliamentary Investigative Committee (EPIC) Act, which provides the EPIC with *inter*	T: 14,928 H: 3,258 R: 11,670

[230] *See* YEH, *supra* note 122, at 159.

[231] The special procedure became legal when the CIPA came into effect on February 3, 1993; July 31, 2017 was the date when the TCC went to recess. The *Same Sex Marriage Case* (*Interpretation No. 748*) was issued on May 24, 2017. *Interpretation No. 313*, which was announced on February 12, 1993, was the first Interpretation rendered post-adoption of the special procedure.

[232] This information was compiled from online official TCC case reports, http://www.judicial.gov.tw/constitutionalcourt/EN/p03.asp (last visited Nov. 28, 2017).

Case No.	Date of Ruling	Date of Referral/ Petition	Date of Hearing(s)	Main Issue(s) Before the TCC	Word Count of the Interpretation
			& 10/29/2004	*alia* broad prosecutorial powers, constitutional?	
603	09/28/ 2005	06/06/ 2005	07/27/2005 & 07/28/2005	Is the requirement concerning the mandatory submission of fingerprints as a precondition for the replacement of national ID cards under the Household Act, Article 8(2) and (3), unconstitutional?	T: 7,805 H: 893 R: 6,912
689	07/29/ 2011	11/20/ 2008	06/16/2011	Is the provision of stalking as a misdemeanor under the Social Order Maintenance Act Article 89, paragraph (2) overinclusive and unconstitutional with respect to acts of journalistic reporting and investigation?	T: 5,996 H: 295 R: 5,701
711	07/31/ 2013	11/08/ 2011	06/13/2013	Is Article 11 of the Pharmacists Act, which provides that a pharmacist may only practice at one single location, unconstitutional? Is the competent authority's interpretation, which requires that a pharmacist who is also qualified as a nurse should practice at the same location, also unconstitutional?	T: 5,725 H: 269 R: 5,456
737	04/29/ 2016	06/05/ 2013	03/03/2016	Is the restriction of the defendant's access to the evidence presented by the public prosecutor to the court for the writ of the pre-trial detention only to the supporting "fact" under the Criminal Procedure Act, Article 33(1) and Article 101(1), unconstitutional?	T: 4,061 H: 411 R: 3,650
748	05/24/ 2017	08/20/ 2015 & 11/04/ 2015	03/24/2017	Do provisions of the Civil Code, which do not allow same-sex marriage, violate the constitution's guarantees of freedom of marriage?	T: 5,664 H: 227 R: 5,437

Note: **T**: word count in total (the holding plus the *ratio decidendi*); **H**: word count of the holding only; and **R**: word count of the *ratio decidendi* only.

Overall, these cases concern either the most important constitutional controversies of their time or crucial legal questions. Due to their implications to fundamental constitutional principles and contemporary politics in Taiwan, the TCC has held public oral hearings to enable the general

public to participate in the legal and constitutional debate relating to the cases. The *Same-Sex Marriage Case* is no exception.[233] Correspondingly, in the majority of these striking cases, the TCC has deviated from its abstract, concise, and formalistic style. By issuing long, detailed holdings accompanied by legally binding *rationes decidendi*, the TCC intends to clarify the underlying constitutional issues and settle the immediate legal dispute. Taken together, the TCC has preferred erudition to brevity in terms of judicial style when it has decided cases that concern critical constitutional issues.

Yet the *Same-Sex Marriage Case* defies this generalization. Though the TCC held public oral hearings in view of the heated debate surrounding same-sex marriage, the *Same-Sex Marriage Case* stands apart from other cases involving public proceedings due to its brevity. The *Same-Sex Marriage Case* is the Interpretation with the shortest holding among the nine constitutional cases (excluding *Interpretation No. 334*, a nonconstitutional interpretation), counting at a total of 227 words.[234] To be clear, not only the holding itself but also the *ratio decidendi* of the Interpretation is legally binding and considered part of constitutional law in Taiwan.[235] Thus, the terseness of this holding does not explain the whole story about its distinctiveness in judicial style compared to the other Big Ten cases. Upon closer inspection, the holding of the *Same-Sex Marriage Case* appears, however, to be indicative of its overall style.

Specifically, in comparison to the length of the nine constitutional cases (with the holding and the *ratio decidendi* combined) that have been decided under the special procedure, the brevity of the *Same-Sex Marriage Case* should be measured excluding the three endnotes in its *ratio decidendi*. We exclude the over-900-word-long endnotes from our analysis for two reasons. First, the *Same-Sex Marriage Case* is for now the only Interpretation accompanied by any endnote or footnote. It is too early to tell whether this case will set out a new judicial style of writing for the TCC or rather will prove to be a one-off deviation—yet it is unprecedented for

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[233] *See* Hwang et al., *supra* note 62, at 759.

[234] We measured the length of Interpretations with the help of the Word Count tool provided by Microsoft Word. All the word counts indicated in this Article result from the foregoing tool after copying the TCC case report and pasting in Microsoft Word file. Notably, we did not exclude punctuation marks or distinguish Chinese characters from Arabic numerals.

[235] *See supra* note 227.

sure.[236] The second reason is more important. As we discuss later,[237] these three endnotes simply list the sources of nonlegal authorities without contributing to the TCC's legal reasoning. Thus, we find it reasonable not to account for the endnotes when we compare the length of judicial reasoning of the *Same-Sex Marriage Case* to the other eight constitutional cases.[238]

Excluding the endnotes, the word count of the *Same Sex Marriage Case* in total is 5,664 whereas after rounding, the average of the nine constitutional cases (including the *Same-Sex Marriage Case*) is 9,433.[239] While five of these cases are below the average length, only *Interpretation No. 737*,[240] which counts at 4,016 words in its entirety, is shorter than the length of the *Same-Sex Marriage Case*. Nevertheless, a closer look at both cases will reveal that it is the *Same-Sex Marriage Case*, not *Interpretation No. 737*, that should be credited for its distinctive brevity. First, in terms of the substantive issue concerned, the former addresses a contentious and developing fundamental issue about the equal citizenship of gays and lesbians, whereas the latter concerns a technical issue in criminal due process.[241] This may explain why the holding of *Interpretation No. 737* is 80% longer than that of the *Same-Sex Marriage Case* whereas its *ratio decidendi* is almost 50% shorter than that of the latter:[242] The technical issue in criminal due process demands feasible solutions and the correspondent arrangement needs to be sorted out at the same time, both of which need to be provided for in the holding without much elaboration on fundamental constitutional principles. Moreover, unlike *Interpretation No. 737*, which stems from a constitutional petition filed by a criminal defendant,[243] the *Same-Sex Marriage Case* is a consolidated case, which involves an individual constitutional petitioner and a statutory municipality.[244] For this reason, six out of the nineteenth paragraphs of the *ratio decidendi* of the

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[236] *See infra* Part IV.A.3.

[237] *Id.*

[238] It is worth noting that the three endnotes were not given paragraph numbers, suggesting that they stand outside the *ratio decidendi*.

[239] The average word count of all the ten cases that have been decided according to the special procedures is 8,641 after rounding. Both figures are the rounding result based on the method of half round up with the endnotes of *Interpretation No. 748* excluded.

[240] Interpretation No. 737 (2016), http://www.judicial.gov.tw/constitutionalcourt/EN/p03_01.asp?expno=737 (English translation).

[241] *See* Hwang et al, *supra* note 62, at 758-59.

[242] The holding of *Interpretation No. 737* is 411 words long whereas that of the *Same-Sex Marriage Case* totals 227 words. The former's *ratio decidendi* counts at 3,650 words, while the latter's reaches 5,437 words.

[243] *See* Hwang et al, *supra* note 62, at 759.

[244] *See supra* text accompanying notes 21-26.

Same-Sex Marriage Case discuss its procedural history.[245] Notably, if we take the procedural history and other jurisdictional issues out of the equation and only account for substantive reasoning in both cases, it turns out that the *ratio decidendi* of the *Same-Sex Marriage Case* is even shorter than that of *Interpretation No. 737*.[246]

As discussed above, the TCC's choice of brevity over erudition in the *Same-Sex Marriage Case* is uncharacteristic to the TCC, especially in terms of the contentious nature of the issue before it. In light of the National Administration and the general public's quick responses to it,[247] the Taiwanese *Same-Sex Marriage Case* appears to embody the virtues that have been attributed to the brevity of *Brown*. By deciding a contentious issue with a concise constitutional judgment on which people who disagree on fundamental constitutional principles would converge, both the Supreme Court in *Brown* and the TCC in the *Same-Sex Marriage Case* send a transformative message to the ongoing public debate—on desegregation in the former and on marriage equality in the latter—with the aim of keeping the public's faith in their role in society.[248] The legitimacy concern underlying the brevity of the *Same-Sex Marriage Case* will become clearer when we take the uncharacteristically few separate opinions accompanying it into account.

2. "Having Only Two Was Unusual and Awkward"[249]

As the institution in charge of giving an authoritative interpretation of the law, the multimember court is expected to have a collective voice. Speaking in the name of the people,[250] the unanimity of the members of the court gives its targeted audience, the citizenry and other branches of constitutional power as well as other institutional actors, a sense of certitude in the

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[245] Interpretation No. 748, *supra* note 2, ¶¶ 1-6.

[246] The reasoning on substantive constitutional principles in the *Same-Sex Marriage Case* exists in paragraphs 13–16, the total of which counts at 1,395 words. In *Interpretation No. 737*, the TCC puts forward its main argument in paragraphs 7–10 totaling 1,409 words.

[247] Wei-han Chen, *Local Action on Household Papers Urged*, TAIPEI TIMES, Jun. 1, 2017, at 3 (reporting on the formation of an interministerial task force under the Executive Yuan in response to the *Same-Sex Marriage Case*).

[248] *See supra* text accompanying notes 77–82.

[249] Justice Samuel A. Alito Jr. was quoted as saying '[h]aving eight was unusual and awkward' in a judicial conference. Justice Alito's quote referred to the composition of the Supreme Court following the death of Justice Anthony Scalia, which was the reason for Supreme Court's exceptionally consensual 2016 term. Adam Liptak, *A Cautious Supreme Court Sets a Modern Record for Consensus*, *in* N.Y. TIMES, Jun. 27, 2017, at A16.

[250] KAHN, *supra* note 172, at 48–83.

settlement of individual disputes.[251] That the court should have a collective voice as an institution seems to be taken for granted. Yet this has not always been the case. Following the practice of English common law court judges, the Justices of the Supreme Court issued their judgements seriatim in its preliminary stage.[252] Each judge wrote his own opinion on the case, regardless of whether he agreed with the result. Even a single sentence from a Justice to the effect that he agreed with everything being said by his brethren on the bench would suffice.[253] Under this common law practice, it would be ironic to speak of the opinion of the court. Only judges had opinions, although those opinions were given only because they were in robes.[254]

As every student of constitutional law ought to know, Chief Justice John Marshall drove historic change on the Supreme Court in its early development. Note: we are not referring to the unprecedented *Marbury v. Madison*, which introduced modern judicial review to the world in 1803.[255] What we have in mind is his introduction of the opinion of the Court,[256] which changed American judicial style and the Supreme Court as an institution forever. With the appointment of the lawyer-statesman John Marshall to the Chief Justiceship of the Supreme Court,[257] the foregoing seriatim practice changed. Under his leadership, the Supreme Court moved away from the common law practice of seriatim judgments to what has been taken for granted ever since: the issuance of the opinion of the Court authored by a single Justice accompanied by separate

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[251] *See* MARY ARDEN, COMMON LAW AND MODERN SOCIETY: KEEPING PACE WITH CHANGE 251 (2015) (summarizing the main reasons for the adoption of a single or single majority judgment); *cf.* KAHN, *supra* note 172, at 6 (suggesting that finality plays a less significant role in the Supreme Court).

[252] KAHN, *supra* note 172, at 2; *cf.* WILLIAM D. POPKIN, EVOLUTION OF THE JUDICIAL OPINION: INSTITUTIONAL AND INDIVIDUAL STYLES 62–68 (2007) (discussing the inconsistent practice of the pre-Marshall Supreme Court in delivering opinions of the court). For an in-depth discussion regarding the issues concerning the Supreme Court's early practice of issuing seriatim judgments and its connection to the English common law custom, *see* PAUL W. KAHN, THE REIGN OF LAW: *MARBURY V. MADISON* AND THE CONSTRUCTION OF AMERICA 109–14 (2002).

[253] *West v. Barnes* (2 U.S. (2 Dall.) 401 (1791)), the first decision rendered by the Supreme Court, is a typical example of the early practice of seriatim opinions with five opinions included. JAMES R. PERRY, THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789–1800, VOLUME 6, at 3–27 (1985). For the practice of formal seriatim judgments in the British context, see POPKIN, *supra* note 252, at 31.

[254] *See* KAHN, *supra* note 172, at 2-3.

[255] 5 U.S. (1 Cranch) 137 (1803).

[256] ARDEN, *supra* note 251, at 251; KAHN, *supra* note 252, at 110; *see also* POPKIN, *supra* note 252, at 62–68, 70–72 (discussing Chief Justice John Marshall's establishment of the opinion of court in judicial style despite the nascent inconsistent practice in the pre-Marshall Court).

[257] *See* ANTHONY T. KRONMAN, THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION 12 (1993) (referring to Chief Justice Marshall as "one of the greatest advocates and judges of the time").

opinions.[258] Speaking with a collective voice as an institution, the Supreme Court has since strengthened its image as the designated oracle of the US Constitution, connecting its interpretation of the Constitution to "We the People" that fathered the Constitution.[259] This was not only a change in judicial style but rather part of the constitution of the legitimacy of judicial review.[260] Giving the opinion of the Court in the place of seriatim judgments, the Supreme Court turned itself from a common law court into a court with the constitutional power of modern judicial review.[261]

The relationship between the collective voice of the court as an institution and its constitutional role in judicial review is further illustrated by the recent change in judicial style in the United Kingdom (UK). As noted above, English courts traditionally do not issue their judgments in a collective, institutional tone.[262] Instead, each judge delivers her "speech" while one of them emerges as the main reference point for the legal issues concerned, serving as the de facto opinion of the court. Yet this centuries-old tradition seems to be changing in recent years. The Supreme Court of the United Kingdom (UKSC), which was inaugurated in 2009 to strengthen British judicial power vis-à-vis the jurisdiction of the European Court of Human Rights in Strasbourg,[263] has moved away from its seriatim tradition to the practice of issuing its judgement in the form of a single majority opinion alongside separate opinions.[264] Given the

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[258] POPKIN, *supra* note 252, at 70–72; KAHN, supra note 252, at 110; *see also* ARDEN, *supra* note 251, at 250–51.

[259] KAHN, *supra* note 252, at 115.

[260] *See id.* at 209–29.

[261] *Id.* at 113–14. In the United Kingdom, judicial review refers to the control of the legality of administrative acts by the court. Acts of the Parliament are not subject to judicial review. For a discussion of judicial review in the UK, *see* T.R.S. ALLAN, LAW, LIBERTY, AND JUSTICE: THE LEGAL FOUNDATIONS OF BRITISH CONSTITUTIONALISM 183–210 (1994).

[262] Though there is no uniform requirement as to the judicial style in the UK, Lady Justice Arden notes that "there is a bias to seriatim judgments." ARDEN, *supra* note 251, at 254; *see also* POPKIN, *supra* note 252, at 10 (noting the English tradition of seriatim judgments in common law alongside the practice of issuing unanimous opinions by the Privy Council in the nineteenth century).

[263] *See* CHARLES BANNER & ALEXANDER DEANE, OFF WITH THEIR WIGS! JUDICIAL REVOLUTION IN MODERN BRITAIN 11, 25–35 (2003) (discussing the concerns raised over the ambiguous status of the House of Lords after the United Kingdom incorporated the European Convention on Human Rights to its domestic law in 2000); *cf.* Owen Bowcott, *European Court Is Not Superior to UK Supreme Court, Says Lord Judge*, THE GUARDIAN, Dec. 13, 2013, https://www.theguardian.com/law/2013/dec/04/european-court-uk-supreme-lord-judge (reporting on the former Lord Chief Justice Lord Judge's extra-judicial remarks to the effect that the Strasbourg Court is not superior to the UKSC).

[264] *Cf.* POPKIN, *supra* note 252, at 31–32, 41–42 (discussing the emergence of de facto opinion of the court before the creation of the UKSC).

foregoing objective of the transfer of the House of Lords' appellate jurisdiction to the UKSC and the quasi-constitutional review that the Human Rights Act of 1998 has brought about in the UK,[265] the change in the UKSC's judicial style should not be taken lightly. Rather, its meaning needs to be read in light of the greater British constitutional context in which judicial power is on the rise vis-à-vis the privileged status of the British parliament under the British constitutional doctrine of parliamentary sovereignty.[266] To be a constitutional power that can make its judgment in the face of the omnipotent legislature as well as the parliament-supported administration, the UKSC needs to make itself heard as an institution, a goal of which the seriatim tradition has fallen short.[267] A collective voice in the form of a single majority opinion of the court gives the UKSC added authority, which was found lacking in the speeches of the individual Law Lords of the previous Appellate Committee of the House of Lords.

If the recent emergence of majority opinions in UKSC rulings testifies to the importance of the court giving institutional opinions on constitutional issues, the increase of separate opinions in the Supreme Court's decisions inevitably casts doubt on its constitutional role in judicial review.[268] With society growing more diverse, consensus is becoming even more elusive in hard constitutional cases.[269] Giving separate opinions enables the court to reflect society's diverse opinions, bringing the judicial deliberation closer to the public debate.[270] Notably, these have

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[265] *See* MARK TUSHNET, WEAK COURTS, STRONG RIGHTS: JUDICIAL REVIEW AND SOCIAL WELFARE RIGHTS IN COMPARATIVE CONSTITUTIONAL LAW 49–51 (2009) (suggesting the transformation of the British weak-form judicial review into hardened constitutional review); Ming-Sung Kuo, *Discovering Sovereignty in Dialogue: Is Judicial Dialogue the Answer to Constitutional Conflict in the Pluralist Legal Landscape?*, 26 Can. J. L. & Juris. 341, 350 (2013).

[266] One of the most important developments is the distinction that the House of Lords drew between "constitutional statutes" and other acts of parliament in *Thoburn v. Sunderland City Council* ([2003] QB 151), to which the UKSC has adhered. As regards the former, the implications of the doctrine of parliamentary sovereignty have been curtailed. For further discussion on the development of constitutional statutes, see Farrah Ahmed & Adam Perry, *Constitutional Statutes*, 37 OXFORD J. LEGAL STUD. 461 (2017).

[267] *See also* ARDEN, *supra* note 251, at 254–55 (suggesting that the UKSC should follow the practice of other supreme courts across the world and depart from the tradition of seriatim judgments to a single majority opinion).

[268] *See* Thomas B. Bennett et al., *Divide & Concur: Separate Opinions & Legal Change*, 103 CORNELL L. REV. 817 (2018) (identifying the increasing tide of separate opinions).

[269] *See* Frank I. Michelman, *The Problem of Constitutional Interpretive Disagreement: Can "Discourses of Application" Help?*, *in* HABERMAS AND PRAGMATISM 113 (Mitchell Aboulafia et al. eds., 2002) (discussing the relationship between constitutional judgment and interpretive disagreement).

[270] LASSER, *supra* note 162, at 338–47; Cass R. Sunstein, *Unanimity and Disagreement on the Supreme Court*, 100 CORNELL L. REV. 769, 804 (2015).

been reasons put forward in support of the British tradition of seriatim opinions.[271] Nevertheless, the Supreme Court's distinctive majoritarian decision-making pattern makes the increase of separate opinions in its rulings look more like the result of political decisions than judicial deliberation.[272]

As Professor Jeremy Waldron rightly points out, judicial review is political since the multimember court needs to appeal to voting as the last resort to end its deliberation.[273] Finally, judicial rulings are no less majoritarian than political decisions.[274] On a theoretical level, this looks as if it applies to judicial review around the globe. Yet, when Professor Waldron argues for comparative law in judicial decision-making, he acknowledges that what judicial decisions around the world have in common is that they pivot on shared patterns of legal reasoning among legal professionals.[275] Thus, in practice, voting in judicial decision-making seems to be not so much a tiebreaker as the culmination of a process of persuasion.[276] From this perspective, the Supreme Court is the outlier in comparative constitutional studies as its vote tally usually comes down to five versus four in its most contentious cases, suggesting that its decisions on constitutional issues have been taken on a purely majoritarian basis.[277] Together with the hardening of the five-four voting trend in hard cases, the separate opinions in the Supreme Court's recent landmark rulings hardly speak to reasonable disagreement among Justices regarding those complex legal and constitutional issues. Rather, they appear to reflect the political infighting of a court divided along ideological lines, although the fighting is in the name of the Constitution.[278] For this reason, the Supreme Court's 2016 term was even highlighted as record-setting for "a level of agreement unseen at the court [sic] in more than 70 years," which

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[271] For further discussion on the reasons for the seriatim tradition in the UK, see ARDEN, *supra* note 251, at 252.

[272] Joseph P. Nadeau, Opinion, *Dissents Undermine the Highest Court*, BOS. GLOBE, June 10, 2012, https://www.bostonglobe.com/opinion/2012/06/09/nadeau/hGYwc22OKLS1bBSQmLIG1K/story.html; *see also* KAHN, *supra* note 252, at 114–15.

[273] *See* Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346, 1357–58, 1395–1401 (2006).

[274] *Id*. at 1358.

[275] WALDRON, *supra* note 174, at 94–108.

[276] KAHN, *supra* note 172, at 5–6.

[277] DAVID ROBERTSON, THE JUDGE AS POLITICAL THEORIST: CONTEMPORARY CONSTITUTIONAL REVIEW 21–27 (2010).

[278] MARK TUSHNET, A COURT DIVIDED: THE REHNQUIST COURT AND THE FUTURE OF CONSTITUTIONAL LAW (2005).

was attributed to the "unusual and awkward" vacancy left by the sudden death of Justice Anthony Scalia.[279] If the Supreme Court turns out to be as political as it currently appears, there is no reason to grant it the power of judicial review given that "the province and duty of the judicial department" is only "to say what the law is."[280] To say what the law is, the Supreme Court is expected to act as a *judicial* department, not a political power. Through this lens, the increasing frequency of five-four Supreme Court decisions and the corresponding growth of separate opinions should be watched with concern as they seem to damage the Court's authority and legitimacy.[281]

Against the backdrop of the current divided Court, the unanimity of the *Brown* Court is even more remarkable. Though the ongoing trend of five-four decisions is considered to corrode the Supreme Court's legitimacy, it does not mean that prior to the Bork moment,[282] the Supreme Court rarely issued rulings accompanied by separate opinions.[283] Rather, the issuance of separate opinions is taken as what has set the Supreme Court apart from other supreme courts in comparative law.[284] Even so, in a landmark decision of *Brown*'s magnitude, which bears enormously on virtually every sector of society, a unanimous voice is essential to legitimizing the holding's judicial reasoning.[285] Amidst such a momentous decision, even a concurring

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[279] Adam Liptak, *A Cautious Supreme Court Sets a Modern Record for Consensus*, N.Y. TIMES, June 28, 2017, at A16.

[280] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803). *See also id*. at 170 ("The province of the court is, solely, to decide on the rights of individuals, not to inquire how the executive, or executive officers, perform duties in which they have a discretion. Questions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court.").

[281] *See* James R. Zink et al., *Courting the Public: The Influence of Decision Attributes on Individuals' Views of Court Opinions*, 71 J. POL. 909 (2009) (discussing the relationship between public acceptance of the Supreme Court's decisions and the size of the deciding majority); *but cf*. Sunstein, *supra* note 270, at 802–15 (suggesting that the Supreme Court has been a plurivocal court since 1941).

[282] President Reagan's nomination of Judge Robert Bork to the Supreme Court and its rejection by the Senate is regarded as the watershed in judicial appointments, politicizing the confirmation process. *See* CHARLES GARDNER GEYH, COURTING PERIL: THE POLITICAL TRANSFORMATION OF THE AMERICAN JUDICIARY (2016); *see also* Bruce Ackerman, *Transformative Appointments*, 101 YALE L.J. 1164, 1164–65 (1988).

[283] *See* Sunstein, *supra* note 270, at 773–84 (discussing the spiking of separate opinions in the Supreme Court case law after 1941).

[284] *See* LASSER, *supra* note 162, at 64 (including the drafting and publication of concurring and dissenting opinions as one of the stylistic characteristics of the Supreme Court's decisions).

[285] *See* Dennis J. Hutchinson, *Unanimity and Desegregation: Decisionmaking in the Supreme Court, 1948–1958*, 68 GEO. L.J. 1, 2 (1979); *see also* Mark Tushnet & Katya Lezin, *What Really Happened in* Brown v. Board of Education, 91 COLUM. L. REV. 1867, 1872–73 (1991) (discussing the centrality of unanimity in Justice Frankfurter's approach to *Brown*).

opinion may weaken the authority of the Supreme Court's ruling. By virtue of providing a competing argument, a concurring opinion could create the impression that the Supreme Court's milestone decision is more of a logical jump than a result of legal reasoning.[286] To be sure, this may not be the intended effect of the Justices who issue their independent judgments alongside the majority's but their bona fide opinions may still affect how the opinion of the Court would be seen in the public's eyes when it comes to a historic ruling. Such concern about the authority of the desegregation decision and its effect on the Supreme Court's legitimacy has made the managed unanimity of the *Brown* decision under Chief Justice Earl Warren's leadership notable at the time of its issuance and even more admirable in hindsight.[287]

Apparently, the Taiwanese *Same-Sex Marriage Case* is not *Brown* and the TCC is not the Supreme Court. Unlike the unanimous *Brown* decision, the *Same-Sex Marriage Case* is accompanied by two separate opinions: one dissenting and another separate opinion formally concurring in part and dissenting in part.[288] Even so, that the *Same-Sex Marriage Case* has only two separate opinions is not only unusual but also awkward as we shall show, suggesting a certain parallelism with the managed unanimity of the *Brown* decision.

In contrast to the Supreme Court's move from the common law tradition of seriatim judgments to the establishment of the opinion of the Court in its early history, the TCC adhered to its Civil Law tradition in judicial style when it was inaugurated in 1948. Before the enactment of the first legislation governing TCC procedures in 1958, the TCC issued Interpretations in a French-style judicial ruling according to its own bylaw:[289] judicial rulings were delivered in a decree-like, formalistic, abstract, single judgment with no distinction being made between the holding and the *ratio decidendi*.[290] During this period, all seventy-nine Interpretations were rendered with a collective voice unaccompanied by any separate opinions. This institutionalized

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[286] *See* Bennett et al., *supra* note 268, at 837 ("[c]ommentators are virtually uniform in contempt for concurrences" for their erosion of legal authority); *see also* John Alder, *Dissents in Courts of Last Resort: Tragic Choices?*, 20 OXFORD J. LEGAL STUD. 221, 240 (2000); Ruth Bader Ginsburg, *Remarks on Writing Separately*, 65 WASH. L. REV. 133, 148 (1990).

[287] KLARMAN, *supra* note 208, at 301–08; *see also* KAHN, *supra* note 252, at 115; Law, *supra* note 213, at 777–78.

[288] Justice Chen-Huan Wu issued the dissenting opinion. Though Justice Horng-Shya Huang delivered her separate opinion in the form of one that was partly concurring and partly dissenting, hers amounted to a dissenting opinion in essence. We shall come back to Justices Wu's and Huang's separate opinions later.

[289] *See supra* note 227.

[290] *See* Chang, *supra* note 127, at 672.

single opinion in judicial practice changed with the enactment of the Council of Grand Justices Act in 1958. The 1958 legislation not only reorganized an Interpretation into a holding and a *ratio decidendi* but also allowed the TCC Justices to issue dissenting opinions. That was a historic change in terms of the long-held Civil Law tradition in Taiwan. *Interpretation No. 80*,[291] the first Interpretation rendered after the 1958 legislation, was issued with an unprecedented dissenting opinion. Yet, despite the statutory change, its impact on judicial style was negligible. From 1958 to February 3, 1993 when the 1958 legislation was replaced by the current CIPA and concurring opinions were thereby introduced alongside dissenting opinions, the TCC issued 233 Interpretations (*Interpretation Nos. 80–312*). Out of the 233 Interpretations issued during this period, 133 were accompanied by at least one separate (i.e., dissenting) opinion.[292] Specifically, 203 separate opinions were issued and the average number of separate opinions in each Interpretation was 0.87. In other words, the 1958 legislation did not change the judicial style fundamentally as the TCC appeared to continue upholding its Civil Law legacy of speaking with one voice.

The enactment of the new CIPA in 1993 did not change this pattern either, at least, in its first ten years. From its enactment to September 2003 when the appointment of the TCC Justices fundamentally changed as a result of the constitutional amendment of 1997,[293] the TCC issued 254 Interpretations (*Interpretation Nos. 313–566*). 124 of those 254 Interpretations had at least one separate opinion (regardless of whether it was concurring or dissenting). During this period, there were 234 separate opinions in total (with concurring and dissenting combined), while the average number of separate opinions in each Interpretation was 0.92. Though the average increased slightly, the judicial style in general remained unchanged as the TCC adhered to its tradition of avoiding separate opinions.[294]

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[291] Interpretation No. 80 (1958), *available at* http://www.judicial.gov.tw/constitutionalcourt/EN/p03_01.asp?expno=80 (English translation).

[292] For present purposes, a separate opinion with multiple authors is counted once. Our analysis, coding, and statistics of the TCC separate opinions are based on the Chinese version of the official online TCC case report as the English version does not include separate opinions.

[293] The most fundamental change brought about by the constitutional amendment of 1997 is that the TCC Justices are appointed for staggered eight-year terms. For a further discussion, see Chang, *supra* note 1, at 148–49.

[294] Notably, *Interpretation No. 520* issued on January 15, 2001 had nine separate opinions, which made it an outlier in this period. This is understandable as it concerned a political drama involving complex denuclearization policies and convoluted partisan struggles. Interpretation No. 520 (2001), *available at*

Yet the TCC has seen a sea change in judicial style since *Interpretation No. 567* when the new TCC Justices appointed for staggered eight-year terms issued their first Interpretation in October 2003. Since then, the TCC has issued 186 Interpretations (*Nos. 567–752*),[295] 153 of which have come with at least one separate opinion. With 755 separate opinions in total issued, the average number of separate opinions in each Interpretation soared from less than one in the previous period to 4.06 during this period. More important, since *Interpretation No. 675* of April 09, 2010, the TCC has never issued a unanimous decision. In this post-unanimity era, 542 separate opinions have been issued in seventy-eight Interpretations, pushing the average number of separate opinions in each Interpretation up to 6.95. In sum, the TCC has departed from its Civil Law pedigree of speaking with a collective voice for a plurivocal court.

Against the recent cacophonic rendering of its decisions, the TCC's delivery of the *Same-Sex Marriage Case* accompanied by only two separate opinions is noteworthy. Still, a prior question needs to be answered: Is the deviation from the recent plurivocal decision-making pattern in the number of separate opinions in the *Same-Sex Marriage Case* a natural result of the newly packed court or a managed product of the TCC itself? As noted in Part II, the TCC Justices personally drove the same-sex marriage issue to the forefront of the political agenda during their confirmation hearings in 2016.[296] Seen in this light, the exceptional decrease in the number of separate opinions for the *Same-Sex Marriage Case* may be explained as a result of the TCC's change in composition. Upon closer examination, however, this proposition does not hold water. Since the new Justices assumed office in November 2016, the TCC has rendered twelve Interpretations (*Nos. 741–752*). Instead of changing course, the TCC has continued the plurivocal pattern set out in *Interpretation No. 675* with no unanimous rulings being issued since November 2016. In this period, the TCC published ninety-one separate opinions with the average number of separate opinions in each of the twelve Interpretations reaching as high as 7.58. Thus, the change in composition does not explain the exceptionally few (only two) separate opinions

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http://www.judicial.gov.tw/constitutionalcourt/EN/p03_01.asp?expno=520 (English translation). For details about the background of *Interpretation No. 520*, see Kuo, *supra* note 12, at 609–12.

[295] The last TCC Interpretation considered in this Article is *Interpretation No. 752*, which was announced on July 28, 2017. It is also the last ruling made by the TCC before it entered its annual month-long recess in August.

[296] *See supra* text accompanying notes 64–68.

alongside the opinion of the Court in the *Same-Sex Marriage Case*. Moreover, after the *Same-Sex Marriage Case* is taken out of the equation, the average number of separate opinions in the eleven Interpretations issued by the newly packed TCC is 8.09. All in all, the *Same-Sex Marriage Case* having only two separate opinions is unusual.

The unusualness of the *Same-Sex Marriage Case* coming with only two separate opinions is borne out by the stark contrast between it and the recent trend in the style of TCC rulings. But being unusual is not necessarily awkward. Why is it awkward that the *Same-Sex Marriage Case* is accompanied by only two separate opinions? Let us start telling the story about awkwardness with the separate opinions themselves. As stated above, the two separate opinions accompanying the *Same-Sex Marriage Case* are one dissenting opinion authored by Justice Chen-Huan Wu and another by Justice Horng-Shya Huang in which she concurs in part and dissents in part.[297] Justice Wu's opinion is dissenting in form and substance. Yet a closer read of Justice Huang's opinion tells us that it is concurring only in name. Justice Huang dissents from not only the majority's reasoning but also the entire result. In other words, there are effectively two dissenting opinions in the *Same-Sex Marriage Case*. The fact that one of them was disguised as a partly concurring opinion is awkward.[298]

Moreover, according to the available anecdotal evidence, the number of separate opinions in the *Same-Sex Marriage Case* does not tell the whole truth of the differing positions on the same-sex marriage issue within the TCC. It was reported that a number of Justices who voted against the TCC holding refrained from issuing their dissenting opinions.[299] Anonymous sources also suggested that draft concurring opinions that would have been more robust than the opinion of the Court had been circulated in the TCC. Yet they were withdrawn at the last minute as a negotiated concession to wavering Justices in an effort to save the result of the *Same-Sex Marriage Case*.[300] Having only two separate opinions is awkward as it does not seem to reflect

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[297] *See supra* text accompanying note 288.

[298] To be fair, it is a TCC practice that the formal designation of separate opinions as concurring or dissenting may not correspond to their substance.

[299] Wei-Rong Su (蘇位榮), Tong Hun Shi Xian Da Fa Guan San Piao Fan Dui Hai You Yi Ren Wei Pu Guang (同婚釋憲大法官3票反對 還有1人未曝光) [An Unknown Third Dissenter in the *Same-Sex Marriage Case*], (聯合報) [UNITED DAILY NEWS], May 31, 2017, https://udn.com/news/story/6656/2495173 (reporting on a third Justice who opposed the majority position but did not issue a separate opinion).

[300] *See* Lin, *supra* note 16 (noting some Justices' withdrawal of their separate opinions to enhance the

the positions of the TCC Justices in the *Same-Sex Marriage Case*.

In sum, having only two separate opinions in the *Same-Sex Marriage Case* is unusual and awkward in terms of the TCC's current plurivocal style and its failure to indicate how individual Justices have approached the contentious issue of same-sex marriage. Yet it is not unusual and awkward in a negative sense.[301] Instead, its unusualness and awkwardness throw the extraordinary character of the *Same-Sex Marriage Case* itself into sharp relief, regardless of whether and, if so, to what extent the anecdotal evidence has reflected the truth. Read together with its distinctive brevity and in light of the foregoing discussion on the importance of a unanimous judicial ruling in face of salient constitutional issues, the *Same-Sex Marriage Case* has managed to maintain its own authority by speaking with virtual unanimity instead of a cacophony of competing voices. Though the TCC still falls short of rendering a unanimous decision in the manner of the *Brown* Court, TCC Justices' concern about the size of their majority was not without reason in view of the salience of the issue. Having only two separate opinions gives the TCC the veneer of a quasi-consensual court, helping it deflect attacks on the legitimacy of its attempt to settle the politically charged issue of same-sex marriage.

3. "Believing in the power of science as the deliverer of final truths"[302]

Judge Richard Posner believes in the power of "methods of science" in the discovery of legal truths as alluded to in the above heading, despite his repudiation of the metaphysical "faith" in science as the "deliverer of final truths" in his effort to overcome the law as it is.[303] In his view, law must look to sources beyond itself scientifically to establish its authority in society. This reminds us of the epistemic uncertainty about the law and its complicated history with the legitimacy of judicial review. As Chief Justice Marshall suggested, the legitimacy of the Supreme Court's power to invalidate Congressional legislation depends in large part on the

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persuasiveness of the decision).

[301] *Cf.* Stephen Ellmann, *The Rule of Law and the Achievement of Unanimity in* Brown, 49 N.Y.L. SCH. L. REV. 741 (2004) (discussing whether judicial candor is "the" principle governing judicial voting and opinion writing in *Brown*).

[302] This is an adaption of Judge Posner's discussion of science, law, and pragmatism. *See* RICHARD A. POSNER, OVERCOMING LAW 395 (1995) (emphasis omitted).

[303] *Id.*

traditional role of the judiciary in saying what the law is.[304] Seen in this light, knowledge about the law is indispensable to the legitimate exercise of judicial review. Yet law's uncertain epistemic character has repeatedly changed the face of the authority of the law that underlies the legitimacy of judicial decisions.

Judge Posner's external view of the law and its epistemic character as noted above seems to be natural in the current legal landscape populated with law and economics, empirical studies, and other competing scientific approaches to the law.[305] Once upon a time, however, such view would have been held to be heretic as the law was seen as the expression of reason, if not reason itself.[306] Under this earlier view, legal expertise was part of science as both subjects were governed by reason.[307] In medieval Europe, Roman law was even considered the embodiment of reason while the study of law was on par with studies of medicine and other esteemed subjects in the predecessors of modern research universities.[308] That internal and scientific view of law and legal expertise was once held to be self-evident.

Yet the centuries-old consensus on the relationship between law and science broke down at the turn of the twentieth-century, setting the two sides of the Atlantic on divergent paths in the development of law. It is true that Baron de Montesquieu's monumental *The Spirit of Laws*[309]

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[304] *Marbury,* 5 U.S. (1 Cranch) at 177.

[305] *See* Guido Calabresi, *An Introduction to Legal Thought: Four Approaches to Law and to the Allocation of Body Parts*, 55 STAN. L. REV. 2113, 2118–22 (2003) (discussing the continuing growth of various "law and…" approaches after legal realism).

[306] *See also* WALDRON, *supra* note 174, at 108 (attributing law to reason); *but cf.* PAUL W. KAHN, THE CULTURAL STUDY OF LAW: RECONSTRUCTING LEGAL SCHOLARSHIP 13-15, 22-23 (1999) (arguing that law is based on both reason and will).

[307] The exemplar is the jurisprudence of classical natural law. Mathias Reimann, *Nineteenth-Century German Legal Science*, 31 B.C.L. REV. 837, 843-44 (1990). Though it was challenged in the nineteenth-century German-speaking world, its replacement laid the foundations for German legal science (*Rechtswissenshaft*). *Id*. at 844-58. For a philosophical discussion of reason and the scientific character of legal knowledge, see ALEKSANDER PECZENIK, ON LAW AND REASON 13-14, 33-38, 115-30 (2009).

[308] WIEACKER, *supra* note 162, at 28-52. For the inclusion of law in university education in medieval Europe, see JAMES A. BRUNDAGE, THE MEDIEVAL ORIGINS OF THE LEGAL PROFESSION: CANONISTS, CIVILIANS, AND COURTS 219-82 (2008). In England, legal education took a different path from its continental neighbors. Roman law was taught in Oxford University as early as 1149, whereas the Inns of Court were the places to learn common law. Common law was not taught in university until the creation of the Vinerian Professorship of English law at Oxford in 1755. *See* R.C. VAN CAENEGEM, JUDGES, LEGISLATORS AND PROFESSORS: CHAPTERS IN EUROPEAN LEGAL HISTORY 61 (1987).

[309] CHARLES DE SECONDAT BARON DE MONTESQUIEU, THE SPIRIT OF THE LAWS (Anne M. Cohler et al. trans. & eds., 1989) (1748).

has long been considered the pioneer of sociological studies of law.[310] Also, European legal scholarship saw its own reformation in thinking about the authority and epistemic character of law in the second half of the nineteenth century.[311] Nevertheless, despite the "free law" movement in the late nineteenth century, which put more emphasis on the role of interest than reason in the formation of the law, the tradition of scientific law, or rather legal science, has survived almost unscathed in Europe.[312] While law continues to embody reason, legal expertise remains to be seen as part of science.

In contrast, the development of the American law has been a winding quest for the scientific character of law and the knowledge about it since it became an object of higher education.[313] At first, the scientific character of the law was to be discovered within the law. Dean Christopher Langdell's science of law embodied that idea.[314] Yet Langdell's dream of the law as a seamless web of doctrines and principles governed by reason and logic evaporated when exposed to the critical light of legal realists and their predecessors.[315] From then on, judicial doctrines were judged as having failed to deliver on the scientific character it had longed for from within. As a result, law needed to look for help from external sources, generating the successive reform movements in the US legal scholarship, including the social science of law during the New Deal and after, law and economics, and critical legal studies movement, legal feminism, and race theories of law, etc.[316] Judge Posner, a child of the post-realist age, believes

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[310] Lorenzo Zucca, *Montesquieu, Methodological Pluralism and Comparative Constitutional Law*, 5 EUR. CONST. L. REV. 481, 483, 490, 498-99 (2009); *but cf.* Ming-Sung Kuo, *A Dubious Montesquieuian Moment in Constitutional Scholarship: Reading the Empirical Turn in Comparative Constitutional Law in Light of William Twining and His Hero*, 4 TRANSNAT'L LEGAL THEORY 487, 489 (2013) (noting the controversy about Montesquieu's sociological account of law).

[311] *See* Reimann, *supra* note 307, at 842-73.

[312] *See* JACCO BOMHOFF, BALANCING CONSTITUTIONAL RIGHTS: THE ORIGINS AND MEANINGS OF POSTWAR LEGAL DISCOURSE 60-64 (discussing how free law movement and the corresponding jurisprudence of interest were tamed by classical legal method); *see also*, Rob van Gestel et al., *Introduction*, *in* RETHINKING LEGAL SCHOLARSHIP: A TRANSATLANTIC DIALOGUE 1, 4-5 (Rob van Gestel et al. eds., 2017).

[313] For the relationship between Dean Langdell's reform on legal education and Charles Eliot's view of university as a research-led higher education institution, see ROBERT STEVENS, LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S 35-36 (1987).

[314] Thomas C. Grey, *Langdell's Orthodoxy*, 45 U. PITT. L. REV. 1, 5 (1983).

[315] *Id*. at 16-32 (discussing Langdell's concept of law alongside its analogy to geometry and characteristics of circularity, precedent, and progress).

[316] *See* Calabresi, *supra* note 305; *cf*. Robert W. Gordon, *Professors and Policymakers: Yale Law School Faculty in the New Deal and After*, *in* HISTORY OF YALE LAW SCHOOL: THE TERCENTENNIAL LECTURES 75, 103, 125 (Anthony T. Kronman ed., 2004) (questioning the quality of social science-based legal arguments during the New

in the power of scientific methods in the discovery of legal truths.

Notably, the development in the relationship between law and other disciplines in the twentieth century is not as straightforward as it seems. If law builds its authority on other disciplines of knowledge, what is the use of law? Shouldn't cases be resolved in accordance with, say, economics rather than the law? In other words, by turning to external sources of epistemic authority, the law may put its autonomy and legitimacy in jeopardy.[317] *Lochner v. New York* provides a primary example.[318] *Lochner* has been criticised for its failure to consider the contemporaneous socio-economic context in its dogmatic approach to the dubious doctrine of freedom of contract.[319] Yet, what made *Lochner* no less outrageous and illegitimate was the adoption of laissez faire economic philosophy and Herbert Spencer's social Darwinism in its constitutional reasoning.[320] Viewed thus, the *Lochner* Court abandoned the law for ideology, if you will.[321]

Only in light of the foregoing bumpy relations between law and other disciplines of knowledge can the significance of the *Brown* Court's turn to sociology and psychology be duly appreciated. Despite its all-time great status, *Brown* has been criticized for simply declaring that "in the field of public education, the doctrine of 'separate but equal' has no place" without countering that infamous *Plessy* doctrine with a comprehensive legal argument of equal citizenship.[322] Instead, Chief Justice Warren chose to engage with Justice Brown's majority opinion in *Plessy* to the effect that the alleged "badge of inferiority" resulting from the separate but equal accommodations of African-Americans was nothing but a self-inflicting construction of their own choosing[323] by appealing to social psychology in his opinion for the *Brown* Court.

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[317] *See* BOHMOFF, *supra* note 312, at 36 (noting law's emphasis on autonomy).

[318] 198 U.S. 45 (1905).

[319] Ellen Frankel Paul, *Freedom of Contract and the "Political Economy" of* Lochner v. New York, 1 N.Y.U. J. L. & LIBERTY 515, 519 (2005) (noting the conventional criticism that *Lochner* "mercurially" "invent[ed]" a "fictional" constitutional right to freedom of contract under the Due Process Clause).

[320] Joseph Frazier Wall, *Social Darwinism and Constitutional Law with Special Reference to* Lochner v. New York, 33 ANNALS SCI. 465 (1976).

[321] *See* Jack M. Balkin, *Ideology and Counter-Ideology from* Lochner *to* Garcia, 54 UMKC L. REV. 175, 178-84 (1986) (providing an ideological analysis of *Lochner* and its progeny).

[322] *Brown*, 347 U.S. at 495.

[323] *Plessy*, 163 U.S. at 551 (Brown, J.) ("We consider the underlying fallacy of the plaintiff's argument to consist

According to this conventional wisdom, Chief Justice Warren replaced legal expertise with social sciences in resolving the *hard* legal case of segregation in public education. Yet the real story about *Brown*'s turn to social psychology is more delicate and complex than the conventional wisdom holds.

In his meticulous exposition of the civil rights revolution, Professor Bruce Ackerman dissects Chief Justice Warren's Opinion of the Court and recover what he calls "the lost logic of *Brown v Board*."[324] In *Brown*, he discerns a five-step approach, which offers the prototype of a sociological jurisprudence.[325] According to Professor Ackerman, the *Brown* Court turned to sociological methods to define the nature of the problem without being straightjacketed by originalism, to refute the legalistic and simplistic classification of rights into political, civil, and social types and the exclusive doctrinal focus on the first two classes of rights, to emphasize the special status of public education, to explore the effect of segregation in public education, and finally to justify the role of social science in constitutional reasoning.[326] Of particular pertinence to our present discussion are the fourth and fifth steps in *Brown*'s social science-based approach to the constitutional question of segregation in public schools. In the fourth step, where the effect of segregation in public education was explored, *Brown* tackled *Plessy*'s self-inflicted "badge of inferiority" proposition head-on. Countering Justice Brown's self-inflicting construction theory, Chief Justice Warren responded, "To separate [black children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."[327] It is for these famous lines that *Brown* has been considered the epitome of sociological jurisprudence, appealing to social psychology to achieve the constitutional goal of setting aside the doctrine of "separate but equal" in the sphere of public education.

Pace that conventional view, Professor Ackerman argues that in contrast to his first three

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in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it.")

[324] ACKERMAN, *supra* note 149, at 129.

[325] *Id*.

[326] *Id*. at 129-33.

[327] *Brown*, 347 U.S. at 494.

moves, Chief Justice Warren broke no new methodological ground on this point.[328] Instead, he simply acted on what Professor Karl Llewellyn famously called "situation-sense", i.e., common sense.[329] In other words, the foregoing quote that has made *Brown* the prototype of sociological jurisprudence is not as socioscientific as it seems. On the contrary, Chief Justice Warren appealed to the unscientific nation's consciousness and the equally unscientific "situation-sense" of the judiciary for putting an end to the "feeling of inferiority" shared among African-Americans. Through Professor Ackerman's lens, "[j]udicial situation-sense was enough" to take down the "badge of inferiority" that Jim Crow had affixed to African-Americans with the help of *Plessy*.[330]

To be clear, Chief Justice Warren did not end the Supreme Court's repudiation of *Plessy* there. And Professor Ackerman knows it very well. Following the fourth step, Professor Ackerman observes that Chief Justice Warren continued to cite Kenneth Clark and other authorities in psychology at that time before concluding that "in the field of public education, the doctrine of 'separate but equal' has no place." It is in this next move that Professor Ackerman finds the place of social sciences in *Brown*. So, what sets his reading of *Brown* apart from the conventional wisdom?

The point of Professor Ackerman's step-by-step retracing of the reasoning of *Brown* is that the *Brown* Court repudiated *Plessy* on the basis of the factual finding that the feeling of inferiority was real, not the result of a self-inflicting construction. But that factual finding was attributed to judicial situation-sense, not the widely assumed sociological methods. To put it bluntly, it did not require a law degree to make sense of the humiliation effected on black children by educational segregation. Nor did it take a Ph.D. in education or psychology to see its detrimental effect on black children's learning performance in schools. In light of common sense, Professor Ackerman argues, these factual findings were already clear in the public's eyes and the Supreme Court knew it.[331] Nevertheless, the Supreme Court moved to "*buttress* its commonsense [*sic*] conclusions with the findings of social science."[332] In this light, it transpires

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[328] ACKERMAN, *supra* note 149, at 131.
[329] *Id*.
[330] *See id*. at 131-32.
[331] *Id*.
[332] *Id.* at 132 (emphasis added).

that the famous citation to social sciences was not the lynchpin of *Brown*'s sociological jurisprudence as the conventional view suggests.[333] Rather, Chief Justice Warren's pre-conclusion tactical move to bring in social science knowledge in *Brown* was meant to firm up the legitimacy of the Supreme Court in face of a salient and divisive constitutional case by relocating the authority of its decision onto more scientific grounds.[334] Decided in the post-New Deal era when social sciences had penetrated into the epistemic realm of law, *Brown* reflected the continuing effort to maintain the authority of the law by redefining its epistemic character.[335]

It is beyond our present purposes to judge whether *Brown*'s choice to base a constitutional / legal judgment on factual findings was successful or deceitful.[336] Nor is it our intention to determine whether the social sciences that Chief Justice Warren invoked was sophisticated or half-baked.[337] Yet our foregoing analysis of *Brown* suggests that confronted with a *Brown*-like contentious case, courts may follow in Chief Justice Warren's footsteps to pivot constitutional judgment on factual findings and thus turn to non-legal authority (including social sciences) to buttress their authority and legitimacy. Empirical legal studies gain wide currency for this reason.[338] Moreover, this has not only manifested itself in the American legal landscape since *Brown* but is also true of the recent developments in Europe.[339] And Taiwan, the TCC included, has not escaped from this empirical and factual turn in constitutional decisions, either.

As the TCC case law indicates, social sciences and other nonlegal authority are "rarely

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[333] Professor Ackerman argues that it is the *Brown* opinion as a whole that has marked *Brown* as the prototype of sociological jurisprudence. *Id*. at 129-33.

[334] MARTHA MINOW, IN *BROWN*'S WAKE: LEGACIES OF AMERICA'S EDUCATIONAL LANDMARK 142-43 (2010).

[335] ACKERMAN, *supra* note 149, at 133; *cf.* Wells, *supra* note 173, at 1030, 1033 (noting the chipping away of *Plessy* preceding *Brown* by appealing to sociological as opposed to moral legitimacy).

[336] *See* Jonathan Simon, Katz *at Forty: A Sociological Jurisprudence Whose Time Has Come*, 41 U.C. DAVIS L. REV. 935, 937-42 (2008) (noting and responding to legal skepticism about sociological jurisprudence of *Brown*).

[337] *Compare* ACKERMAN, *supra* note 149, at 155-56 (suggesting the insufficiency of qualitative-only sociological argument in *Brown*), *with* Sabrina Zirkel & Nancy Cantor, *50 Years After* Brown v. Board of Education*: The Promise and Challenge of Multicultural Education*, 60 J. SOC. ISSUES 1, 3-4 (2004) (defending *Brown*'s legacy in social science).

[338] *See generally* Mark C. Suchman & Elizabeth Mertz, *A New Legal Empiricism? Assessing ELS and NLR*, 6 ANN. REV. L. & SOC. SCI. 555 (2010) (explaining the resurgence of empirical legal studies).

[339] *See*, *e.g*., Hans-W. Micklitz, *A European Advantage in Legal Scholarship?*, *in* RETHINKING LEGAL SCHOLARSHIP: A TRANSATLANTIC DIALOGUE, *supra* note 312, at 262, 304-05; Emanuel V. Towfigh, *Empirical Arguments in Public Law Doctrine: Should Empirical Legal Studies Make a "Doctrinal Turn"?*, 12 INT'L J. CONST. L. 670 (2014) (arguing that the traditional doctrinal approach be balanced with empirical arguments in Germany); Mattias Kumm, *On the Past and Future of European Constitutional Scholarship*, 7 INT'L J. CONST. L. 401, 402-03, 408-09 (2009) (suggesting the inclusion of empirical knowledge in present European legal scholarship).

considered" by the TCC.[340] Also, there is no consensus among scholars as to the role of nonlegal authority in the TCC decision making. In one of those rare cases, the TCC upheld the statutory total ban on ex-convicts of murder, serious sex offences, and other felonious crimes working as taxi drivers based on the statistics indicating high recidivism rates on those crimes.[341] Yet it provoked an academic debate as to the role of factual findings and empirical evidence in constitutional interpretation.[342] Moreover, it is not easy to tell from Interpretations whether the TCC actually invoked nonlegal authority. The TCC has never provided any footnote or endnote in its interpretations apart from the *Same-Sex Marriage Case*. To be clear, this peculiarity in judicial style does not suggest that the TCC never acknowledged the source of nonlegal authority in those rare cases in which it did look beyond legal authority. The TCC has referenced the source of authority, legal as well as nonlegal, from time to time in the body text of the *ratio decidendi*. Yet, juxtaposed with the decades-old un-footnoted judicial style and the uncertainty about the status of nonlegal authority in constitutional judgment, the unprecedented addition of three endnotes to the *Same-Sex Marriage Case* alone speaks volumes about the value of the authority therein in the eyes of the TCC Justices.

As noted above, the TCC includes three lengthy endnotes in the *ratio decidendi* of the *Same-Sex Marriage Case*, which totals over 900 words, nearly as long as 17% of the *ratio decidendi* (excluding the endnotes).[343] The puzzle is that the TCC does not elaborate on legal details in those three endnotes. It does not use the endnotes to buttress its argument either. Instead, the three lengthy and sometimes repetitive endnotes summarize the reports of international organizations such as the World Health Organization and the Pan American Health Organization, and various professional bodies at home and abroad to the effect that sexual

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[340] Chang, *supra* note 127, at 665.

[341] Interpretation No. 584 (2004), http://www.judicial.gov.tw/constitutionalcourt/EN/p03_01.asp?expno=584 (English translation). For a summary discussion on the TCC's invocation of sociological and other nonlegal authority, see Chang, *supra* note 127, at 665-67.

[342] *Compare* Shu-Perng Hwang, *Can Numbers Talk? The Status of Fact in Constitutional Review in Light of* Judicial Yuan Interpretation No. 584, 1 ACADEMIA SINICA L.J. 1 (2007) (article in Chinese with English title and abstract) (criticizing *Interpretation No. 584* for its empirical approach), *with* Wen-Tsong Chiou, *Facts Neglected: The Possible Role of Social Science in Legal Reasoning*, 37 (2) N.T.U.L.J. 233 (2008) (article in Chinese with English title and abstract) (the opposite).

[343] The word count of the endnotes weighs in at 923. With the endnotes excluded, the *ratio decidendi* of the *Same-Sex Marriage Case* is 5,437 words long.

orientation is immutable and homosexuality is not a disease.[344] Without expertise in psychology or psychiatry, the TCC does not cite the foregoing authorities to engage with them for the purpose of deliberation. Instead, the TCC invokes them as the source of authority as they support its legal conclusion. As it turns out, the TCC looks to external, nonlegal authority to bolster the authority of its constitutional judgment. For this reason, *Obergefell* is cited as part of the expert evidence on psychiatry instead of a source of persuasive authority in the law.[345]

The exceptional character of the unprecedented inclusion of endnotes in the *ratio decidendi* of the *Same-Sex Marriage Case* becomes clearer when juxtaposed with the TCC's omission of any precedential authority or inspiration from comparative law sources. As noted in Part III, the TCC does not cite any of its own case law except to distinguish the issue of same-sex marriage from the past cases.[346] Failure to build on the authority of legal precedents puts the judicial decision at a precarious position.[347] The TCC is not unaware of this risk but still carries on. Moreover, even if *Obergefell* exerts disproportionate influence on the TCC's legal reasoning in the *Same-Sex Marriage Case*, the TCC deliberately leaves it out except referencing it among other psychological and medical authorities in the endnotes. To be fair, this may be explained by the convention of unattributed reference rooted in the TCC's Civil Law pedigree. Yet the TCC did feel no constraint as it saw fit. For example, in its landmark decision to strike down the unconstitutional constitutional amendment of 2000, the TCC explicitly referred to a ruling of the Italian Constitutional Court (*Sentenza* n.1146 of 1988) to support its conclusion,[348] even though Italian law had exerted virtually no influence on the legal practice or scholarship in Taiwan. Thus, just like its abandonment of its own case law, the TCC's omission of comparative law inspiration in the *Same-Sex Marriage Case* is a deliberate choice rather than a logical conclusion of judicial style.

Given the oversized influence of German jurisprudence on Taiwanese legal scholarship and the TCC case law,[349] the missing of German constitutional jurisprudence in the *Same-Sex*

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344 Interpretation No.748, *supra* note 2, Notes 1-3.
345 *See supra* text accompanying note 171. (Interpretation No.748, *supra* note 2, n.1.)
346 *See supra* notes 119-21, 163-66 and accompanying text.
347 *See* Planned Parenthood v. Casey, 505 U.S. 833, 864-69 (1992).
348 Interpretation No. 499, *supra* note 175, ¶ 7.
349 TOM GINSBURG, JUDICIAL REVIEW IN NEW DEMOCRACIES: CONSTITUTIONAL COURTS IN ASIAN CASES 139-40

Marriage Case is even more surprising. The TCC does not leave the GFCC jurisprudence out because it has said nothing about the same-sex marriage issue. Instead, the TCC omits it intentionally because it has said too much and repeatedly upheld the heterosexual-only marriage institution under German law.[350] The TCC knows this inconvenient truth only too well and thus decides to depart from its jurisprudential parents for other sources of authority.[351]

It is also worth noting that when the TCC seeks authority for its judgment but finds its own case law and comparative law insufficient to lend it the legal support, it avoids looking to the decades-long "jurisgenerative" constitutional politics surrounding the gay rights movement and the recognition of same-sex marriage in Taiwan.[352] Failing to tap into that abundant history as discussed in Part II and take into account its immanent "constitutional canons" with imaginativeness,[353] the TCC comes to the awkward conclusion on the "insularity and discreteness"[354] of gays and lesbians and their lack of power within the democratic order of twenty-first-century Taiwan. Instead, it looks to nonlegal authority to establish the immutability of sexual orientation in order to pave the way for its awkward conclusion on the political status of gays and lesbians.

Taken together, the TCC's attitude towards its own case law, its reluctance to recognize the legal influence of *Obergefell*, its lack of engagement with its traditional jurisprudential guide—the GFCC, as well as its refusal to consider the jurisgenesis of the decades-long gay rights movement in Taiwan suggest that TCC was uneasy about legal authority on same-sex marriage when it was called to make the constitutional decision that had life-changing

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(2003).

[350] *See* Anne E.H. Sanders, *When, if not Now? An Update on Civil Partnership in Germany*, 17 GERMAN L.J. 487 (2016). Notably, the German Parliament recently passed a law to recognize same-sex marriage. *See* Alison Smale & David Shimery, *German Parliament Approves Same-Sex Marriage*, N.Y. TIMES, July 1, 2017, at A6. Yet this may raise concerns about whether it contradicts the constitutional guarantee of marriage as a traditional institution in Article 6 (1) of the Basic Law. We owe this observation to Professor Dieter Grimm, a former GFCC judge.

[351] *See* Kuo & Chen, *supra* note 4 (noting the TCC's strategic avoidance of the GFCC jurisprudence in this regard).

[352] *See* Michelman, *supra* note 207, at 1502-10; *see also* Robert M. Cover, *The Supreme Court, 1982 Term -- Foreword:* Nomos *and Narrative*, 97 HARV. L. REV. 4 (1983) (arguing that extra-judicial narratives are generative of the constitutional order as they enrich and substantiate the meaning of what he called a legal *nomos*).

[353] *See* ACKERMAN, *supra* note 149, at 32-36 (regarding landmark civil rights legislation as part of constitutional law for its embodiment of popular sovereignty in the legislative history).

[354] Interpretation No. 748, *supra* note 2, ¶ 15.

implications for many. When neither its own case law nor its main source of comparative law offered the authority that it needed to support its conclusion, the TCC simply turned toward non-legal expertise for what it could not find in traditional legal authority. By doing so, however, the TCC could no longer claim the privileged status of a specialist. In order to preserve its precarious position in face of the salient issue of same-sex marriage, the TCC thus attempted to compensate its truncated legal argument with long and even repetitious psychological and psychiatric references, which were separated from the main text and incorporated into three endnotes. Echoing the *Brown* Court, the TCC's deliberate addition of endnotes concerning psychological and psychiatric knowledge builds the authority of the *Same-Sex Marriage Case* on scientific grounds, rather than legal doctrines.

B. *Judicial Legitimacy in the Limelight*

Brown brought the question of the legitimacy of judicial review to the fore in the U.S. Regardless of whether the *Brown* Court successfully dismantled Jim Crow or simply set the civil rights revolution in motion, the political reactions to the Supreme Court's decision unquestionably rewrote the history of American constitutional law and politics.[355] The Supreme Court has become the focus of constitutional politics since it turned from being "the least dangerous branch of the federal government" into the most decisive voice in constitutional interpretation.[356] In parallel with the political polemics surrounding *Brown* and the Supreme Court in general, various theories of judicial review have since been put forward to justify or question the legitimacy of judicial review. *Brown* has defined generations of constitutional scholarship from the second half of the twentieth century on, all of which have been organized around the issue of the legitimacy of judicial review with that historic decision in mind.[357]

It is too early to tell whether the *Same-Sex Marriage Case* will redefine the next generation of constitutional scholarship on the TCC in the same way *Brown* did with respect to the Supreme Court. However, it seems clear at least that the political reactions to the *Same-Sex Marriage*

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[355] *See*, *e.g.*, ACKERMAN, *supra* note 149; KLARMAN, *supra* note 208.

[356] *See generally* RICHARD L. PACELLE, JR., THE ROLE OF THE SUPREME COURT IN AMERICAN POLITICS: THE LEAST DANGEROUS BRANCH? (2001).

[357] *See* sources cited *supra* note 209.

Case in Taiwan have been similar to the post-*Brown* politics in the U.S. The National Administration, with its strong support of gay rights groups, has responded swiftly to the TCC's ruling by creating a special task force in charge of implementing a statutory overhaul for the legalization of same-sex marriage. Within its mandate, it has drafted government bills on the amendment of social security, criminal law, and other legislation.[358] On the other hand, opponents of same-sex marriage have also reacted vociferously without delay. Continuing their objection to same-sex marriage, churches and other religious groups have called for a national referendum aimed at overruling the TCC decision.[359] Among them, some Presbyterian churches which had won wide respect for their progressive role in past political reforms have issued statements condemning the TCC for its interference with the institution of marriage and family.[360] Apart from the mobilization of religious and other civic groups, political forces have also intervened in the hopes of the *Same-Sex Marriage Case* being neutered. A county council has passed an extraordinary resolution, calling for the impeachment of the TCC Justices for the *Same-Sex Marriage Case*.[361] Even Annette Lu, Vice President in the DPP government from 2000 to 2008 and feminist and women's rights trailblazer in Taiwan, has joined the chorus of criticism in accusing the TCC of overstepping the bounds of constitutional interpretation in striking down the heterosexual-only marriage institution under the current Taiwanese Civil Code.[362] In the wake of the *Same-Sex Marriage Case*, the TCC seems to be denied the extensive

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[358] *See* Chen, *supra* note 247.

[359] Lawrence Chung, *Taiwan Opponents of Gay Marriage Call for Referendum on Issue*, SOUTH CHINA MORNING POST, May 25, 2017, http://www.scmp.com/news/china/society/article/2095653/taiwan-opponents-gay-marriage-call-referendum-issue.

[360] Jin'ni Chen (陳衿妮), Taiwan Jidu Zhanglao Jiaohui Kaohsiung Zhong Hui, Tainan Zhong Hui Lianhe Shengming: Fandui Tongxing Hunyin Hefahua Nanbu Taiwan Jidujiao Zhanglao Jiaohui Jueding Zhankai "Ai Taiwan, Shouhu Jiating" Yundong (台灣基督長老教會高雄中會、台南中會聯合聲明: 反對同性婚姻合法化　南部台灣基督教長老教會決定展開「愛台灣、守護家庭」運動) [Joint Statement of the Gaoxiong and Tainan Presbyteries of the Presbyterian Church in Taiwan, "Against the Legalization of Same-Sex Marriage," Presbyterian Churches in Southern Taiwan to Launch "Love Taiwan, Protect Family" Movement], Jidujiao Jinri Bao (基督教今日報) [CHRISTIAN DAILY], June 3, 2017, http://www.cdn.org.tw/News.aspx?key=11319.

[361] Guoxian Lin (林國賢), Yunlin Yihui Chenqing Jianyuan Yaoqiu Tanhe Tonghun Shixian Dafaguan (雲林議會陳情監院 要求彈劾同婚釋憲大法官) [Yunlin Council Petitioned the Control Yuan to Impeach the TCC Justices for the *Same-Sex Marriage Case*], LIBERTY TIMES NET, June 23, 2017, http://news.ltn.com.tw/news/politics/breakingnews/2109610.

[362] Suping Ye (葉素萍), Tonghun Shixian Lü Xiulian Dafaguan Ying Xiang Shehui Daoqian (同婚釋憲 呂秀蓮：大法官應向社會道歉) [Annette Lu: The TCC Justices Owe the Society an Apology for the *Same-Sex Marriage Case*], CENTRAL NEWS AGENCY, July 17, 2017, http://www.cna.com.tw/news/firstnews/201707170222-1.aspx.

social acceptance that it had consistently commanded for its past decisions. It seems that for the first time in history then, both the role of the TCC in the constitutional order, and the question of judicial legitimacy in Taiwan have been brought into the limelight.

It is important to note that this does not mean that the TCC has never been challenged for its decisions prior to the *Same-Sex Marriage Case*, nor does it suggest that the legitimacy of judicial review has been taken for granted since the TCC's inauguration in 1948. The historic meaning of the *Same-Sex Marriage Case* to the legitimacy of judicial review needs to be read in light of the TCC's changing role in the decades-long constitutional transformation in Taiwan. To closely examine TCC's role in Taiwan's metamorphosis from a quasi-military dictatorship into a constitutional democracy would be to take the discussion beyond the scope of this article.[363] Therefore, we will instead underline the characteristic features of the TCC to the extent necessary to make sense of why the *Same-Sex Marriage Case* breaks new ground in the debate over the role of the TCC in Taiwanese constitutional law and politics.

As we have noted in the beginning, the TCC had already existed long before constitutional democracy arrived in Taiwan. Far from being the constitution's guardian during that period, the TCC instead stood at the institutional convenience of the political branches when they needed some constitutional cover for their positions.[364] Its reputation was also tainted for it obediently granted the dictatorial regime the constitutional endorsement for the unlimited prolongation of the three-year term of the 1948 Parliament.[365] Despite being seemingly unredeemable, the TCC conducted an unexpected exercise of constitutional bootstrapping and rebooted itself as the legitimate interpreter of constitutional principles when democratization and constitutional reform were already underway in the 1980s.[366] By means of the well-discussed *Interpretation No. 261* of 1990, which ended the seemingly permanent 1948 Parliament and mandated the holding of new general elections,[367] the TCC not only provided a convenient constitutional exit from the political deadlock for embattled reformists, both within and without the government, but also

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[363] For a summary account, *see* YEH, *supra* note 122.

[364] *See id*. at 167-68.

[365] Interpretation No. 31 (1954), http://www.judicial.gov.tw/constitutionalcourt/EN/p03_01.asp?expno=31 (English translation).

[366] *See* Kuo, *supra* note 12, at 598-602, 604.

[367] Interpretation No. 261 (1990), http://www.judicial.gov.tw/constitutionalcourt/EN/p03_01.asp?expno=261 (English translation).

gave itself the legitimacy required for judicial review.[368] Notably, *Interpretation No. 261* exemplified the TCC being called upon to defuse the political crisis that could have nipped the democratic reform in the bud and brought down the whole political regime, setting the pattern for the TCC's active intervention in constitutional issues concerning separation of powers.

Importantly, the TCC's move towards becoming a robust power of judicial review was not without challenge, despite the extensive social acceptance that it had commanded following its assistance in the dismantlement of the fossilized 1948 Parliament. The foregoing pattern that has distinguished the TCC from other constitutional courts for its continuing involvement in separation of powers issues is equally revealing of the bumpy road that the TCC has taken when playing its constitutional role. As has been well discussed in constitutional scholarship, courts have the least political capital and their role is most limited when it comes to the judicial review of separation of powers issues.[369] The TCC's struggle to settle divisive political disputes and its powerlessness vis-à-vis the non-cooperation from other constitutional powers after 2000 indicated the limits of its effort to continue to resolve the lingering political deadlock among differing constitutional powers and rivalling political forces.[370] The challenges that the TCC has encountered apparently bear out the theory.

Yet, a careful read of the TCC's post-2000 record suggests that the challenges with which the TCC was confronted during that period were more a consequence of high "partyism" than a reflection of general doubt about its legitimacy.[371] To the extent that judicial review can only function properly under certain political conditions,[372] the TCC's post-2000 incompetence mirrored the breakdown of the political condition needed for its proper function rather than its failure on the legitimacy test. Despite poor partisanship and defiance from the losing opposition during constitutional disputes,[373] the TCC did not face massive protests for its interpretations during that period. Instead, the political turmoil into which the TCC was thrown after 2000

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[368] *See* Yeh, *supra* note 27.

[369] *See* JESSE H. CHOPPER, JUDICIAL REVIEW AND THE NATIONAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT 169-70 (1980).

[370] *See* Kuo, *supra* note 12, at 605-33.

[371] *Id*. For the notion of partyism, see CASS R. SUNSTEIN, #REPUBLIC: DIVIDED DEMOCRACY IN THE AGE OF SOCIAL MEDIA 9-12 (2017).

[372] *See* Kuo, *supra* note 12, at 625 (suggesting that partisanship rendered the TCC ineffectual in the period 2004-08).

[373] *Id*. at 610-25.

suggests that judicial review is unsustainable on its own terms.[374] Moreover, the 2016 Parliament's obedient suspension of its legislative process on the bills of same-sex marriage until the TCC's decision was testament to the overall support of the TCC's role as the authoritative interpreter of constitutional principles.[375] In sum, the sixteen-year incompetence post-2000 posed political challenges to the TCC but barely shook its legitimacy in constitutional interpretation.[376]

Apart from the TCC's role in the unsettling area of separation of powers, another point that should be considered in making sense of the law and politics of the *Same-Sex Marriage Case* is its role in the protection of fundamental rights. The TCC has presented a remarkable record on a wide range of rights issues since its bootstrapping exercise in the early 1990s. These include issues relating to, inter alia, criminal justice, freedom of speech, data privacy, gender equality, and land rights.[377] However, its case law in this area has rarely generated heated debates beyond the small circles of legal professionals or special interested parties. For this reason, the TCC seems to have deviated from the pattern of other courts in new democracies where the judicialization of politics has resulted in the politicization of judicial review as the judicial power intervened in political issues mainly through the constitutional interpretation of fundamental rights.[378] Having said that, we do not suggest that the TCC's intervention in fundamental rights issues is free from controversy. For example, the TCC's decision to strip public prosecutors of the power of pre-trial detention was vehemently opposed by the Ministry of Justice and other law

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[374] *Id*. at 610-34.

[375] *See supra* text accompanying notes 79-80.

[376] On the eve of the inauguration of the current DPP government in May 2016, which later packed the TCC with the new Justices who set the stage for the *Same-Sex Marriage Case*, one of the two coauthors of the Article suggested that the TCC degenerated into a "nominal court" as a result of its ineffective intervention in politically charged cases after 2000 and its absence from issues of high politics after 2010. *See* Kuo, *supra* note 12, at 603, 640-41.

[377] *See, e.g.*, Interpretation No. 293 (1992), http://www.judicial.gov.tw/constitutionalcourt/EN/p03_01.asp?expno=293 (English translation) (on data privacy); Interpretation No. 364 (1994), http://www.judicial.gov.tw/constitutionalcourt/EN/p03_01.asp?expno=364 (English translation) (on freedom of speech); Interpretation No. 365 (1994), http://www.judicial.gov.tw/constitutionalcourt/EN/p03_01.asp?expno=365 (English translation) (on gender equality); Interpretation No. 392 (1995), http://www.judicial.gov.tw/constitutionalcourt/EN/p03_01.asp?expno=392 (English translation) (on criminal justice); Interpretation No. 425 (1997), http://www.judicial.gov.tw/constitutionalcourt/EN/p03_01.asp?expno=425 (English translation) (on land rights).

[378] *See* HIRSCHL, *supra* note 13, at 12-13; *cf*. WOJCIECH SADURSKI, A STUDY OF CONSTITUTIONAL COURTS IN POSTCOMMUNIST STATES OF CENTRAL AND EASTERN EUROPE (2d ed. 2014) (discussing constitutional politics in the postcommunist states in Central and Eastern Europe).

enforcement agencies. This invited the criticism that the TCC, in adopting a literalist interpretation of the constitution, paid no heed to the needs of law and order and the decades-old judicial proceedings.[379] A further example is the TCC's invalidation of the statutory provision for the mandatory submission of fingerprints as a precondition for the replacement of national ID cards.[380] Again, it was accused of expanding the protection of the unenumerated right to privacy at the expense of the need for crime-prevention in modern society.[381] Nevertheless, none of the TCC decisions concerning fundamental rights, including the two aforementioned decisions, have ever prompted street protests or reactionary vitriol. This record proves the extensive acceptance of the TCC's role in issues concerning fundamental rights. Moreover, if we consider the fact that judicial review most directly impacts individuals when decisions on fundamental rights are rendered,[382] the enduring respect that the TCC has possessed in post-authoritarian Taiwan for its interpretation of fundamental rights provides the sociological evidence of its legitimacy in constitutional interpretation.[383]

Taken as a whole, it is fair to characterize the TCC as a robust power of judicial review with broad support or as a legitimate and effective dispute-settlement mechanism except during the first sixteen years of hype-partyism in the twenty-first century. If our characterization is correct, the post-ruling reaction to the *Same-Sex Marriage Case* suggests something that merits close attention. As noted above, the *Same-Sex Marriage Case* has provoked raucous protests from groups of different political persuasions.[384] In contrast to the attacks and boycotts with which the TCC was afflicted during the 2000-16 period, however, the criticism that the TCC has

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[379] Interpretation No. 392, *supra* note 380. *Cf.* Li-Da Fan (范立達), Xianshen Shuofa: Yiwei Zishen Faguan Di Huiyilu (現聲說法：一位資深法官的回憶錄) [VOICE OF THE LAW: SENIOR JUDGE XIANG-ZHU LI'S MEMOIR] 321 (2013) (noting the disappointment at Interpretation No. 392).

[380] Interpretation No. 603, *supra* note 129.

[381] *See Don't Sacrifice Rights for Security*, TAIPEI TIMES, Oct. 02, 2005, http://www.appledaily.com.tw/appledaily/article/headline/20050929/2089923/ (noting "public concerns about a breakdown in law and order" in commenting *Interpretation No. 603*).

[382] *See* Louis Henkin, *Rights: American and Human*, 79 COLUM. L. REV. 405, 413-15 (1979) (noting the importance of constitutional rights in American daily lives through judicial enforcement); Dieter Grimm, *The Role of Fundamental Rights After Sixty-Five Years of Constitutional Jurisprudence in Germany*, 13 INT'L J. CONST. L. 9 (2015) (discussing how the German Basic Law has influenced daily lives through the GFCC's fundamental rights jurisprudence).

[383] For the relationship between the respect that the court commands and its legitimacy, see Wells, *supra* note 173, at 1023-24 (noting reputation as a factor of the sociological legitimacy of the court).

[384] *See supra* text accompanying notes 359-62.

suffered in the wake of the *Same-Sex Marriage Case* does not emerge along party lines. Rather, it transcends the traditional political rivalry and brings the TCC's intervention in the institution of marriage and family to the forefront of the law and politics surrounding the legalization of same-sex marriage.

Also, the fact alone that the issue of fundamental rights came front and center in the *Same-Sex Marriage Case,* makes the unprecedented grievous reaction to the TCC's decision even more disquieting. If judgments on fundamental rights provide the link between judicial review and individuals, the reactions generated are indicative of the extent to which judicial review is accepted as having a powerful constitutional role in society. In this light, the post-ruling politics of the *Same-Sex Marriage Case* can be seen as the sign of the TCC's struggle to win wide-ranging support for its robust intervention in a fundamental rights issue. In sum, the *Same-Sex Marriage Case* brings the TCC into line with other courts in new democracies to the extent that it exposes the judicialization of politics through fundamental rights to public scrutiny.

To repeat, it is too early to tell how the post-ruling politics of the *Same-Sex Marriage Case* would have played out in the legalization of same-sex marriage and in which direction it will move the future of the TCC within the constitutional order. Also, we have stopped short of suggesting that the *Same-Sex Marriage Case* has thrown the TCC into a legitimacy crisis. Yet, in terms of the unprecedented reactions, the *Same-Sex Marriage Case* does bring the question of judicial legitimacy and the TCC's role in the society into the limelight for the first time in its post-authoritarian history. Mirroring *Brown* in this sense, the *Same-Sex Marriage Case* marks the TCC's *Brown*, not *Obergefell*, moment.

V. CONCLUSION

"[J]udicial review cannot, in the long run, operate effectively unless there is general popular acceptance of [it]," commented Professor Arthur von Mehren in 1952 in the wake of the first substantive ruling issued by the then nascent GFCC when Germany was still struggling to rebuild itself after the Second World War.[385] This was not only true of the GFCC in its infancy and throughout its growth into a giant in comparative constitutional law and politics, but it is true

[385] Arthur T. von Mehren, *Constitutionalism in Germany: The First Decision of the New Constitutional Court*, 1 AM. J. COMP. L. 70, 92 (1952).

more broadly with regards to the TCC and any institution of judicial review in the world. The issuance of the *Same-Sex Marriage Case*, however, has made it appropriate to examine whether the TCC can continue to possess the general popular acceptance for its momentous decision. It is against this background that we have conducted a microscopic examination of the law and politics of the *Same-Sex Marriage Case*.

In this Article, we have first situated the *Same-Sex Marriage Case* in the larger context of the social movement for the recognition of same-sex marriage in Taiwan. What is distinctive about the *Same-Sex Marriage Case* is the discrepancy between law and politics in the pursuit for the constitutional rights of gays and lesbians in Taiwan. Politically, the rise of same-sex marriage to the top of the antidiscrimination agenda resulted from the continuous effort of gay rights activists that has paralleled the democratic movement. In contrast, the TCC watched the gay rights movement from the side-lines without intervening in it with legal guidance until the *Same-Sex Marriage Case*. Acutely aware of the constitution's long-standing silence on gay rights, the newly-packed TCC was determined to intervene in the issues concerning the rights of gays and lesbians by taking on the fundamental question of same-sex marriage with doctrinal insight and stylistic innovations.

With the distinctive discrepancy between the law and politics of same-sex marriage in mind, we read the *Same-Sex Marriage Case* closely in light of American constitutional jurisprudence. The legalization of same-sex marriage through judicial review naturally brings to mind the comparison of the TCC's *Same-Sex-Marriage Case* and the Supreme Court's *Obergefell*. Juxtaposing both cases in terms of doctrine and principle, we agree that a certain parallel exists between the *Same-Sex Marriage Case* and *Obergefell*. We have found that the *Same-Sex Marriage Case* does not simply mirror *Obergefell* itself, but reflects the Greater *Obergefell* jurisprudence on the right to equal liberty. The latter encompasses the series of the Supreme Court judgments on the rights of gays and lesbians that have developed since *Lawrence*. In other words, to address the discrepancy between the law and politics in the constitutional protection of gay rights, the TCC manages to accomplish in the *Same-Sex Marriage Case* what has taken the Supreme Court a whole line of case law and over a decade to

achieve.[386] It is here that the parallelism ends between the *Same-Sex Marriage Case* and *Obergefell*. And it is for that discrepancy that the *Same-Sex Marriage Case* has prompted the public rancor that *Obergefell* has barely seen,[387] bringing itself closer to *Brown*.

Turning to judicial style, we have found that the *Same-Sex Marriage Case* and *Brown* are comparable in terms of their managed brevity, virtual unanimity, and reliance on non-legal authority. We argue that contrary to its conventional practice, the TCC did not issue the relatively brief *Same-Sex Marriage Case*, accompanied by only two separate opinions, with the support of scientific authority by accident. Those features were part of the law and politics surrounding the *Same-Sex Marriage Case*, which had been preconditioned by its political pre-history, as they were meant to maintain the public support of the TCC after the decision. Compared to the turmoil that the TCC experienced in its post-authoritarian history, and given the centrality of fundamental rights in this ruling, the *Same-Sex Marriage Case* marks the TCC's *Brown* moment when its legitimacy has been brought into the limelight by the post-ruling politics.

Following his perceptive comment on the GFCC as quoted in the beginning of this Part, Professor von Mehren also noted that the GFCC's "skill, insight, and determination" has substantially influenced the general acceptance of its role in a constitutional democracy.[388] That proposition had applied to the infant GFCC and persists to this day, even as it is about to enter its seventies. More broadly, it is also true of the TCC and the Supreme Court. The concern over general popular acceptance is embodied in the judicial style of the *Same-Sex Marriage Case* as the TCC was bracing itself for its *Brown* moment during the decision-making process. The TCC and the Supreme Court have shown both insight and determination in the *Same-Sex Marriage Case* and *Brown*, respectively. However, it remains to be seen whether following the *Same-Sex*

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[386] For this reason, the *Same-Sex Marriage Case* is a "natal opinion." For the notion of natal opinion and its precariousness, see KAHN, *supra* note 172, at 108-17.

[387] We do not contend that *Obergefell* did not generate reactions. Instead, our point is that the post-judgment politics of *Obergefell* has been the continuation of the decades-long "culture war" surrounding the role of the Supreme Court in social issues. *See* Marsha B. Freeman, *Holier Than You and Me: 'Religious Liberty' Is the New Bully Pulpit and Its New Meaning Is Endangering Our Way of Life*, 69 ARK. L. REV. 881, 887-89 (2017); *see also* Paul W. Kahn, *The Jurisprudence of Religion in a Secular Age: From Ornamentalism to Hobby Lobby*, 10 LAW & ETHICS HUM. RTS. 1, 2-4 (2016) (situating *Obergefell* in the dynamics of religion vis-à-vis secularization in a broader culture war).

[388] *See* von Mehren, *supra* note 385, at 93.

Marriage Case, the TCC will achieve what the Court in *Brown* fell short of while maintaining the general popular support that it has habitually commanded with its skilful maneuvering of judicial style.