

BELIEVE IN THE IDEAL, NOT THE IDOL: CONSTITUTIONAL LITERACY AND CONSTITUTIONAL IDOLATRY IN TAIWAN

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ABSTRACT

Conventional wisdom has long held that constitutional literacy helps stabilize constitutional democracy. Nonetheless, the case of Taiwan and its constitution not only challenges this idea but also suggests that constitutional literacy itself may threaten constitutional democracy. Moreover, constitutional literacy could easily devolve into constitutional idolatry, if constitutional literacy is predicated on anachronistic and undemocratic constitutional provisions. This is exactly the case in Taiwan, where constitutional idolatry is interwoven with political ideology: the more pro-unification a Taiwanese person is, the more likely the individual will be to embrace constitutional idolatry. Therefore, we should distinguish between constitutional literacy as it concerns constitutional practices and constitutional literacy as it concerns written constitutions.

KEYWORDS: *constitutional literacy, constitutional idolatry, civic constitutionalism, One-China policy, constitutional identity, Taiwan*

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INTRODUCTION

Recent years have witnessed two major challenges to constitutional democracy: the spread of COVID-19 and the rise of populism. Worldwide, the COVID-19 pandemic not only has cost millions of lives but also has led to the expansion of executive power at the expense of checks and balances (Scheppelle and Pozen 2020). Many legislatures granted the executive branch broad discretionary powers to enact regulatory health restrictions that arguably violate constitutional rights in the name of disease control and public health. When facing major challenges, courts often defer to political branches on the grounds of epistemic humility and the separation of powers (Lawson and Seidman 2020, 90–107; Posner and Vermeule 2011; Ginsburg and Versteeg 2021). Moreover, the resurgence of populism around the world has resulted in the formation of so-called illiberal democracies, in which elections are regularly and openly held but constitutional rights are nonetheless seriously constrained. Would-be dictators pretend to observe the rules of liberal democracy while actively yet subtly departing from them (Sajó 2021, 5).

As a result, renewed attention is being paid to the importance of constitutional literacy—the “knowledge of the constitution sufficient to invoke it properly” (Dreisbach 2016, 11)—because it is reasonable to assume that only when citizens are familiar with their constitution can they effectively monitor their government, defend their rights, and thereby consolidate a constitutional democracy. The idea of enhancing constitutional literacy to preserve constitutionalism and to promote democratic governance is anything but new. In the United States, one well-known example is the Marshall-Brennan Constitutional Literacy Project,¹ which “promotes democratic engagement, constitutional literacy, and legal advocacy by placing talented upper level law students in high schools to teach yearlong courses in constitutional law and oral advocacy” (Raskin 2013).

Nevertheless, constitutional literacy could easily devolve into constitutional idolatry (De Visser and Jones forthcoming), an attitude that “drastically or persistently over-sell[s] the importance and effects of written constitutions” (Jones 2020, 19). If the importance of the written constitution is overemphasized, constitutional development may remain stagnant or even suffer setbacks. In this regard, the case of Taiwan and its constitution not only challenges the conventional wisdom that constitutional literacy helps stabilize constitutional democracy but also suggests that constitutional literacy itself may threaten constitutional democracy. This latter

1. Marshall-Brennan Constitutional Literacy Project, <https://www.wcl.american.edu/impact/initiatives-programs/marshallbrennan>.

point pertains to contexts in which constitutional literacy is predicated on anachronistic and undemocratic constitutional provisions. In fact, overemphasizing the importance of written constitutions, which is tantamount to constitutional idolatry, played an important role in bolstering the autocracy in Taiwan during its authoritarian period (roughly 1948 to 1987). Even since democratization, the understanding of the constitution has remained highly contested. A broad swath of ordinary Taiwanese citizens have learned about their constitution from firsthand experience, whereas Taiwanese politicians who are more pro-unification with China tend to emphasize the importance of the written constitution, so much so that they sometimes fall prey to constitutional idolatry.

For example, on October 6, 2022, former president Ma Ying-jeou created a Facebook post stating that the territory of the Republic of China (ROC, the official name of Taiwan) comprises not only Taiwan but also China. To prove his point, he invoked a specific article in the ROC Constitution.² He also criticized incumbent president Tsai, arguing that she was misinterpreting the Constitution when she made such comments as “the Republic of China and the People’s Republic of China should not be subordinate to each other.”³ According to Ma, such comments celebrate a two-state view of Chinese and Taiwanese relations—after all, if neither country is subordinate to the other, they are equally sovereign states. Ma’s contention was criticized as obsolete.⁴ Indeed, some critics argued that his assertion posed a threat to Taiwan’s sovereignty and security by endorsing some sort of one-China policy. Ma responded to these charges by asking his opponents to “go back and read the ROC Constitution!”⁵ Ma’s reliance on the written constitution at every step in his argument epitomizes how constitutional literacy can spawn constitutional idolatry.

Unfortunately, there is a dearth of literature discussing the relationship between constitutional literacy and constitutional idolatry in Taiwan. The present study, in which I address this knowledge gap, consists of four main sections. In Section I, this paper discusses in broad strokes the constitutional literacy in Taiwan by introducing the Taiwanese government’s efforts to improve constitutional literacy, which, according to extensive surveys, remains deficient among lay people. In Section II, I explore whether Taiwanese people are indeed ignorant about their

2. See ICRT (2022).

3. See Office of the President (2021).

4. As reported by Pan (2022) in the *Taipei Times*.

5. As reported by Shih (2022) in the *Liberty Times*.

constitution and constitutionalism. I first argue that we should distinguish between constitutional literacy as it concerns constitutional practices and constitutional literacy as it concerns written constitutions. From this perspective, Taiwanese people are much more literate in the former regard than in the latter. That is, Taiwanese people tend to learn about their constitution and constitutionalism from matters of realpolitik and from firsthand experiences, such as legal mobilization or civic participation. Interestingly, the prominence of this bottom-up approach to learning about Taiwanese constitutionalism can be traced all the way back to the country's authoritarian period. In Section III, this paper analyzes the relationship between constitutional literacy and constitutional idolatry in the Taiwanese context and argues that constitutional idolatry is interwoven with political ideology in Taiwan regarding the potential unification of Taiwan with China: the more pro-unification a Taiwanese person is, the more likely the individual will embrace constitutional idolatry. Section IV explains why the case of Taiwan sheds light on our understanding of constitutional literacy and constitutional idolatry generally.

I. CONSTITUTIONAL EDUCATION AND CONSTITUTIONAL LITERACY

In Taiwan, the supreme law of the land is officially known as the Constitution of the Republic of China (the ROC Constitution), which was promulgated by the Nationalist government (the Kuomintang, KMT) in Nanjing, China, in 1947. In other words, the constitution was enacted for a geographically immense country but was relegated to Taiwan after the KMT in 1949 lost not only the Chinese Civil War but also all of mainland China to its nemesis, the Chinese Communist Party, which, in that same year, went on to found the People's Republic of China (PRC, commonly known as China). This tremendous shift in power has greatly affected Taiwanese attitudes toward their Constitution.

According to the ROC Constitution, when presidents assume office, they should take an oath,⁶ swearing that they will, among other things, observe the Constitution. The Oath Act requires that most politicians, including legislators, city councilors, ambassadors, mayors, and many other high-ranking officials, take

6. Article 48 of the Constitution of the Republic of China provides that “the President shall, at the time of assuming office, take the following oath: ‘I do solemnly and sincerely swear before the people of the whole country that I will observe the Constitution, faithfully perform my duties, promote the welfare of the people, safeguard the security of the State, and will in no way betray the people’s trust. Should I break my oath, I shall be willing to submit myself to severe punishment by the State. This is my solemn oath.’”

an oath swearing to observe the Constitution.⁷ Of course, politicians often invoke the Constitution to justify their political claims, citing, for example, the Preamble⁸ of the Additional Articles of the Constitution (i.e., the document’s constitutional amendments): the previously mentioned former president Ma Ying-jeou justified his claim that Taiwan should not oppose unification with China, as “unification is a goal stipulated in our Constitution.”⁹ In a similar vein, the incumbent president of the KMT, Eric Chu, contended that according to the Constitution, the two regimes facing each other down across the Taiwan Strait belong to “one China.”¹⁰ Pro-unification politicians are certainly not the only political figures who cite the Constitution to undergird their claims. For example, in a speech delivered in the United States, current president Tsai Ing-wen opined that she “will push for the peaceful and stable development of cross-strait relations in accordance with the will of the Taiwanese people and the existing ROC constitutional order.”¹¹ It seems that politicians across the political spectrum invoke the Constitution to communicate their assertions to domestic and international audiences for different purposes.

Does this heavy reliance on the constitutional text reflect a high level of constitutional literacy on the part of the Taiwanese people? In Taiwan, constitutional education starts at the high school level. A civic education course provides, *inter alia*, a preliminary introduction to constitutional rights, the separation of powers, and civil society. The course also discusses constitutional disputes such as those associated with conscientious objectors,¹² same-sex marriage,¹³ privacy rights,¹⁴ and the severe limitations that were imposed on political rights during the White Terror (i.e., the authoritarian government’s decades-long repression of the island’s population). In contrast

7. Article 2 of the Oath Act provides that “[t]he following civil servants shall oath in accordance with this Act: 1. Legislatures, councilors of the special municipality, county/city councilors, and township/city representatives. 2. The speaker and deputy speaker of Legislative Yuan, the speaker and deputy speaker of the council of the special municipality and county/city council, as well as that for the chairperson and vice chairperson of township/city council.”

8. The Preamble of the Additional Articles of the Constitution of the Republic of China provides the following: “To meet the requisites of the nation prior to national unification, the following articles of the ROC Constitution are added or amended to the ROC Constitution.”

9. See news report by Hsu (2018).

10. See news report by Lo (2015).

11. See Glaser (2016) at the Center for Strategic and International Studies.

12. Judicial Yuan Interpretation No. 490 (1999).

13. Judicial Yuan Interpretation No. 748 (2017).

14. Judicial Yuan Interpretation No. 603 (2005).

with this mandatory civic education course at the high school level, undergraduate university students—with the exception of law-school students—are not required to take any constitutional course. However, there is a constitutional course that university students may take in order to satisfy their general-education requirements.

Constitutional education can take place outside a classroom. Many top courts around the globe have shouldered the responsibility of constitutional education.¹⁵ Tasked with interpreting the ROC Constitution, the Taiwan Constitutional Court (TCC) has made an effort to improve constitutional literacy in a variety of ways. For example, oral arguments are broadcast live, and people have easy online access to recordings of constitutional debates that occur in the courtroom. Likewise, the TCC makes all its decisions available online and will, in important cases, hold a press conference at which the secretary of the TCC presents the decisions to the public or clarifies possible misunderstandings. A point of special interest is that, in recent years, the TCC's decisions have included increasingly long explanations justifying the decisions. It has been suggested that a principal reason for this new writing style is to strengthen the clarity of TCC decisions (Kuo and Chen 2017).

Beyond the classroom and the courtroom, the media plays an important role in informing the Taiwanese people of constitutional developments. Although the media is in general not interested in covering judicial decisions, which tend to be too solemn and tedious for most people's tastes, a few TCC decisions have been widely reported because of their social or political relevance. A good example is the 2017 TCC decision known formally as Interpretation No. 745, which concerned tax law—normally not an attention-grabbing topic for the public. However, this decision made headlines because one of the individuals involved in this case was a famous model who, the TCC concluded, had been unconstitutionally taxed. Another TCC decision to attract widespread media coverage and public attention concerned same-sex marriage: Interpretation No. 748 (2017). In fact, the announcement of the decision was live-broadcast across most media channels in Taiwan. Further establishing the importance of this case was the TCC's decision to hold an international conference introducing this landmark ruling to the world.

Notwithstanding the formal and informal sources of constitutional education mentioned above, it remains unclear whether ordinary people care much at all about the Constitution or the TCC. Since 2013, the Judicial Yuan, which is the highest judicial organ responsible for, among other things, judicial administration

15. The Korean Constitutional Court, e.g., uses cartoons to introduce some of their leading cases. See Constitutional Court of Korea, “News and Media: Decisions in Cartoon,” <https://english.court.go.kr/site/eng/ex/bbs/List.do?cbIdx=1089>.

in Taiwan, has conducted annual public-opinion surveys. One of the survey questions is, “Do you think you know the duties of the TCC?” In these surveys, three-quarters of the interviewees confessed to ignorance regarding the TCC’s duties, which are prescribed in the Constitution. Moreover, only 20 to 25 percent of the interviewees could correctly point out that the TCC, before 2022, had no power to review decisions made by ordinary courts.¹⁶

In a perennial survey conducted by scholars in 2016, when asked to identify the main duty of the TCC, more than 40 percent of the respondents answered (wrongly) that the TCC is responsible for either enacting a new constitution or adjudicating on civil and criminal disputes (Lee and Huang 2016).¹⁷ Interestingly, in the same perennial survey conducted in 2022, more than 80 percent of respondents correctly stated that the major work of the TCC is to interpret the Constitution (Lee 2022).¹⁸ These surveys are certainly inconclusive, but they provide some information about the constitutional literacy of Taiwanese people. In general, they indicate that laypeople’s knowledge about the ROC Constitution and the Constitutional Court is mixed.

Because these survey results are of limited accuracy and generalizability, we should not be too quick in lamenting the constitutional illiteracy of the general Taiwanese population. First of all, constitutional literacy is a multifaceted concept that includes but is not limited to legal, political, and civic knowledge (De Visser and Jones, forthcoming). In Taiwan, for example, the concept of constitution might signify not only the codified ROC Constitution but also the political thought of the ROC’s founding father, Sun Yat-sen.¹⁹ The aforementioned surveys focused only on whether the respondents were knowledgeable about Taiwan’s written constitution, not about constitutional principles or related ideas. Given the narrow scope of the surveys’ focus, the survey results may suggest that the Taiwanese people’s level of constitutional literacy is lower than it actually is. Second, there is room for debate as to whether constitutional illiteracy is really all that bad, especially if the “constitution” in the surveys refers only to the ROC Constitution as a text. Although

16. See Judicial Yuan, “Statistics: Perception of Ordinary People on the Judiciary,” <https://www.judicial.gov.tw/tw/lp-1262-1.html>.

17. See Lee and Huang (2016) data file available from the Survey Research Data Archive at https://srda.sinica.edu.tw/datasearch_detail.php?id=970.

18. See Lee and Huang (2016) data file available from the Survey Research Data Archive at https://srda.sinica.edu.tw/datasearch_detail.php?id=970.

19. The very first article of the ROC Constitution sets in stone the foundational ideology of the ROC by stipulating that the ROC is “founded on the Three Principles of the People.” Because the Three Principles of the People was created by Sun Yat-sen, the founding father of the ROC, these principles were once mandatory topics to be taught in high schools’ civic education courses. This form of curricular indoctrination was terminated in 2005.

constitutional law should not be seen as an esoteric and exclusive province of lawyers and judges, it is one thing to be knowledgeable about the exact wording of a constitutional provision and quite another to be well informed about constitutional concepts and court cases. Third, it could even be a good thing to know little about what is explicitly etched in a written constitution if the disjuncture between the constitutional text and constitutional reality is inordinately wide. This is exactly the situation in Taiwan, where the small-c constitution (Chilton and Versteeg 2021) is sometimes more authoritative than the codified Constitution.

II. THE CHASM BETWEEN THE CAPITAL-C CONSTITUTION AND THE SMALL-C CONSTITUTION

To paraphrase Roscoe Pound, there is inevitably a gap between the constitution one finds in books and the constitution one observes in practice (Pound 1910). This gap should come as no surprise because constitutional framers, however wise they are, cannot with certainty accurately forecast the sociopolitical and scientific developments that will arise in the years, decades, and centuries to come. Even clear constitutional texts do not always prevail over the powerful influence of constitutional practices. Using American jurisprudence as an example, David Strauss has demonstrated many scenarios in which constitutional texts have been essentially overridden by later developments in society (Strauss 2015). The ROC Constitution is no exception to this finding. In theory, the ROC Constitution, including its amendments, is the supreme law of Taiwan. In practice, however, some constitutional provisions are supreme only by virtue of their textual presence—that is, only insofar as they accord with long-term political practices. When the accordance ceases to exist, unwritten constitutional norms can supersede constitutional provisions and become the supreme law of the land. Because so much that is constitutional is not laid out in formal constitutional writings, the criteria for ascertaining the constitutional literacy of a person should cover constitutional practices, not just constitutional texts (De Visser and Jones, forthcoming).

A. Inconsistencies between the Capital-C Constitution and the Small-c Constitution

Because the ROC Constitution was enacted for pre-1949 China, many of the text's provisions are ill-fitting for Taiwan, a small island-state whose population is a mere 23 million. Furthermore, both the structure of government and the jurisprudence

surrounding rights in Taiwan have gone through considerable changes since Taiwan's democratization in the 1990s. These changes have fundamentally altered the constitutional landscape in Taiwan, but not all of the changes have been codified in the Constitution as amendments. These uncodified constitutional changes have spawned significant inconsistencies between the constitution in books and the constitution in action.

To begin with, although a 1994 constitutional amendment designates that the president of Taiwan shall be popularly elected,²⁰ the ROC Constitution mentions only in passing the presidential prerogatives on matters concerning, for example, national security and ceremonial powers. By contrast, the Constitution still states that the head of the executive branch belongs to a nonelected member of government: the president of the Executive Yuan (the prime minister in Taiwan).²¹ Moreover, a 1997 constitutional amendment gave the president the power to appoint the prime minister, but the prime minister is institutionally accountable to the Legislative Yuan, which can hold a vote of no-confidence on the prime minister. On paper, therefore, Taiwan has a semi-presidential system under which the president has very limited formal authority and serves primarily as the head of state. In reality, however, the constitutional system in Taiwan should be classified as presidential, given the practical influence of party politics and electoral politics.

The executive branch is essentially led by the president, not the prime minister, who, rather than answer to the legislature, serves at the pleasure of the president. No prime minister has ever challenged the status of a president, notwithstanding the former's formal constitutional mandate, and this political reality is clear within Taiwan. In fact, the president is often criticized for overstepping the bounds set by the Constitution and for lacking accountability to the legislature because, according to the Constitution, it is the prime minister, not the president, who should be responsible to the parliament.²² The Constitutional clause that designates the prime minister as the head of the executive has thus encountered what Richard Albert has termed "constitutional desuetude," which occurs when a constitutional provision

20. Article 2 of the Additional Articles of the ROC Constitution states, "The president and the vice president shall be directly elected by the entire populace of the free area of the Republic of China."

21. Article 53 of the ROC Constitution states, "The Executive Yuan shall be the highest administrative organ of the State." Article 54 further states, "The Executive Yuan shall have a President, a Vice President, a certain number of Ministers and Chairmen of Commissions, and a certain number of Ministers without Portfolio."

22. Article 3(2) of the Additional Articles of the ROC Constitution states, "The Executive Yuan shall be responsible to the Legislative Yuan in accordance with the following provisions."

encounters “conscious nonuse and public repudiation” (Albert 2019), even if it is etched in the written constitution. Constitutional desuetude also explains why an important part of Taiwan’s constitutional politics operates on the basis of an unwritten constitution.

The structure of Taiwan’s judiciary is another example. The ROC Constitution prescribes that the Judicial Yuan, in addition to being the highest organ in the judicial administration, is the highest court and that it thus has final say over constitutional, civil, criminal, and administrative cases. This prescription reflects the original intent of the framers of the constitution, which was to set up a unitary judicial system in which the Judicial Yuan would play the same role as the US Supreme Court. As a result, the government enacted the Judicial Yuan Organization Act on March 31, 1947, three months after having promulgated the ROC Constitution on January 1, 1947. The Act stipulated that the Judicial Yuan was to comprise nine justices,²³ who would have general jurisdiction over all civil, criminal, administrative, and constitutional issues. Unfortunately, the act provoked fervent criticism from the then–Supreme Court of China and, before it became effective, the government revised it and reinstated the Supreme Court on December 25, 1947. Since then, consequently, the Judicial Yuan in practice has had jurisdiction only over constitutional controversies while the Supreme Court and the Supreme Administrative Court have been the final appellate tribunals for civil, criminal, and administrative cases. Rooted in history, conventional wisdom regarding this matter has long held that the constitutional design of the TCC was based on the US model (Ginsburg 2003, 116; Chang 2015, 146; Billias 2011, 310; Liu 1991). In practice, however, the TCC functions like a specialized constitutional court that can hear only constitutional cases.

Attempting to bridge the gap between the written Constitution and constitutional practice in terms of the institutional design of the judiciary, the TCC rendered Interpretation No. 530,²⁴ in which the majority opinion maintained that the Judicial Yuan should be Taiwan’s highest generalist court, exercising jurisdiction over all legal controversies, not only constitutional ones. The majority opinion invoked the framers’ intent and required the government to impose the original design—namely, the American model—within two years. This ruling proved again that the Judicial Yuan had been designed not strictly as a constitutional court but as an apex court similar to the US Supreme Court. Notwithstanding this clear constitutional mandate, the political branches have completely ignored this decision

23. This is yet more evidence that the Judicial Yuan was modeled after the US Supreme Court.

24. Judicial Yuan Interpretation No. 530 (2001).

and are unlikely to implement it in the future. In January 2022, the Constitutional Court Procedure Act took effect. It completely renders the TCC a specialized constitutional court, similar to the German Federal Constitutional Court. Thus, a rather obvious inconsistency exists between constitutional provisions and constitutional practice—an inconsistency that will persist until the provisions are amended to conform to practice, not the other way around.

The gap between the Constitution in books and the constitution in action exists with respect not only to constitutional provisions about the structure of government but also to rights provisions. Consider, for instance, the right of referendum, which is enshrined in Article 17 of the Constitution.²⁵ This article used to serve primarily as window-dressing, because no Taiwanese citizens before 2003 could exercise their right of referendum, regardless of the constitutional guarantee. Only after the enactment of the Referendum Act in 2003, sixteen years after Taiwan’s initial democratization in 1987, could Taiwanese people theoretically exercise this power. Still, even after 2003, the Referendum Act was notorious for limiting the exercise of direct democracy owing to the high thresholds the act prescribed. Some commentators even labeled it a “birdcage referendum act.”²⁶ This obstacle to the right of referendum ceased to exist in 2018, when the legislature substantially lowered the legal barriers that had previously been restricting votes for recalls and referendums. Indeed, the referendum process was quickly weaponized by opposition parties and political outsiders as a means of setting the national agenda and swaying public opinion. For example, opponents of the TCC’s same-sex marriage decision successfully mobilized and passed several proposals in the 2018 referendum, demanding the government not revise the Civil Code.

Territory is yet another aspect of Taiwanese society where a gap exists between the Constitutional text and the constitutional reality. This time, the gap is particularly noticeable: although the main text of the ROC Constitution does not clearly demarcate the boundaries of the ROC,²⁷ Article 11 of the Additional Articles of the Constitution,²⁸ which distinguishes the free area of the ROC from the main-

25. According to Article 17 of the ROC Constitution, “The people shall have the right of election, recall, initiative and referendum.”

26. So-called in the news report by Houng (2007).

27. Article 4 of the ROC Constitution simply stipulates that “the territory of the Republic of China according to its existing national boundaries shall not be altered except by resolution of the National Assembly.”

28. Article 11 of the Additional Articles of the ROC Constitution provides the following: “Rights and obligations between the people of the Chinese mainland area and those of the free area, and the disposition of other related affairs may be specified by law.”

land area of the ROC, requires the legislature to regulate rights and obligations between the two regions. As authorized by this constitutional clause, the legislature passed the Act Governing Relations between the People of the Taiwan Area and the Mainland Area, in which Article 2[2]²⁹ states, “‘Mainland Area’ refers to the territory of the Republic of China outside the Taiwan Area.” These two provisions, taken together, unmistakably convey the idea that the territory of the ROC still includes the vast stretch of territory comprising the People’s Republic of China (PRC). Furthermore, Articles 119 and 120 of the Constitution currently identify Mongolia and Tibet as local self-governing entities,³⁰ as though they were still territory belonging to Taiwan—that is, to the ROC. Needless to say, these provisions are absurd, as well as anachronistic, but they remain in the text of the Constitution.

The constitutional provisions regarding the territory of the ROC actually reflect a much deeper inconsistency between formal Constitutional provisions and informal constitutional practices: the inconsistency of Taiwan’s constitutional identity. What the ROC Constitution is remains unclear. Rather than serve as a common denominator for Taiwanese society, the Constitution focuses on a unified “China,” declaring that the purpose of constitutional revision is to “meet the requisites of the nation prior to national unification.” To what extent this statement, which appears in the Preamble of the Additional Articles, is binding is highly controversial and subject to fierce debate (Hwang 2000). According to some critics, the statement is, at best, a guideline that lacks any legal effect and that therefore is nonbinding; other critics insist that the statement enshrines a kind of One China policy and is a constitutional obligation imposed on every Taiwanese government. Whether binding or not, the statement seems to suggest that some form of unification with China is a goal of Taiwan. In an ironic twist, the Constitution’s explicit reference to a single, united China has been cited by the PRC to enhance its claim over Taiwan.³¹

As for popular opinion, since the early 1990s an overwhelming majority of Taiwanese have regarded themselves as “Taiwanese” rather than “Chinese.” One authoritative perennial survey conducted found that, in June 2022, 63.7 percent of

29. Article 2 of the Act Governing Relations between the People of the Taiwan Area and the Mainland Area provides the following definitions: “1. ‘Taiwan Area’ refers to Taiwan, Penghu, Kinmen, Matsu, and any other area under the effective control of the Government. 2. ‘Mainland Area’ refers to the territory of the Republic of China outside the Taiwan Area.”

30. Article 119 of the ROC Constitution: “The local self-government system of the Mongolian Leagues and Banners shall be prescribed by law.” Article 120 of the ROC Constitution: “The self-government system of Tibet shall be safeguarded.”

31. As reported by Lowther (2016).

Taiwanese respondents identified as Taiwanese, as opposed to a meager 2.4 percent who regarded themselves as Chinese.³² Another 30.4 percent saw themselves as both Taiwanese and Chinese. These statistics reveal a striking shift in views: the percentage of ROC citizens who identify as Taiwanese has dramatically increased from 17.6 percent in 1992 to 63.7 percent in 2022, whereas the percentage of ROC citizens who identify as Chinese has plummeted from 25.5 percent in 1992 to 2.4 percent in 2022.

The ROC Constitution’s anachronistic, out-of-step aspects cast doubt on the assertion that constitutional literacy, when based chiefly on the written word, gives one access to core truths. Indeed, constitutional literacy that is beholden to literal, noncontextualized readings of foundational texts, which may actually damage constitutionalism by promoting serious misconceptions (Lin 2021). Fortunately, constitutional literacy need not be predicated exclusively on written constitutional texts. Instead, it can and should encompass an awareness of history, current events, and firsthand experience, as well as of the abstract—and sometimes absurd—principles recorded in constitutional texts.

B. Constitutional Literacy and Civic Constitutionalism

For two reasons, a codified constitution does not exhaust our understanding of what a constitution is or should be. First, constitutions are often semantically opaque and thus rely heavily on judicial interpretation and political implementation for clarification. It is not unusual for judicial interpretations and governmental practices to be brazenly inconsistent with constitutional wording that has plain meaning. Hence, there are many citable examples of constitutional practices that are incongruent with constitutional texts. This incongruence, which arises from “conscious nonuse and public repudiation” of constitutional provisions (Albert 2019), explains why the provisions may be misleading even if they are core tenets of a constitution. Taiwanese people appear to be more familiar with constitutionalism than the previously cited polls suggest because, as demonstrated in the evidence presented below, Taiwanese people have exhibited the capacity to form considered judgments about constitutional matters and to act on these judgments.

Taiwanese people’s disenchantment with their written Constitution can be traced back to the authoritarian period, which extended roughly from 1949 to 1987. During that time, the ROC Constitution was suspended, single-party rule was the status quo, and government violations of people’s basic rights were commonplace: the presidential term limit was circumvented, imposition of military trials on civilians

32. Survey conducted by the National Chengchi University Election Study Center (2022).

was prevalent, and free speech was seriously curtailed. These experiences convinced many Taiwanese people that a written constitution can be nothing more than a piece of glorified parchment and that they should fight for their fundamental rights themselves. This awareness has given birth to a high degree of civic constitutionalism—public engagement in shaping the constitutional landscape of Taiwan. This national trait has not gone unnoticed in Taiwan. The Taiwanese scholar and political figure Yeh Jiunn-rong, for example, has maintained that civic constitutionalism is a prominent feature of Taiwan’s constitutional development (Yeh 2016, 244–46).

Using grassroots methods, many Taiwanese have contributed significantly to their country’s constitutional milestones. The Wild Lily student movement in 1990 might be the most remarkable milestone. At that time, the Temporary Provisions, a quasi-constitutional law, had been imposed on Taiwan for more than four decades. Owing to the Temporary Provisions, which suspended many constitutional provisions, the presidency had no term limits and congressional elections were suspended. To protest this glaring breach of constitutionality, thousands of Taiwanese students gathered in Taipei in March 1990 and used such nonviolent means as sit-ins to pressure the government to restore the constitutional order. During the protests, then-president Lee Teng-hui met with student representatives and agreed to hold a national-affairs conference. In the end, the student movement successfully sparked the first wave of constitutional reforms that ultimately led to the liberalization of Taiwan’s political system and the development of Taiwan’s civil society: “the former provided the space for the growth of civil society organizations . . . [which] further compelled the state to respond to the demand for democracy and accountability, leading to democratic transformation and consolidation” (Lee et al. 2013, 127). Later constitutional developments conformed to this same pattern of widespread civic engagement.

In 2014, KMT legislators attempted to force the Cross-Strait Service Trade Agreement (CSSTA) to the legislative floor without giving it a clause-by-clause review. Many people feared that the CSSTA would make Taiwan more economically reliant on China and would thus threaten Taiwan’s young yet vibrant democracy. In an event that was later known as the Sunflower Movement, students and NGOs stormed and occupied the legislative complex to protest what they regarded as the legislators’ reckless handling of the CSSTA. During the students’ occupation of the complex, they joined forces with NGO representatives to demand that citizen conferences be held to discuss constitutional reform and the legal foundations of the cross-strait relationship between China and Taiwan. The activists also demanded that the CSSTA be returned to the executive. It should be noted that the students and NGOs inside the congressional hall received considerable support outside the complex: the nearby courtyard and the surrounding streets soon swelled with additional

student protestors and members of civic groups in support of the occupation. Furthermore, professors from across Taiwan voluntarily held free outdoor classes on constitutionalism (Rowen 2015, 9), trying to raise people’s constitutional consciousness. In the end, the Sunflower Movement attracted a half million participants and triggered rallies in forty-five cities around the globe (Ho 2018). Although it did not successfully spur further constitutional reform because of the nearly insurmountable threshold for amending the constitution,³³ the movement proved that Taiwan was home to a vibrant and diligent civil society willing to actively oppose democratic backsliding. Perhaps even more important is that the movement ushered in a wave of social movements and political changes across many issues, ranging from curriculum reform to the establishment of new political parties (Ho 2018, 123–28).

In addition to vocal street protests and sit-ins, Taiwanese have often aired their grievances by submitting constitutional petitions to the TCC in a bid to translate rights advocacy into constitutional law. A germane example of this trend involves the same-sex marriage decision issued by the TCC in 2017. The TCC’s judicial intervention in the marriage-equality issue is the result of Taiwanese citizens’ decades-long mobilization of legal resources (Kong et al. 2021). The early 1990s in Taiwan witnessed the establishment of many LGBT groups, including the Taiwan Alliance to Promote Civil Partnership Rights (TAPCPR). Beginning in 2014, the TAPCPR began to recruit same-sex couples who would challenge the government’s exclusion of same-sex marriage in the courts (Kong et al. 2021). One of these cases was brought by Mr. Chi, a well-known LGBT activist who, years earlier, had petitioned the TCC only to have his petition dismissed in 2000. In 2017, the TCC heard Chi’s case, ruled in his favor, and required Taiwan’s national legislature to legalize same-sex marriage within two years. This LGBT-friendly decision triggered a vehement backlash from conservative Taiwanese voters in a 2018 referendum (Kuan 2021). Still, LGBT groups continued to monitor and pressure the legislature, which eventually passed the Act for Implementation of Judicial Yuan Interpretation No. 748. As a consequence of these events, Taiwan in 2019 became the first Asian country to legalize same-sex marriage.

The same-sex marriage example indicates that civic constitutionalism in Taiwan is different from popular constitutionalism, which rejects judicial supremacy (Kramer

33. Article 12 of the Additional Articles of the Constitution of the Republic of China states, “Amendment of the Constitution shall be initiated upon the proposal of one-fourth of the total members of the Legislative Yuan, passed by at least three-fourths of the members present at a meeting attended by at least three-fourths of the total members of the Legislative Yuan, and sanctioned by electors in the free area of the Republic of China at a referendum . . . , wherein the number of valid votes in favor exceeds one-half of the total number of electors.”

2005; Tushnet 1999). Adherents to popular constitutionalism argue that the power of constitutional interpretation should fall not to judges but to the people, via either elected representatives or referendums. By contrast, in Taiwan, the TCC has the final word regarding what the country's constitutional law is and should be. This reliance on the judiciary is characteristic of Taiwan partly because the principal-agent problem between the voters and their elected representatives is more serious in young democracies than in old ones, and Taiwan has witnessed several occasions when the TCC consolidated the country's nascent democracy by ruling against the political branches.³⁴

Admittedly, we lack a precise sense of the level and the nature of Taiwanese people's constitutional literacy. Still, the aforementioned events in contemporary Taiwan demonstrate that through their discourses and practices, Taiwanese people have forged a unique constitutional culture that has laid the groundwork for shifts in constitutional principles and practices. Without the element of civic engagement, perhaps neither the TCC nor the political branches would have been able to reform the constitution unilaterally. More important is that the events outlined above indicate that many Taiwanese people have acquired a robust understanding of constitutional democracy and have successfully, if incrementally, transformed their country's constitutional law. This civic constitutionalism, in the context of Taiwan, not only mitigates tensions between constitutionalism and democracy (Pettys 2008) but also speaks to the relative absence of "constitutional idolatry"—an issue I now turn to.

III. DOES CONSTITUTIONAL IDOLATRY OCCUR IN TAIWAN?

As mentioned in the preceding section, constitutional literacy could lead to constitutional idolatry for at least three reasons. First, some constitutional preambles contain narratives—such as the greatness of a country, the constitution's genius, or even God's guidance—that promote constitutional idolatry (Jones 2020, 55). Second, constitutional idolatry may arise partly because a constitution has endured for decades or even centuries, such as the case of the Constitution of the United States (Levinson, 1988). Third, people might falsely believe that each and every codified constitutional provision is unconditionally true or is accurately reflective of contemporary mainstream society. Does this form of idolatry occur in Taiwan? The answer depends in part on how wide the gap is between the capital-C Constitution

34. A notable example is the Constitutional Court's Interpretation No. 499, in which the court declared the 1999 constitutional amendments unconstitutional and void. This decision has been highly acclaimed because representatives of the National Assembly were abusing their power to amend the constitution in an effort to prolong their own lucrative terms in office. In this regard, the Constitutional Court acted as perhaps the last bastion capable of deterring this form of political corruption.

and the small-c constitution. *Ceteris paribus*, a written constitution is more likely to be overvalued when the codified provisions function less frequently as the supreme law of a land, because whether a constitution is codified under this circumstance makes little difference. Put another way, constitutional idolatry is more likely to emerge when a constitution becomes a parchment barrier. In Taiwan, although politicians often invoke the Constitution to justify their claims, constitutional idolatry is not prevalent among members of the public for three reasons.

First, civic constitutionalism has become an important part of constitutional development in Taiwan. One feature of civic constitutionalism in Taiwan is that laypeople do not blindly trust what the written constitution prescribes, either in the rights domain or in the separation-of-powers domain. For over four decades, the government regularly and severely deprived the people of their rights even though these rights were enshrined constitutionally. Furthermore, what a constitution stipulates on paper is not necessarily an accurate reflection of constitutional politics. Just imagine how confused the Taiwanese citizenry would feel if they wholeheartedly believed that every provision in their constitution were true and enforced, given the aforementioned mismatch between constitutional provisions and constitutional practice.

A second reason why constitutional idolatry has never taken hold in Taiwan has to do with the supremely undemocratic nature of certain provisions in the ROC Constitution. As we all know, a constitution is usually the outcome of political negotiation and compromise, and it does not necessarily reflect what ordinary people want. Ran Hirschl points out that a constitution could be “the product of a strategic interplay among hegemonic yet threatened political elites, influential economic stakeholders, and judicial leaders” (Hirschl 2004, 72). The ROC Constitution and its amendments are no exception to Hirschl’s general principle. The unification mandate enshrined in the preamble of the constitutional amendments is a good example of this hegemonic interplay. Knowing that they were going to retire by the end of 1991, the old representatives of the National Assembly—many of them having been elected in mainland China in 1947 and having never faced a reelection in Taiwan—grasped at their last chance to etch their political ideology and their nostalgia for the old ROC in the preamble of the constitutional amendments in May 1991. This unification mandate has become a straitjacket in that it has constrained later attempts at earnest constitutional revision. Many critics have advocated the removal of this preamble but in vain, because as noted, the thresholds for amending the constitution are excruciatingly difficult.³⁵

35. Article 12 of the Additional Articles of the Constitution of the Republic of China (2005).

National identity is the third reason why the Taiwanese people tend not to display enchantment with their Constitution. As noted, a broad swath of the island's citizenry believe they are Taiwanese rather than Chinese. And when considering this issue through the prism of local Taiwanese, some commentators even argue that the ROC, which took over Taiwan after the end of World War II, was a foreign regime. These commentators further contend that Taiwan cannot become a normal state under the existing constitutional regime and must declare independence—an act that would entail the framing of a new constitution, one tethered to the idea of Taiwanese sovereignty. This national identity, which is incompatible with the long-espoused KMT view that Taiwan and mainland China are, at least in principle, one, has led many Taiwanese to conclude that the ROC Constitution belongs to the so-called imposed constitutions (Albert et al. 2019). Like many constitutional concepts, the imposed constitutions concept is fiercely contested. However, generally speaking, an imposed constitution is one created by a dominant external actor. For example, following a war, victorious countries might draft a constitution and impose it on a vanquished country. Alternatively, an occupying country might impose a constitution on an occupied country (Elkins et al. 2008).

In Taiwan's context, there are three angles from which one could argue that the ROC Constitution is an imposed constitution. First, because native Taiwanese did not meaningfully participate in the constitution-making process, the Constitution can be seen as an imposed one. According to this view, the eighteen Taiwanese representatives who did participate in the process constituted, at best, a token number not befitting of a constitution regulating only Taiwanese society. In fact, not one of their proposals in the Constituent Assembly was adopted. The ROC Constitution could be seen as an imposed constitution in another sense, for “[e]ven if the ROC Constitution was not *initially* imposed on Taiwan by the Kuomintang government, one might argue that it is *currently* imposed on Taiwan by an overbearing neighbor [China]” (Law 2019, 41). In other words, the PRC's threat that it will invade Taiwan if the “renegade province” declares independence has essentially forced the Taiwanese people to refrain from calling for a properly Taiwanese constitution in place of the current—and imposed—ROC Constitution. Finally, as some scholars have suggested, a constitution that prevents efforts to amend or replace it reflects another form of imposition (Contiades and Fotiadou 2019, 31–32), and amending the ROC Constitution is extraordinarily difficult, particularly in relation to other unitary states (Lorenz 2005, 339–61; Schneier 2006, 222–25; Lutz 2009, 170–82; Lijphart 2012, 206–11). One recent example is the failed attempt to amend the ROC Constitution in November 2022. Specifically, all major political parties agreed to lower the voting age to 18 by rewriting Article 130 of the Constitution,

which provides that any citizen who has attained the age of 20 shall have the right of election.³⁶ In March 2022, the legislature approved the voting-age proposal with a 109–0 vote. Despite the overwhelming bipartisan support, the proposal failed to garner enough votes in the 2022 constitutional referendum because the constitutionally mandated threshold for passing an amendment to the constitution was simply too high: to be effective, any constitutional amendment proposal must pass the Legislative Yuan by a three-fourths vote with a quorum of three-fourths of legislators and then be ratified in a constitutional referendum by an absolute majority of the eligible voters. Consequently, Taiwan remains one of the very few democracies where the voting age is above 18.

For these reasons, constitutional idolatry by and large does not exist in the general Taiwanese population. This is not to say that Taiwanese people do not obey the Constitution. Nor does it suggest that the Constitution is a sham. In the domain of rights, constitutional judges have relied on the Constitution as the textual peg on which to hang their progressive judgments. Also, civil society and NGOs have invoked the Constitution’s bill of rights as leverage for social and political change. As for the separation of powers, the codified structure of Taiwan’s government, despite all its shortcomings, has coordinated the flow of governmental power and the interactions of checks and balances rather effectively. Even though the Constitution was written essentially for another country (“China”) and still contains highly unrealistic provisions, the longevity of Taiwan’s Constitution appears to be attributable partly to the strengths of the document itself.

Interestingly, constitutional idolatry was rampant in Taiwan not so long ago. During the authoritarian period, supporters of the KMT regime treated the ROC Constitution as the basis for *fatung*, a concept in Chinese political culture referring to “legally authentic succession within a regime” (Yeh 1997, 24–26). The authoritarian KMT government used this concept to claim that it was the only legitimate government of China even after the Chinese Civil War, in which the military forces of the Chinese Communist Party soundly defeated those of the KMT government. Given that the KMT government—relegated to the island of Taiwan—had lost 99 percent of its former territory, the written constitution became a sacrosanct and untouchable symbol of the unrealistic contention that the ROC was the rightful inheritor of power over China: the justification for this contention was the equally problematic contention that all Chinese people had democratically enacted

36. Article 130 of the Constitution of the Republic of China (1947) states, “Any citizen of the Republic of China who has attained the age of 20 years shall have the right of election in accordance with law.”

the Constitution (Lin 2016, 372–73). Therefore, when President Chiang Kai-shek wanted to serve his third term, he was reluctant to rewrite the Constitution. Instead, he chose to promulgate the Temporary Provisions to circumvent the two-term limit enshrined in the document.³⁷ This desire to keep the written ROC Constitution intact at any cost was a historical form of constitutional idolatry in Taiwan.

Even since the country's democratization, a few politicians have remained obsessed with preserving constitutional provisions that are highly impractical and anachronistic. As mentioned, former president Ma invoked the ROC Constitution and contended that there is only one China in the world and that the territory of the ROC comprises both Taiwan (the so-called free area in the constitution) and China (the mainland area). From a constitutional perspective, Ma may very well be technically right, but no one can realistically and seriously maintain that the ROC's territory includes the vast territory governed by the PRC. Invoking as true such an unrealistic constitutional provision is yet another form of constitutional idolatry, one that is rooted in historical legacies dating back to the Chinese Civil War and before.

The history of Taiwan's constitutional idolatry before and after democratization actually indicates that the phenomenon correlates with political ideology in Taiwan. The more one is pro-unification with China, the more one is likely to invoke the written constitutional provisions that are both undemocratic and unrealistic. This is understandable because the written constitution is the last resort for certain political stakeholders who are seeking to undergird their political agenda in a compelling manner when the agenda runs counter to mainstream public opinion, which has consistently rejected unification.

IV. CONCLUSION

This paper suggests that constitutional idolatry played an important role in bolstering the post-Civil War autocracy in Taiwan. By worshipping word-for-word the written ROC Constitution and by making it an untouchable source of foundational truths, Taiwan's authoritarian leaders self-deceptively justified their claim that the government in Taiwan was the only legitimate Chinese government in the world. Fortunately, this constitutional idolatry, though still present in some quarters, has been largely demystified since Taiwan's democratization. Three reasons explain this development: civic constitutionalism, undemocratic constitutional law, and national identity. In the context of Taiwan, it could be argued that constitutional idolatry is interwoven with the issue of national identity: the more one is inclined

37. Article 47 of the ROC Constitution states, "They may be re-elected for a second term."

to unify with China, the more vulnerable one is to the seductive comforts of constitutional idolatry.

The relationship between the ROC Constitution and Taiwan is noticeably unique, as few constitutions survive when their track record includes regulating a state that lost 99 percent of its territory in a civil war and that then effectively suspended the constitution during a four-decade period of martial law. Eventually, the ROC Constitution blossomed, not in its birthplace (mainland China), but on an island that at the time of the drafting of the Constitution was under Japanese colonial rule. Partly because of this historical arrangement of powers and trends, the case of Taiwan challenges the conventional wisdom that constitutional literacy contributes to the stability of constitutional democracy. In Taiwan, the opposite may be closer to the truth: constitutional literacy may threaten Taiwan's constitutional democracy, especially if the literacy involves an ahistorical, decontextualized reading of the Constitution as a sacred collection of textual provisions—that is, if we strictly adhere to the constitutional wording that requires unification with the PRC. Thus, this paper proposes one simple idea: constitutional literacy need not be based on written constitutional provisions, especially when there is a gaping chasm between the constitution in books and the constitution in action. A broader focus on the small-c constitution not only roots our constitutional knowledge in concrete realities but also prevents us from succumbing to constitutional idolatry.

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