

Are Taiwan Constitutional Court Justices Political?

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Abstract

In the decision-making on the Taiwan Constitutional Court (TCC), is there really no place for Justices' political ideology? Or, is it rather the case that court watchers could not find the smoking gun of ideologically motivated judicial behavior because the sensor they use is just not good enough? If the TCC is indeed an apolitical court that renders its constitutional judgments solely on the basis of legal reasoning, what explains the marked and increasing disagreement among the TCC Justices in the recent years? We seek to answer these questions by analyzing and comparing the opinion positions of those TCC Justices who served during 2003 and 2015 voted in two sets of merit cases—the political and the less-political cases. Contrary to the existing empirical literature, we find some circumstantial evidences that political ideology does play some role in the merit decision-making in the TCC, albeit most of the TCC Justices can be considered ideological moderates.

Keywords: Taiwan Constitutional Court, ideal point estimation, judicial ideology, the attitudinal model, judicial philosophy, judicial activism

1. Introduction

“All judges are political—except when they are not.” (Bybee, 2010). This statement appears to hold no less true for the Taiwan Constitutional Court (TCC) Justices than for the Justices sit on other supreme courts or constitutional courts around the world. On the one hand, judges are humans, and their decisions are bound to be affected by their political ideologies or worldviews just like other human beings. As the final arbiters of constitutional law, politically appointed constitutional judges that sit on the top courts are even far less constrained by existing law and prior judicial precedents than are the career judges of the ordinary courts. For social scientific students of judicial behavior, therefore, apolitical judging on a constitutional court is simply a myth, and the only meaningful question is how, and how big a role, political ideology plays in constitutional adjudication. This logic certainly applies to the TCC, which is among the strongest and most activist constitutional courts around the world. On the other hand, most constitutional judges are jurists by training, and the legal model of judicial decision making remains the dominant thinking in the legal profession and legal academia. Much of the authority and legitimacy of a constitutional court, in addition, is premised on the idea that judges can and do set aside their personal ideologies and act as faithful servants of law when adjudicating a case. As typical constitutional judges, the TCC Justices certainly take seriously their judicial duty to the rule of law, and the last thing they want to do is to entertain the idea that they are merely “politicians in robes.”

The contradiction between the political and the legalist aspects of constitutional judging appears to be less obvious in Taiwan, though, as two previous empirical studies of the TCC decision making found no smoking gun for the influence of political ideology on the merit decisions of the TCC (Garoupa, Grembi and Lin, 2011; Pellegrina, Garoupa, and Lin, 2012). But instead of viewing them as vindicating the legalist claim that the TCC Justices are apolitical in the sense that their personal political ideologies do not significantly affect their judgment calls in constitutional adjudication, we think these findings have more to do with the difficulties and limitations of measuring and testing attitudinal decision making in Taiwan. In view of Taiwan’s political developments in general, and the composition of the TCC in particular, we do not expect to find that the way a TCC Justice voted in a given constitutional case is primarily determined by his or her ideological stance. But we surmise that political ideology still plays some roles in the TCC decision making. There are some anecdotal evidences—including, among others, the separate opinions written by individual Justices—showing that some TCC Justices are more liberal/conservative than others. But this insider knowledge remains a well-kept secret. To forcefully argue that, as a matter in general, the TCC Justices are as political as one can expect of a constitutional judge, we need to demonstrate with empirical evidence that the

Justices' political ideology does play a role in their adjudication of constitutional cases.

Are the TCC Justices political in the sense that (i) they can be identified as liberals, moderates or conservatives in the same way as any other political actors, and (ii) their political ideologies have certain influences on the decisions they make in adjudicating constitutional cases? We suspect that they are, but we cannot rule out the possibility that the TCC can be perceived less as a political court and more as a court of law if the Justices are ideologically indistinguishable, and the disagreement among them has little to do with the political disagreement found between liberals and conservatives. To find out which is the case, we first review the existing literature and discuss the challenges confronting the study of judicial behavior on the TCC (Section 2). We then propose a new empirical strategy for tracing the influence of political ideology on the TCC merit decision making and apply it to study the opinion alignments (as partially revealed judicial votes) of the TCC Justices served during 2003 and 2016 (Sections 3 and 4). By analyzing and comparing the TCC Justices' disclosed positions in political and less-political cases, we find that, although most of the TCC Justices are moderate jurists, they do have different ideological predispositions, and, along with some less-ideological factors such as personality, jurisprudence and judicial philosophy, their ideologies do play some role in their decision making. We discuss our findings and their implications in Section 5.

2. All Top Courts Are Political—Except the TCC?

With the fast advancement of judicial behavior as a field of social scientific study in the recent years (Epstein, 2016), there is a growing uneasiness about the adequacy of the attitudinal model, which posits that ideological considerations alone can explain and predict much of the decisions judges make on the top courts (Segal and Spaeth, 2002). We now know that “ideological motivations are just one of several kinds of motivations that should be incorporated into a realistic and comprehensive conception of judicial decision making.” (Epstein and Knight, 2013: 24) Still, judges' political ideology matters, and more and more evidences of ideological voting have been found in many supreme courts and constitutional courts around the world (Hönnige, 2009; Garoupa, 2009; Amaral-Garcia, Garoupa, and Grembi, 2009; Garoupa, Gomez-Pomar, and Grembi, 2011; Hanretty, 2012; Iaryczower and Katz, 2015; Tiede, 2016; Rachlinski and Wistrich, 2017). Not all top courts are conducive to empirical study. But when it is possible to identify or infer from the opinions how an individual Justice voted in a given case, students of judicial behavior usually can unearth evidence of judging under the influence of political ideology by using none other than the appointing regime as a crude proxy for the ideology of a given Justice in regression analysis. The resulting empirical findings usually are strong enough to dispel

as a myth the notion of apolitical judging under the legal model (Fischman and Law, 2009: 172).

However, two previous studies of the TCC decision making suggested otherwise. Using the party affiliation of the President by whom a TCC Justice was appointed as the proxy for that Justice's political stance, Garoupa, Grembi, and Lin (2011) tested whether the TCC Justices ruled in favor of their appointers' interests in 97 cases of political significance the Court decided during the period of 1988-2008. The results do not confirm their political allegiance hypothesis, which predicts an appointing-party alignment to be found in the Justices' voting patterns as a result of ideological congruence and/or partisan loyalty between the Justices and their appointers. This pioneering study thereby concluded that the TCC was "fairly insulated from main party interests" during the observed period. Subsequently, Pellegrina, Garoupa and Lin (2012) used the published collective and separate opinions as substitutes for the undisclosed judicial votes and estimated the TCC Justices' ideal points in the 101 decisions of political significance the Court made during the period of 1988-2009. They found that the TCC was "largely non-polarized" and seemed to "follow the pattern of civil law jurisdictions by pursuing a certain apolitical façade." Taken as a whole, these findings are in line with two prevailing perceptions held among students of the TCC: (i) The TCC has been able to exert its independence since as late as Taiwan began her democratic transition in the late 1980s (Ginsburg, 2003; Yeh, 2016). (ii) Even with its rising opinion dissensus in the recent years (Su and Ho, 2016; Lin, Ho, and Lee, 2018), the TCC has not been known for being an ideologically polarized court. That being said, can we take these findings as proof that the TCC Justices are rather apolitical? We have some doubts.

Consider first the lack of ideological polarization and what it means for the Court. Notwithstanding the escalation of partisan polarization in Taiwan for the past two decades, the major cleavage in Taiwan politics has long been between the Chinese and the Taiwanese identities as opposed to the left-right or liberal-conservative division commonly found in western democracies (Achen and Wang, 2017; Sheng and Liao, 2017; Hsiao, Cheng, and Achen, 2017). While the two major political parties in Taiwan—the Democratic Progressive Party (DPP) and the Kuomintang (KMT)—may be positioned respectively as center-left party and center-right party, the ideological sorting of the parties has been rather weak at the level of elite politics. Most of the political elites in Taiwan can be said to be ideological moderates, and there is little reason to expect that the TCC Justices would be otherwise. The TCC is composed of 15 Justices. Most of them came from the career judiciary and the legal academia. Few of them have known affiliation with political parties. Still fewer have public profiles as staunch liberals or conservatives. Under these circumstances, there is little wonder that ideological polarization is not found in the TCC.

Ideologically moderate Justices, however, are not necessarily apolitical Justices. The absence of ideological polarization in the composition of the Court might just mean that it takes extra efforts to flesh out the vague liberal-conservative division on the Court.

The fact that liberal-conservative political ideology generally takes a backseat in Taiwan politics also suggests that ideology might not be a central concern in the selection of the TCC Justices. The Justices are nominated and appointed by the President with the consent of the Legislative Yuan. In picking nominees for the TCC, the President's discretion is limited, however, as Article 4 of the Judicial Yuan Organization Act stipulates rather stringent qualifications for the Justices and requires that the overall composition of the Court maintain diversity in terms of the Justices' professional backgrounds. In practice, the President picks his or her TCC nominees from a short list of hopefuls recommended by a nomination committee, which is usually chaired by the Vice President. Composed mainly of former Justices and reputable elders from the civil society, the committee is responsible for making merits-based recommendations to the President. As senior career judges or law professors, most of the TCC nominees have CVs and paper trails that provide scant information about their political ideologies. Although the confirmation of the TCC Justices is not above the fray of partisan warfare (especially during the period of divided government), most of the nominees can get through the process, which only has cursory hearings and ends with a confirmation vote in anonymity.

In view of the nature of the TCC appointment, it is certainly questionable whether the appointing regime can serve as a good proxy for judicial ideology in Taiwan. But Garoupa, Grembi, and Lin's 2011 study suffers from yet another limitation that is even more severe: Each and every case in their dataset was decided by Justices that were appointed by the same President and confirmed by the KMT-controlled parliament. The appointing-party measure simply cannot tell the differences in judicial ideology when all of the Justices sitting on a given case have to be coded as the same, regardless of whether they voted unanimously or not. It was not until 2008 that we were able to observe whether Justices appointed by different Presidents reached different conclusions in a given case, and we suspect that the appointing-party measure may have more bite as a crude proxy for judicial ideology thereafter.

Once appointed, a TCC Justice serves an 8-year term, and cannot be consecutively re-appointed for the following term. Their decision making on the Court is further complicated by the way the TCC works. The TCC hears all cases *en banc*. It uses majority rule to decide whether to dismiss a case on procedural grounds, and to dispose cases concerning unified statutory interpretation or review of regulation. A 2/3 supermajority is required, however, for the Court to rule on cases involving the constitutionality of

statutes or constitutional controversies over separation of powers.¹ During the review sessions held in secrecy, the Justices are known to deliberate rather scrupulously on the exact wordings of its merit decision, which is referred to as Judicial Yuan (J. Y.) Interpretation. Though first drafted by one of the Justices who are assigned to report the case, a J.Y. Interpretation is a collective work contributed and signed by all of the attending Justices, even including those who voted in the minority.

Luckily for students of judicial politics, such deliberative process of decision-making and opinion-writing does not guarantee consensus, and individual Justices are allowed to write (or join) concurring or dissenting opinions to be signed and published along with the authoritative J.Y. Interpretation. The TCC Justices, moreover, appear to be much more opinionated than Justices on the other constitutional courts. At our request, two former and one sitting TCC Justices (who were appointed to the Court in 2003, 2007, and 2015 respectively) shared with us their thoughts about the norms and practices of dissenting opinion writing on the TCC. According to them, there is a clear understanding among the Justices that one cannot write or join a dissent unless she/he voted against the majority when the outcome of the case was put to a vote. However, it is entirely up to individual Justice to decide whether to write or join a dissenting opinion to express and explain her/his disagreement with the Court's decision to the public. Our sources told us that it is not unusual for the dissenting Justices to forego the opportunity to file dissenting opinions. It appears that some Justices had done so more often than others, while the trend had been increasingly for public dissent in the recent years. In this regard, we think the opinion alignment—i.e., the information about which Justices were in the majority/minority as provided by the published opinions of a given case—can be used as a close but imperfect substitute for the undisclosed judicial votes.

Even though the actual judicial votes remain a secret, the use of opinion alignment as stand-in for the judicial votes enables students of the Court to apply the method of ideal point estimation developed by Martin and Quinn (2002). Pellegrina, Garoupa and Lin's 2012 study presented the first Martin-Quinn scores for the TCC Justices. We also use our data to estimate the static ideal points for the TCC Justices served during 2003 and 2016, and our estimation is reported in Appendix 1. To interpret the meaning of such ideal point estimations, we first have to ascertain what the uncovered latent dimension stands for (Ho and Quinn, 2010). In the context of the U. S. Supreme Court, the Martin-Quinn scores match closely to the general perception of where the Justices stand on the conservative-liberal spectrum (Epstein, et al., 2012: 713). The uncovered latent dimension,

¹ Although the TCC has broad discretion over the scope of judicial review, it cannot review the rulings of ordinary courts. In addition to judicial review, the Court possesses such ancillary powers as the power to dissolve unconstitutional parties and the power to adjudicate presidential impeachment.

therefore, can be said to have strong ideological connotations in the U.S. Supreme Court. It is not necessarily the case in the context of the TCC, however. While we suspect that the latent dimension has something to do with political ideology, we cannot rule out the possibility that it has more to do with the less-ideological factors, such as the Justices' professional and educational backgrounds and their judicial philosophies. So while we may infer from the overlapping Martin-Quinn scores that the differences between the TCC Justices are not polarized, we still need to know what drives them to disagreement.

In short, we do not think that the existing empirical evidences lend support to the legal model of constitutional adjudication in Taiwan. It has yet to be proven with systemic evidence, though, that the TCC Justices are just as political as their peers on the other top courts in the sense that their decision making is more or less affected by political ideology they personally hold. Notwithstanding the relative irrelevance of the liberal-conservative divide in Taiwan politics, we think it still makes sense to characterize a TCC decision in terms of its ideological valence, and to identify a TCC Justice as a liberal, a moderate, or a conservative in a one-dimensional ideological spectrum. Even if the Justices detest such labels for harming their public images as constitutional judges, students of the TCC can readily sense that some Justices are just more liberal or more conservative than their colleagues in view of the positions they took. The judicial ideology thusly defined arguably captures much of the Justices' political or policy motivations than their national identities, which are likely to influence only a handful of TCC cases concerning or implicating the Taiwan-China relations.

3. Research Design and Data

To assess the effect of ideology on the Justices' merit decisions, we first need to measure the Justices' ideology. One of the biggest challenges to our study, though, is to find ways to ensure that the measures of ideology we use are not too blunt to detect signs of attitudinal decision making. The only exogenous measure we can use is the appointing-party measure, which cannot differentiate Justices appointed by the same President/party, and tends to produce results that systematically understate the impact of ideology (Fischman and Law, 2009: 170-71). Due to the paucity of public discussion about the TCC appointment, it is not possible to develop the equivalent of the Segal-Cover scores (Segal and Cover, 1989) in Taiwan. And to the extent that the TCC Justices' Martin-Quinn scores can be used as an endogenous measure of judicial ideology, we cannot explain votes with measures derived from those very same votes (Epstein, et al., 2012: 708). What else can we do?

We think retooling the old strategy of divide and conquer provides a key to solving

this problem. Many studies of ideology and judicial decision making proceed from the intuition that judges' "political attitudes are apt to be most salient in cases with direct political implications" (Rachlinski and Wistrich, 2017: 206). It is therefore understandable that the aforementioned two studies on the TCC decision making opted to limit the scope of their inquiries to a set of "political cases." We also divide the cases in our dataset into two categories labeled as "political cases" and "less-political cases," with the set of political cases including all cases that are either (i) politically salient or (ii) have clear ideological implications in Taiwan according to our assessment. While speculating that the effect of ideology on judging might be easier to detect in political cases than in less-political cases, we do not discard the less-political cases—i.e., cases that are of less political salience and the ideological implications of which are indeterminate—in our dataset, however. Rather than focusing solely on the Justices' decision making in the political cases, we analyze and compare the Justices' opinion positions in these two types of cases in order to find out whether ideology (i) affects judging only when ideological/political issue is at stake, (ii) affects judging in less-political cases as well, or (iii) has no discernible effect in either type of cases. Evidences of ideological voting, we think, are much stronger if they are found not just in political cases, but in less-political cases as well.

Given that significant differences do exist in the vote/opinion patterns in these two types of cases², we further take cues from Lindquist and Cross (2009) and speculate that, when a Justice opts to invalidate the norm under review, the judicial activism she/he exercises may have different connotations in these two types of cases. Lindquist and Cross (2009) differentiate the multi-dimensional judicial activism into two strands: Whereas *institutional activism* "reflects justices' willingness to substitute their own judgments for those of other governmental actors, to expand judicial adjudicatory power, and to revise prevailing legal doctrines," *ideological activism* "reflects the justices' readiness to engage in these activities in furtherance of their own ideological preferences (Lindquist and Cross, 2009: 134)." Since we assume that ideology is less salient in less-political cases, we further take an activist decision in a less-political case as driven mainly by institutional activism rather than by ideological activism. Under this assumption, we first develop an *institutional conservatism score* (ICS) as a measure of a Justice's institutional activism based on the decisions she/he made in the less-political cases during the observed period. For Justices within a natural court (i.e., a court composed by the same Justices), the ICS for a Justice J on a less-political case i is defined as the standardization of the proportion in which J had upheld the norm under review, with the case i omitted to avoid circularity in subsequent

² We estimate Justices' ideal points in political and less-political cases in our dataset separately. The correlation between the median ideal points in these two types of cases is -0.1585, which indicates that there is no linear relationship between the Justices' voting behavior in political and less-political cases.

regression analyses.³ Thus computed, the ICS can serve as a rough indicator of a Justice's willingness to exercise judicial self-restraint on account mainly of his or her judicial philosophy. A Justice with above-average ICS, for instance, is likely to be a judicial conservative who is more deferential to other political actors than his or her colleagues. But because of the staggered terms of the TCC, we have different numbers of observations for different Justices. For Justices with fewer observations, their ICSs may be a less robust predictor of their institutional activism.

We assume that, in political cases, Justices are more likely than not to vote in line with their own ideologies, and, as a result, an activist decision in a political case bears the marks of both institutional and ideological activism. But instead of looking into a Justice's decisions to uphold or invalidate the norms under review in political cases, we take the advantage of being able to tell whether the outcome of a political case is a "liberal" or a "conservative" decision as defined in ideological terms to observe and study a Justice's *post hoc* ideological leaning. Since the TCC has yet to invalidate any liberal law as unconstitutional for conservative reasons, all political decisions that invalidated the norm under review are coded as liberal decisions. Political cases involving judicial validation, in turn, are coded in accordance to the ideological valence of the norm at issue and on a case-by-case basis. With this information, we propose a *political conservatism score* (PCS) that reports the standardized leave-one-out proportion of ideologically conservative decisions a Justice *J* made in political cases within a natural court. The PCS can serve as a crude *post hoc* measure for a Justice's political ideology, though it is less reliable a measure for Justices with fewer observations. And since the correlation between the averaged PCS and the appointing-party measure is statistically insignificant ($r = -0.019$), we suspect that the use of PCS may help us detect more signs of ideological voting on the TCC.

With these new tools in hand, we study the 167 constitutional decisions the TCC made during the period of October 2003 to October 2016. This period began when the first 15 Justices appointed by DPP President Chen Shui-bian (陳水扁) took office, and ended when 7 of the 15 Justices appointed by KMT President Ma Ying-jeou (馬英九) left the Court. Choosing this time frame thereby enables us to observe a Chen Shui-bian Court (i.e., a TCC composed all by Chen's appointees) (2003-2008), a Ma Ying-jeou Court (a TCC composed all by Ma's appointees) (2015-2016), and a Court of divided appointment (2008-2015). Of the 167 constitutional cases, we characterize 51 as political cases and 116 as less-political cases. A case would be characterized as a political case if it is politically salient (because it concerns a major policy issue or because its petitioner is a prominent public figures, for instances), or has indisputable ideological valence (such as a case concerning

³ We compute a Justice *J*'s ICS for political cases in a similar way except that the proportions to be rescaled are based on all less-political cases, resulting in a static z-score for a Justice within a natural court.

freedom of expression or equality). Considering that a given case (J.Y. Interpretation) may implicate more than one object/issue of constitutional review, and the Court may reach different conclusions for different issues in a given case, we choose “issue” as opposed to “case” as the unit of our analysis. For instance, if a J. Y. Interpretation upheld 3 distinct provisions of a statute but invalidated 2 other distinct provisions of the same statute, it would be counted as containing 5 issues. We count a total of 174 political issues and 230 less-political issues (including 10 less-political issues from 4 political cases). A list of the cases and the corresponding number of issues is reported in Appendix 2.

Like Pellegrina, Garoupa, and Lin (2012), we study the Justices’ opinion alignment in a given case as a substitute for the undisclosed judicial votes, and the dependent variable in our study is whether a Justice publicly “voted” for or against the constitutionality of the law at issue. We obtain the data about the opinion alignment of a given case from the Taiwan Constitutional Court Interpretations Database (TCCID) constructed by the Institutum Iurisprudentiae, Academia Sinica (IIAS), and we recode the case-based opinion data into the issue-specific vote data. Since a TCC Justice can file a partial dissent on some but not all of the issues decided in a given case, and since a dissent in the TCC does not necessarily mean that the dissenting Justice disagrees with the majority over the very judgment of constitutionality,⁴ we read and double-check all of the dissenting opinions on our dataset to ensure the accuracy of our coding.

To test whether political ideology is a significant factor in the TCC decision making in constitutional cases, we use independent variables *appointing President* and *political conservatism score (PCS)* as two crude proxies for Justices’ political ideologies. We assume that Justices appointed by KMT President Ma Ying-jeou are more conservative than Justices appointed by DPP President Chen Shui-bian, and the higher the PCS a Justice has, the more conservative he or she is. We test three hypotheses:

Hypothesis 3.1. A Justice’s opinion positions (stated votes) are affected by his/her political ideology as measured by the appointing President variable and/or by the PCS variable.

Hypothesis 3.2. A Justice’s opinion positions on political issues are affected by his/her political ideology as measured by the appointing President variable and/or by the PCS variable.

Hypothesis 3.3. A Justice’s opinion positions on less-political issues are affected by his/her political ideology as measured by the appointing President variable and/or by the PCS variable.

⁴ Some Justices, for instance, would dissent from a decision holding unconstitutionality not because they would uphold the law under review, but because they thought the transition period granted to the Legislature was too long.

Aside from Justices' political ideology, we consider and control the following four Justice-based, less-ideological factors that are likely to influence the merit decision making on the TCC:

(a) *Judicial philosophy (Institutional Activism)*: As suggested above, different Justices may hold different views on the role of the Court in constitutional democracy, and, as a result, some Justices tend to be more/less deferential to other political actors than their colleagues. We use the *institutional conservatism score (ICS)* variable to control a Justice's institutional activism.

(b) *Judicial Personality (Outspokenness)*: Since the actual judicial votes are kept in secret, and disagreement within the Court surfaces only when individual Justices write separately, there is a possibility that the pattern of a given Justice's opinion positions is a function of his/her "judicial personality" as defined in terms of whether the Justice prefers to speak out or keep quiet when he/she disagrees with the majority of the Court. Some Justices are not shy away from expressing in public what they really thought, whereas other Justices may care more about teamwork than their individual reputations. Using the data provided by the TCCID, we calculate a Justice's career *separate opinion average (SOA)* as a measure of his/her judicial personality (or outspokenness, to be more specific). For an observed Justice *J*, his/her SOA = the number of separate opinions (including concurrences and dissents) *J* ever issued / the number of J.Y. Interpretations *J* ever voted on. The higher the SOA a Justice has, the more outspoken or opinionated the Justice appears to be. We test whether this independent variable is significantly correlated with his/her stated votes.

(c) *The Scholars-Judges Divide*: A mutual dislike appears to exist between the legal academia and the career judiciary in Taiwan. On the one hand, many law professors look down on career judges (and prosecutors) as mediocre bureaucrats who often get the law wrong. Many practitioners in the judiciary, on the other hand, criticize academic lawyers for being too idealistic and not knowing enough about legal practice on the ground. Since the TCC, roughly speaking, is composed of half former law professors and half former career judges, it is worth exploring whether the disagreement among the Justices has anything to do with this social divide found in Taiwan's legal profession. To examine the effect of this scholars-Judges divide on judging, we create a dummy variable *prior judicial experience* that indicates whether a Justice is a former career Judge/prosecutor. This variable is coded based on the Justices' background information we obtain from the Taiwan Constitutional Court Justices Database (TCCJD) developed by the IIAS.

(d) *The German Approach vs. the American Way*: Taiwan is a civil law country heavily influenced by the European continental legal thought. Academic jurists trained in Germany, Japan, or other civil law countries have long dominated most of the major law

faculties in Taiwan. But thanks to the close political, economic and cultural ties Taiwan has with the United States, American-trained academic lawyers have constituted a growing minority in Taiwan’s legal academia. It is often asserted in Taiwan that German-trained and American-trained lawyers see things differently and adopt different approaches to law and legal theory. Whereas German-trained lawyers usually pursue doctrinal scholarship aimed at disciplining legal reasoning and separating law from politics, American-trained lawyers tend to embrace legal pragmatism and emphasize interdisciplinary studies of law. Given that there are German-trained and American-trained Justices serving on the TCC, one may speculate that the disagreement within the Court can be linked to this sectarian division in Taiwan legal thought. To assess this possibility, we include a dichotomous variable *American exposure* that codes whether a Justice received a doctoral degree in law from the United States or from other common law jurisdictions. The coding of this variable is also based on the information provided by the TCCJD.

Summary statistics of the independent variables considered in our study are reported in the following Table 1.

Table 1: Descriptive Statistics of Independent Variables (N=34)

Panel A: Continuous Variables

	Mean	Std. Dev.	Min.	Max.
PCS	0.45	0.1658	0	0.6364
ICS	0.4952	0.1368	0.1967	0.7105
SOA	0.3803	0.3124	0	1

Panel B: Categorical Variables

	%
Appointing Presidents	
Chen Shui-bian (陳水扁)	55.88
Ma Ying-jeou (馬英九)	44.12
Past Judicial Experience	44.12
American Exposure	17.65

In short, we think the TCC Justices can be said to be political—in the ideological

sense of the term—if empirical evidence can be found that political ideology significantly correlates with their opinion positions in cases with and even without political salience. The TCC Justices are as apolitical as they can be, however, if their disagreement has more to do with such less-ideological factors as judicial philosophy, judicial personality, and the divisions in the Justices’ professional and educational backgrounds, than with their political ideology.

4. Analysis and Results

We can think of a Justice’s opinion position in a given case as some kind of (stated or public) vote; it’s a vote for or against the constitutionality of the norm under review. To account for the within-subject correlation, and also the possible personal heterogeneities, we incorporate random effects into fixed effects structure (thus mixed) modeling. Since the response variable is binary, we deploy the mixed effects logistic regression, or logistic GLMM (generalized linear mixed (-effects) model) to characterize the repeatedly-measured vote distribution. Although analyzing the entire population rather than a sample of stated votes, we think of the votes observed as a realization of a stochastic process of deliberation. That is, there still are some uncertainties in the underlying generating process responsible for the collected data. Therefore, (large-sample) inferences can be made in the usual way (Gelman et al, 2013).

We first investigate three models for the stated votes in all issues. Model (a) tests whether *appointing President*, *past judicial experience*, *American exposure*, and SOA affect a Justice’s stated votes in all issues decided during the whole observed period (Oct. 2003-Oct. 2016). Model (b) tests the same set of independent variables, but its scope of inquiry is limited to all issues decided after November 2008, when the effect of divided appointment began to kick in. Model (c) adds PCS and ICS to the list of independent variables, and it investigates all issues the Court decided during the whole observed period. Tables 2 reports the maximum likelihood estimates from fitting GLMMs.

The results in Models (a), (b), and (c) lend support to our Hypothesis 3.1. The variable *appointing President* is statistically significant at the 10% level in Model (a), and is significant at 5% level in Model (b). Consistent with our expectations, *appointing President* is positively correlated with the likelihood that a Justice would vote to uphold the norm under review. As shown in Model (b), for instance, Justices appointed by President Ma Ying-jeou have a 51% ($=\exp(0.414)-1$) increase in the estimated odds of voting for the law versus voting against the law as compared to Justices appointed by President Chen Shui-bian. *Appointing President* is not a significant factor in Model (c), but the effect of ideology is arguably picked

up by PCS, which has a significance level at 0.1.

Table 2: Fixed-Effect Parameter Estimates Fitting GLMMs

Variables\ Models	(a)	(b)	(c)
Intercept	0.235*	0.108	0.260***
	(0.106)	(0.203)	(0.065)
Appointing President	0.286+	0.414*	0.082
	(0.157)	(0.207)	(0.107)
Political Conservatism Score			0.072+
			(0.041)
Institutional Conservatism Score			0.182***
			(0.036)
Past Judicial Experience	0.150	0.366*	-0.013
	(0.109)	(0.183)	(0.073)
American Exposure	-0.070	-0.128	-0.138+
	(0.138)	(0.224)	(0.082)
Separate Opinion Average	-0.721**	-0.880*	-0.425**
	(0.235)	(0.345)	(0.158)
Natural Courts (baseline: Weng, Oct. 2003-Sep. 2007 for (a)(c); Lai 2, Nov. 2008-Sep. 2010 for (b))			
Lai 1, Oct. 2007-Oct. 2008	-0.117		-0.083
	(0.124)		(0.115)
Lai 2, Nov. 2008-Sep. 2010	-0.080		-0.066
	(0.109)		(0.094)
Rai 1, Oct. 2010-Sep. 2011	0.024	0.106	0.069
	(0.172)	(0.171)	(0.160)
Rai 2, Oct. 2011-Sep. 2015	-0.383**	-0.366**	-0.308**
	(0.129)	(0.114)	(0.099)
Rai 3, Oct. 2015-Oct. 2016	-0.596**	-0.566**	-0.532**
	(0.188)	(0.178)	(0.168)
Observations	5440	2509	5440

*** p<0.001, ** p<0.01, * p<0.05, + p<0.1

In Model (c), the coefficients for PCS and ICS are 0.072 and 0.182. Both coefficients

are significantly different from 0 using significance level 0.1 and 0.001, respectively. This indicates that, for every one-unit increase in PCS, we expect a 7.47% ($=\exp(0.072)-1$) increase in the odds of upholding the norm under review, and the odds of upholding the norm under review increase by 19.96% ($=\exp(0.182)-1$) with each additional point on ICS. In Model (c), the estimate -0.138 for the variable *American exposure* is significantly less than 0 if we chose significance level to be 0.05, implying the odds of voting for the law under review for Justices with American doctoral degrees decreases by 12.89% ($=\exp(-0.138)-1$) compared with the rest of the Justices. Of the other control variables, SOA is statistically significant in all three models. *Past judicial experience* has significant effect in Model (b). The estimated odds of voting for the law increase by 44% ($=\exp(0.366)-1$) for Justices with prior judicial experience compared to Justices from the academia at a 0.05 significance level.

To test our Hypotheses 3.2 and 3.3, we fit two models for political issues, and two for less-political issues. The four models reported in Table 3 differ only in their scopes of inquiry. Model (d) and Model (f) consider respectively all political issues and all less-political issues the TCC decided during the whole observed period. Model (e) and Model (g), by contrast, investigate the political and the less-political issues the Court decided during the period of Nov. 2008 – Oct. 2016.

The results in Model (d) support our Hypothesis 3.2, as PCS is statistically significant at the 0.05 level. However, none of the variables reaches significance in Model (e). PCS is statistically significant in Model (g), but neither PCS nor *appointing President* is statistically significant in Model (f). Hypothesis 3.3 is partially supported in this regard. Among the control variables, ICS is statistically significant in Model (f) with a .05 significance level. The variable SOA is significant in both Model (d) and Model (f) at the .05 level and 0.1 level, respectively.

Table 3: Fixed-Effect Parameter Estimates Fitting GLMMs for Political/Less-Political Issues.

	Political Issues		Less-Political Issues	
Variables \ Models	(d)	(e)	(f)	(g)
Intercept	-0.188 ⁺	0.903 ^{***}	0.663 ^{***}	0.084
	(0.103)	(0.220)	(0.092)	(0.257)
Appointing President	0.238	0.203	0.010	-0.057
	(0.174)	(0.191)	(0.174)	(0.315)
Political Conservatism Score	0.102 [*]	0.109	0.095	0.508 [*]
	(0.052)	(0.104)	(0.076)	(0.240)
Institutional Conservatism Score	0.010	0.214	0.214 [*]	-0.033
	(0.073)	(0.132)	(0.089)	(0.154)
Past Judicial Experience	0.024	0.040	0.008	0.036
	(0.116)	(0.186)	(0.117)	(0.273)
American Exposure	-0.075	0.027	-0.110	-0.339
	(0.131)	(0.242)	(0.116)	(0.278)
Separate Opinion Average	-0.638 [*]	-0.349	-0.399 ⁺	-0.504
	(0.265)	(0.336)	(0.242)	(0.488)
Natural Courts (baseline: Weng, Oct. 2003-Sep. 2007 for (d)(f); Lai 2, Nov. 2008-Sep. 2010 for (e)(g))				
Lai 1, Oct. 2007-Oct. 2008	0.076		-0.187	
	(0.168)		(0.166)	
Lai 2, Nov. 2008-Sep. 2010	1.202 ^{***}		-0.729 ^{***}	
	(0.187)		(0.119)	
Rai 1, Oct. 2010-Sep. 2011	0.196	-1.026 ^{**}	-0.215	0.500
	(0.319)	(0.346)	(0.198)	(0.201)
Rai 2, Oct. 2011-Sep. 2015	0.482 ^{**}	-0.764 ^{***}	-1.014 ^{***}	-0.423 [*]
	(0.160)	(0.199)	(0.151)	(0.148)
Rai 3, Oct. 2015-Oct. 2016	-2.316 ^{***}	-3.569 ^{***}	-0.492 [*]	0.204 ^{**}
	(0.547)	(0.557)	(0.209)	(0.209)
Observations	2338	917	3102	1592

*** p<0.001, ** p<0.01, * p<0.05, + p<0.1

5. Discussion

Our empirical study simply confirms a truism of legal realism that ideology matters in judicial decision making. All judges are political in the sense that they make decisions under the influence of their political ideologies, and the TCC Justices are no exceptions. Most of the TCC Justices are ideological moderates, and the lack of polarization makes it much harder to discern the influence of ideology on the TCC decision making. Still, our findings suggest that the TCC Justices' ideologies affect their opinion positions not only in political cases, but in some of the less-political cases as well. That we are able to unearth some circumstantial evidences of ideological voting on the TCC is thanks in large part to the temporal span of our dataset and to the censors we use. We would not be able to find significant correlations between a Justice's appointing President and his/her stated votes had our dataset not included many cases decided by a TCC of mixed appointment. Our finding that the influence of ideology is more pronounced in Model (b) than in Model (a) further suggests that the efficacy of the appointing-party measure is much contingent on the extent to which we can observe how Justices appointed by different Presidents interacted with each other. In addition, we propose and deploy a new measure of judicial ideology—the political conservatism score (PCS). Although it is less reliable a measure for Justices with fewer observations, the PCS appears to have outperformed the appointing-party measure in capturing a Justice's ideology. It should be noted, however, that the Justices' opinion positions also track their differences in judicial personality (as measured by SOA), judicial philosophy (institutional activism), professional background (the academia-judiciary divide), and legal philosophy (the German or American influences). Our findings are in line with the emerging consensus among students of judicial behavior that ideology is but one among many factors influencing judicial decision making.

That the appointing party measure still has its use as a crude proxy for the Justices' political ideology also suggests that the appointment of the TCC Justices is not entirely merit-based, but has some sort of ideological vetting at play behind the scene. In other words, we do not think it is a coincidence that in general the Justices appointed by KMT President Ma Ying-jeou tend to vote more conservative than the Justices appointed by DPP President Chen Shui-bian. The appointing-party measure can also be used as a measure of judicial partisanship. However, we don't think we can infer from our findings that partisanship or partisan loyalty in and of itself plays a role in the TCC decision making. We would caution against making such an inference because even in most of the political cases in our dataset, the two major political parties simply did not care to take a stand on the issues before the Court, and the fact that the liberal-conservative divide is not that important in Taiwan politics also suggests that ideology does not necessarily coincide with

partisanship in TCC decision making. Saying that the TCC Justices are political in the ideological terms, therefore, does not imply that they are biased in partisan terms.

By proving that political ideology works behind the scene of the TCC merit decision making, our study is hoped to serve as a stepping stone for developing a more realistic understanding of judicial behavior on the TCC. We still need to know, for instance, how ideology works on the TCC, and whether the realist account of judging has any impact on how the public and other political actors think of the Court.

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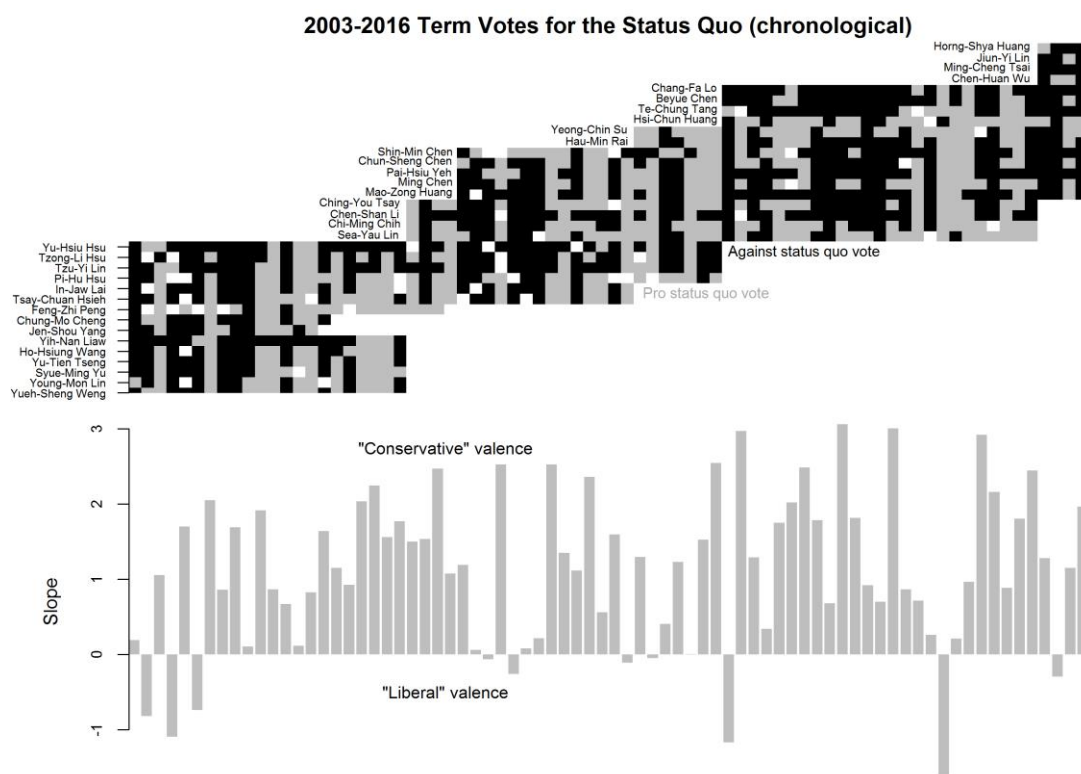
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Appendix 1: Static Ideal Point Estimation for the TCC, 2003-2016

The TCC issued a total of 174 J. Y. Interpretations during 2003-2016. We first exclude the 7 unified statutory interpretation cases the Court issued during the same period from our dataset because the ideological valence of these decisions is too difficult to tell. For the purpose of estimating issue-based as opposed to case-based ideal points of the TCC Justices, we count a total of 404 issues decided in the 167 cases. Figure I displays our overall data.

Figure I: Votes cast in non-unanimous cases for staggered terms of TCC (the top panel), with slopes in each case model serving as weights and direction given to each case (the bottom panel).

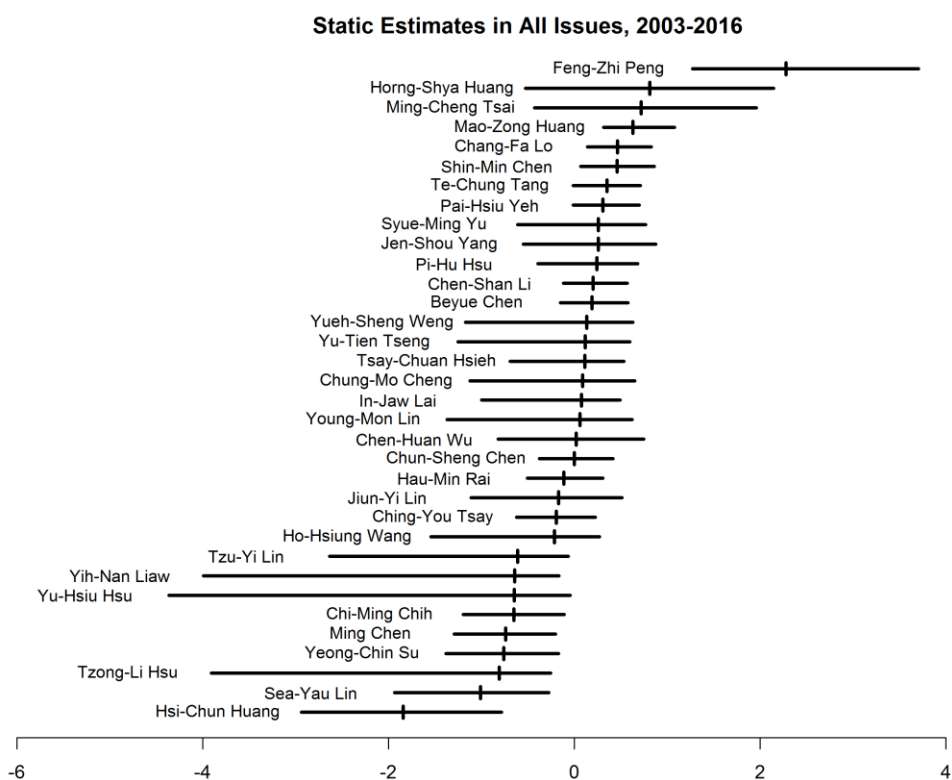


Source: authors

We choose Justice Yu-Hsiu Hsu (left) and Justice Feng-Zhi Peng (right) as the two anchor Justices, and Figure II reports the static ideal point estimates for all cases in our dataset. Having taken into account the inferred voting data, our updated belief on each Justice's ideal points can be summarized by the median of the posterior distribution, a robust measure of central tendency in skewed distributions, and by the 95% equal-tailed Bayesian credibility interval (CI), which includes the Justices' true ideal points with 95%

probability. For any two Justices (such as J. Feng-Zhi Peng and any other Justice except J. Horng-Shya Huang and J. Ming-Cheng Tsai), the fact that their CIs do not overlap suggests that their ideal points are evidently and significantly different. Although some of the CIs overlap partially or wholly in Figure II, sorting all 34 posterior distributions based on individual median values provides us with the Justices' relative locations in the uncovered latent dimension.

Figure II: Static median ideal point estimates (the short vertical bars) with 95% credible intervals for staggered terms of TCC. Justices are sorted from left to right by median ideal point.



Source: authors

Appendix 2: The List of Political and Less-Political Cases of the TCC, Oct. 2003-Oct. 2016

The Political Cases

J.Y.I. No. (year) (number of issue)

1. 567 (2003) (3)	18. 627 (2007) (4)	35. 690 (2011) (1)
2. 573 (2004) (3)	19. 631 (2007) (1)	36. 699 (2012) (3)
3. 577 (2004) (3)	20. 632 (2007) (1)	37. 708 (2013) (2)
4. 578 (2004) (6)	21. 633 (2007) (15)	38. 709 (2013) (5)
5. 582 (2004) (5)	22. 636 (2008) (11)	39. 710 (2013) (7)
6. 584 (2004) (1)	23. 639 (2008) (4)	40. 712 (2013) (1)
7. 585 (2004) (23)	24. 644 (2008) (1)	41. 717 (2014) (10)
8. 588 (2005) (15)	25. 645 (2008) (2)	42. 718 (2014) (3)
9. 599 (2005) (2)	26. 646 (2008) (1)	43. 719 (2014) (3)
10. 601 (2005) (1)	27. 649 (2008) (1)	44. 721 (2014) (3)
11. 603 (2005) (2)	28. 656 (2009) (1)	45. 724 (2014) (1)
12. 613 (2006) (8)	29. 664 (2009) (3)	46. 728 (2015) (1)
13. 617 (2006) (3)	30. 665 (2009) (4)	47. 729 (2015) (1)
14. 618 (2006) (1)	31. 666 (2009) (1)	48. 732 (2015) (3)
15. 623 (2007) (1)	32. 678 (2010) (3)	49. 733 (2015) (1)
16. 624 (2007) (2)	33. 684 (2011) (1)	50. 735 (2016) (1)
17. 626 (2007) (2)	34. 689 (2011) (1)	51. 737 (2016) (2)

The Less-Political Cases:

J.Y.I. No. (year) (number of issue)

1. 568 (2003) (1)	30. 608 (2006) (1)	59. 654 (2009) (3)	88. 693 (2011) (3)
2. 569 (2003) (5)	31. 609 (2006) (2)	60. 655 (2009) (1)	89. 694 (2011) (1)
3. 570 (2003) (2)	32. 610 (2006) (2)	61. 657 (2009) (2)	90. 696 (2012) (2)
4. 571 (2004) (3)	33. 611 (2006) (1)	62. 658 (2009) (1)	91. 697 (2012) (5)
5. 572 (2004) (1)	34. 612 (2006) (1)	63. 659 (2009) (1)	92. 698 (2012) (2)
6. 574 (2004) (4)	35. 614 (2006) (1)	64. 660 (2009) (1)	93. 700 (2012) (1)
7. 575 (2004) (2)	36. 615 (2006) (3)	65. 661 (2009) (1)	94. 701 (2012) (1)
8. 576 (2004) (2)	37. 616 (2006) (2)	66. 662 (2009) (1)	95. 702 (2012) (3)
9. 579 (2004) (2)	38. 619 (2006) (1)	67. 663 (2009) (1)	96. 703 (2012) (2)
10. 580 (2004) (11)	39. 620 (2006) (1)	68. 667 (2009) (1)	97. 704 (2012) (2)
11. 581 (2004) (2)	40. 622 (2006) (1)	69. 669 (2009) (1)	98. 705 (2012) (6)
12. 583 (2004) (2)	41. 625 (2007) (1)	70. 670 (2010) (1)	99. 706 (2012) (2)
13. 586 (2004) (1)	42. 628 (2007) (1)	71. 671 (2010) (1)	100. 707 (2012) (1)
14. 587 (2004) (4)	43. 629 (2007) (1)	72. 672 (2010) (3)	101. 711 (2013) (2)
15. 589 (2005) (1)	44. 630 (2007) (1)	73. 673 (2010) (4)	102. 713 (2013) (1)
16. 590 (2005) (2)	45. 634 (2007) (2)	74. 674 (2010) (2)	103. 714 (2013) (1)
17. 591 (2005) (2)	46. 635 (2007) (2)	75. 675 (2010) (1)	104. 715 (2013) (1)
18. 592 (2005) (1)	47. 637 (2008) (1)	76. 676 (2010) (2)	105. 716 (2013) (2)
19. 593 (2005) (4)	48. 638 (2008) (2)	77. 677 (2010) (1)	106. 720 (2014) (1)
20. 594 (2005) (1)	49. 640 (2008) (2)	78. 679 (2010) (2)	107. 722 (2014) (1)
21. 596 (2005) (1)	50. 641 (2008) (1)	79. 680 (2010) (2)	108. 723 (2014) (1)
22. 597 (2005) (1)	51. 642 (2008) (2)	80. 681 (2010) (2)	109. 725 (2014) (4)
23. 598 (2005) (4)	52. 643 (2008) (1)	81. 682 (2010) (3)	110. 727 (2015) (2)
24. 600 (2005) (2)	53. 647 (2008) (1)	82. 683 (2010) (1)	111. 730 (2015) (1)
25. 602 (2005) (3)	54. 648 (2008) (1)	83. 685 (2011) (3)	112. 731 (2015) (1)
26. 604 (2005) (2)	55. 650 (2008) (1)	84. 686 (2011) (1)	113. 734 (2015) (2)
27. 605 (2005) (1)	56. 651 (2008) (1)	85. 687 (2011) (1)	114. 736 (2015) (1)
28. 606 (2005) (1)	57. 652 (2008) (1)	86. 688 (2011) (1)	115. 738 (2016) (4)
29. 607 (2005) (3)	58. 653 (2008) (2)	87. 692 (2011) (1)	116. 739 (2016) (6)