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## CONSTITUTIONAL FIG LEAVES IN ASIA

Po Jen Yap<sup>†</sup>

*Abstract:* Constitutional landscapes in Asia are littered with fig leaves. These proverbial fig leaves are legal principles, doctrines, and theories of interpretation that judges appeal to when resolving constitutional disputes. This article uncovers and examines three constitutional fig leaves that are prevalent and flourishing in Asia: 1) formalism and its conceptual variants; 2) the exercise of judicial review that is merely symbolic; and 3) the invocation of vacuous constitutional doctrines. This article further argues that judicial recourse to fig leaves is not intended to deceive anyone about what courts are doing; the fig leaves are on public display merely to demonstrate that judges accept the role they are expected to play within their political systems. For better or worse, it would appear that Asian judges believe that these fig leaves are necessary to legitimize their actions, and, insofar as Asian judges are doing very little, these legal loin-cloths are vital to preserve judges' modesties.

### I. INTRODUCTION

Constitutional landscapes in Asia are littered with fig leaves. The proverbial fig leaves referred to herein are the legal principles, doctrines, and theories of interpretation that judges appeal to when they resolve constitutional disputes. But in the post-legal-realism world that we live in today, we have all come to accept that many of the legal techniques judges purport to apply are merely rhetorical devices by which they seek to cover their true motivations. This is so in the West and, as this article explores, it is also true in Asia.<sup>1</sup>

Asian judges, like many of their Western counterparts, would have us believe that adjudication is merely a mechanical affair that involves applying the law to the facts of a specific case. In so doing, judges seek to offer us hope that the law can truly be separated from politics, and judges merely follow pre-determined rules and exercise little discretion when making decisions.<sup>2</sup> This is true of the (more) liberal or active courts that exist in Hong Kong, India, and Taiwan, and it is equally applicable to the conservative or passive courts in Malaysia and Singapore.

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<sup>1</sup> See generally NEIL DUXBURY, PATTERNS OF AMERICAN JURISPRUDENCE (1995); Martin Stone, *Formalism*, in THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW 166 (Jules Coleman & Scott Shapiro eds., 2002); Christopher Forsyth, *Of Fig Leaves and Fairy Tales: The Ultra Vires Doctrine, the Sovereignty of Parliament and Judicial Review*, 55 CAMBRIDGE L.J. 122 (1996).

<sup>2</sup> See Erwin Chemerinsky, *Getting Beyond Formalism in Constitutional Law: Constitutional Theory Matters*, 54 OKLA. L. REV. 1, 1 (2001).

For the liberal courts in Asia, their reform-minded judges understandably need legal fictions to protect themselves from the maelstrom of politics when they hand down constitutional decisions that may incur the government's displeasure and/or public outrage. Insofar as these judges can point to the Constitution, they can (hopefully) deflect any accusations that they have intentionally interfered with the legislative prerogatives of the political branches of government.

But conservative courts in Asia need their legal fictions too. The political reality is that in both Singapore and Malaysia, the State has been governed by the same ruling party or coalition since each nation's independence and will be so governed for the foreseeable future.<sup>3</sup> More significantly, both countries have experienced judicial crises, which have cast a pall over the state of constitutional review. In Malaysia, two Supreme Court judges, one of whom was the Lord President, were impeached and removed based on trumped-up charges in 1988.<sup>4</sup> In Singapore, the judiciary was equally shaken after Parliament passed a series of constitutional and statutory amendments—which ousted the judicial review of executive decisions taken under the Internal Security Act—within a month of the Court of Appeal's ruling. In that decision, the judges held that they would henceforth objectively review the President's exercise of his discretion to detain persons under the impugned Act.<sup>5</sup> Where legislative and executive power is consolidated by a *semi-permanent* party or coalition, the dominant political entity in question can display its displeasure more easily, either by eliminating judicial review or even ousting the judges themselves.<sup>6</sup> Judges operating in such political systems are not oblivious to this fact. Due to

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<sup>3</sup> The same political coalition, the Alliance Party, has ruled Malaysia since independence. The Alliance Party was renamed Barisan Nasional (National Front) in 1974. The People's Action Party has been the ruling party in Singapore since its independence and the party has controlled over 90% of the elected seats in Parliament since 1968.

<sup>4</sup> The Malaysian judicial crisis of 1988 was sparked by a letter that Tun Salleh, the Lord President of the Supreme Court of Malaysia (now re-titled Chief Justice of the Federal Court of Malaysia), wrote to the King on March 26, 1988 about the judiciary's concern over its deteriorating relationship with the government. (Back in 1987, Malaysian Prime Minister Mahathir Mohammad had expressed his displeasure, on several occasions, over various decisions of the Malaysian courts.) Unfortunately, the King was offended by the letter as he believed the royalty would be drawn into a conflict with the government if he intervened on the judiciary's behalf. On May 1, 1988, in an audience with the Prime Minister, the King conveyed his displeasure with the letter and asked for appropriate action to be taken against the Lord President. As a result, the Lord President and another Supreme Court judge were eventually impeached and removed. For a fuller discussion, see Andrew Harding, *The 1988 Constitutional Crisis in Malaysia*, 39 INT'L & COMP. L.Q. 57 (1990).

<sup>5</sup> *Chng Suan Tze v. Minister of Home Affairs* [1988] 2 SLR 132.

<sup>6</sup> See TOM GINSBURG, JUDICIAL REVIEW IN NEW DEMOCRACIES: CONSTITUTIONAL COURTS IN ASIAN CASES 82–83 (2003).

external political constraints, judges likely feel compelled to rule in favor of their government or at most rule against the government in modest ways. But these judges, concerned about their own legitimacy in the public eye, would also feel the need to convince the people that they are able to discharge their judicial duties without fear or favor, even if they can realistically achieve very little. Therefore, fig leaves are used by passive judges to justify to the public that a pro-government result was inevitable as it was merely mandated by the law, rather than the result of any judicial capitulation to legislative and executive power.

This article uncovers and examines three constitutional fig leaves that are prevalent and flourishing in Asia: 1) formalism and its conceptual variants; 2) the exercise of judicial review that is merely symbolic; and 3) the invocation of vacuous constitutional doctrines. One must note at the outset that the fig leaves identified in this article are not consistently applied in the jurisdictions surveyed, as judges in different countries rely on varying types of fig leaves. For example, symbolic review is only applied by passive judges in Malaysia and Singapore, while relatively liberal courts in India and Taiwan do *not* appeal to formalism and its conceptual variants during constitutional adjudication.

Recent literature on constitutional law has generally explored the political climates within Asian jurisdictions that account for the strategic behavior of their judges, but there has been no scholarly attempt to examine the doctrinal devices or fig leaves (as termed in this article) that Asian judges apply during constitutional adjudication.<sup>7</sup> In short, the current literature explains *why* Asian judges behave strategically, but not *how* they do so at a retail level in individual constitutional cases.<sup>8</sup> At the outset, one should note that this article does not seek to make any Westphalian assumptions about judicial review. Rather, the article's central thesis is premised on the common, accepted argument that in our globalized world today, insofar as Asia has differed in its approach to human rights, this

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<sup>7</sup> See generally *id.*; Jiunn-Rong Yeh & Wen-Chen Chang, *The Emergence of East Asian Constitutionalism: Features in Comparison*, 59 AM. J. COMP. L. 805 (2011); Thio Li-ann, *Between Apology and Apogee, Autochthony: The 'Rule of Law' Beyond the Rules of Law in Singapore*, 2012 SING. J.L. STUD. 269; Wen-Chen Chang, *Strategic Judicial Responses in Politically Charged Cases: East Asian Experiences*, 8 INT'L J. CONST. L. 885 (2010); Eric Ip, *The Evolution of Constitutional Adjudication in the Chinese Special Administrative Regions: Theory and Evidence*, 61 AM. J. COMP. L. 799 (2013).

<sup>8</sup> I have chosen to examine Asian jurisdictions that best illustrate my central arguments.

distinction is “maintained not by ‘natural’ culture but by a will to differ.”<sup>9</sup> This applies to both lawmakers and judges. Therefore, there is nothing inherently Asian about the choices that the judges have made; the repertoire of fig leaves Asian courts appeal to is merely used to disguise the normative choices made by their judges to override or succumb to domestic politics. Finally, this article concludes by arguing that judicial recourse to these constitutional fig leaves seeks not to deceive anyone about what the courts are doing. The fig leaves are on public display merely to demonstrate that judges accept the role they are expected to play within their political systems. For better or worse, it would appear that some Asian judges believe these fig leaves are necessary to lend legitimacy to their actions. Insofar as judges are doing very little, these legal loin-cloths are vital to preserve their modesties.

## II. UNCOVERING THE FIG LEAVES

### A. *Formalism*

Formalism refers to a belief that judges are able to deduce “objective and apolitical legal answers from abstract legal rules, principles or categories, without recourse to policy considerations.”<sup>10</sup> There are three variants of formalism exemplified in Asian case law, and this article explores them in turn.

#### i. *Principles/Policy Dichotomy*

The first variant of formalism is the distinction judges draw between legal principles (rights) and policy. The genesis of this dichotomy can be traced to Professor Dworkin’s argument that a policy is a “standard that sets out a goal to be reached, generally an improvement in some economic, political, or social feature of the community,”<sup>11</sup> whereas a principle is a “standard that is to be observed . . . because it is a requirement of justice or fairness[.]”<sup>12</sup> The implication of this distinction is that the vindication of legal principles falls within the province of the courts, while policy is a matter exclusively for the legislature to decide. In the same vein, Professor

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<sup>9</sup> Simon Tay, *Human Rights, Culture, and the Singapore Example*, 41 MCGILL L.J. 743, 748 (1996). See also Michael Davis, *Constitutionalism and Political Culture: The Debate over Human Rights and Asian Values*, 11 HARV. HUM. RTS. J. 109 (1998).

<sup>10</sup> Jeff King, *Institutional Approaches to Judicial Restraint*, 28 OXFORD J.L.S. 409, 414 (2008).

<sup>11</sup> RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 22 (1977).

<sup>12</sup> *Id.*

Jeffrey Jowell has been explicit about the distinct spheres of influence the two branches of government occupy:

[L]egislative authority inevitably contains a wide area of discretion to make social and economic policy, over which the courts have no dominium. It is not for the judges to second-guess the legislature on utilitarian considerations of the social good. Their role is strictly confined to the limited issue of whether the various inherent elements of democracy have been infringed by other branches of government and therefore cannot be sustained.<sup>13</sup>

This principle/policy dichotomy was expressly endorsed by the Singapore Court of Appeal in *Jeyeretnam Kenneth Andrew v AG*.<sup>14</sup> In this case, a private individual sought to bring judicial review proceedings against the Singapore Government, alleging that its contingent financial loan to the International Monetary Fund violated Article 144(1) of the Singapore Constitution.<sup>15</sup> The Court ultimately rejected the applicant's claim on the basis that he had no *locus standi* to bring a suit in the first place as he, a mere private individual, was "unable to assert any rights—private or public—to the alleged breach of duty, . . . his claim is brought in the public interest."<sup>16</sup>

More relevant here, the Singapore Court of Appeal explained that:

Suffice it to say that we see much value in maintaining the Dworkinian policy/principle divide here; this finds expression in the courts being concerned only with the individual's rights and interests, and not matters of public policy, which rightfully remains in the remit of proper political process.<sup>17</sup>

In the same vein, when the Malaysian Court of Appeal in *Mat Shuhaimi bin Shafiei v Pendakwa Raya* recently upheld the constitutionality

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<sup>13</sup> Jeffrey Jowell, *Parliamentary Sovereignty Under the New Constitutional Hypothesis*, PUB. L. 562, 578–79 (2006).

<sup>14</sup> *Jeyeretnam Kenneth Andrew v A.G.* [2014] 1 SLR 345.

<sup>15</sup> Constitution of the Republic of Singapore (1999 Reprint) Art 144(1). ("No guarantee or loan shall be given or raised by the Government: (a) except under the authority of any resolution of Parliament with which the President concurs; (b) under the authority of any law to which this paragraph applies unless the President concurs with the giving or raising of such guarantee or loan; or (c) except under the authority of any other written law.").

<sup>16</sup> *Jeyeretnam Kenneth Andrew*, 1 SLR 345 at [51].

<sup>17</sup> *Id.* at [56].

of the Sedition Act, which imposes criminal liability on the sale and distribution of seditious publications, the judges were adamant that the draconian nature of the law was not suited for judicial resolution.<sup>18</sup> As observed by Justice Abdul Malik Bin Ishak for the unanimous Court: “The question whether the impugned Act is ‘harsh and unjust’ is a question of policy to be debated and decided by Parliament, and therefore not meet for judicial determination. To sustain it would cut very deeply into the very being of Parliament.”<sup>19</sup>

Lest one think that this judicial appeal to the principle/policy divide is a rhetorical device applied only by conservative judges, liberal judges in Asia have equally intervened and overturned social policies in the name of vindicating rights. For example, in the landmark Hong Kong constitutional decision of *W v. Registrar of Marriages*, the Hong Kong Court of Final Appeal (C.F.A.), by a four-to-one majority, held that the pre-existing statutory prohibition against post-operative transsexuals from marrying in their acquired gender violated their constitutional right to marry.<sup>20</sup> In contrast, the dissenting judge, Chan P.J., viewed the recognition of a post-operative transsexual’s acquired gender for the purpose of marriage as involving a change in social policy, and, in his opinion, such changes should be left to the legislature. As observed by Chan P.J.:

The role of the court is to give effect to a change in an existing social policy, not to introduce any new social policy. The former is a judicial process but the latter is a matter for the democratic process. Social policy issues should not be decided by the court.<sup>21</sup>

The judicial bifurcation of principles/rights from policy, as examined above, rests on a questionable but common assumption that courts merely interpret legal principles or rights, while legislatures are supreme in their exercise of policy, in particular over social policy. However, this distinction between “principles,” or “rights,” and “policy” is untenable. Every allegedly rights-infringing legislation stems from a social policy that lawmakers sought to pursue. When the Malaysian legislature criminalizes the sale of

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<sup>18</sup> According to Section 3(1)(a) of the Sedition Act, a publication would have a seditious tendency if it would “bring into hatred or contempt or to excite disaffection against any Government.” Sedition Act (Cap 290, 2013 Rev Ed) s 3(1)(a).

<sup>19</sup> *Mat Shuhaimi bin Shafiei v. Pendakwa Raya* [2013] M.L.J. 1342, 114.

<sup>20</sup> *W v. Registrar of Marriages*, [2013] 3 H.K.L.R.D. 90.

<sup>21</sup> *Id.* at 192.



“seditious” publications, it may be pursuing a certain social policy on public order while concurrently carving away citizens’ right to free expression. Similarly, when the CFA vindicates the constitutional right of post-operative transsexuals to marry, the CFA has equally (and rightly) displaced the government’s social policy on marriage. Thus, there is no self-evident way by which one can delineate the domain of “rights” from “policy,” such that courts should be stewards only of the former and not the latter.<sup>22</sup> Insofar as judges appeal to this distinction, they are merely seeking refuge behind a legal fig leaf. This convenient dichotomy allows Asian courts to justify their activism when invalidating primary legislation, and/or their passivity in allowing controversial statutes to stand, by asserting they have no choice in the resolution of the matter at all, that is, that the judicial role mandates the substantive outcome.

ii. *Originalism*

Originalism, as a constitutional theory, presents itself as a resolution to the tension between constitutionalism and democracy. Insofar as courts only implement the original understanding of the constitution, judges adjudicate in a democratically legitimate way, as they are merely enforcing the original meaning of the constitutional text that was duly enacted by the people via their representatives.<sup>23</sup> It is thus believed that originalism, as a mode of constitutional interpretation, may best promote predictability and also prevent illegitimate constitutional change under the guise of judicial interpretation.<sup>24</sup>

This brand of originalism has been termed “hard originalism,” and is largely defended by judges and scholars who seek to transform constitutional law into a system of rules, such that judicial review becomes more democratic by virtue of its connection to past judgments of the constitutional framers.<sup>25</sup> Consequently, judicial discretion is also fettered and legal predictability enhanced by this judicial reliance on historical rulings.<sup>26</sup> Originalists often caution that if judges are allowed to stray from

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<sup>22</sup> Po Jen Yap, *Defending Dialogue*, PUB. L. 527, 539 (2012).

<sup>23</sup> Aileen Kavanagh, *Original Intention, Enacted Text, and Constitutional Interpretation*, 47 AM. J. JURIS. 255, 261 (2002).

<sup>24</sup> See generally ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 143–160 (1990); Antonin Scalia, *Common Law Courts in a Civil Law System: The Role of the United States Federal Courts in Interpreting the Constitution and Laws*, in *A MATTER OF INTERPRETATION* 17 (Amy Gutmann ed., 1998).

<sup>25</sup> CASS SUNSTEIN, *LEGAL REASONING AND POLITICAL CONFLICT* 173 (1996).

<sup>26</sup> See generally BORK, *supra* note 24; Scalia, *supra* note 24.



the original understanding of the Constitution, they will be given free rein to amend the Constitution, and therefore judges (non-elected officials) would be imposing norms that the people have not accepted through their democratically elected representatives.<sup>27</sup>

An originalist understanding of the Singapore Constitution was explicitly endorsed by the Singapore Court of Appeal in *Yong Vui Kong v. Public Prosecutor*.<sup>28</sup> In that case, the accused was sentenced to death by the trial judge under the Misuse of Drugs Act for trafficking 47.27 grams of diamorphine, a controlled drug. On appeal, the accused argued that the mandatory nature of the death penalty (MDP) imposed by the impugned statute was not “in accordance with law” as required under Article 9(1) of the Singapore Constitution, as the expression “law” enshrined under Article 9(1) excluded inhuman forms of punishment.<sup>29</sup> Accordingly, he argued he could not be validly deprived of his life under the statute.

Specifically, counsel for the accused asked the Court to follow a series of Privy Council decisions from the Caribbean States where the Law Lords of the United Kingdom had overturned the MDP imposed by the respective State laws.<sup>30</sup> Nevertheless, the Court of Appeal flatly rejected these cases’ applicability. According to the Chief Justice for the unanimous court, Singapore’s due process clause was based on its equivalent in the 1963 Malaysian Federal Constitution, which was likewise based on the 1957 Malayan Constitution drafted pursuant to the advice of the Federation of Malayan Constitutional Commission chaired by Lord Reid (the Reid Commission).<sup>31</sup> Unlike those foreign decisions, which involved constitutions that expressly prohibited inhuman punishments, the Chief Justice opined that the Singapore Constitution did not expressly include such a prohibition. In his view, the fact that the Reid Commission did not recommend an express prohibition against inhuman punishment, even though such a provision existed in the European Convention on Human Rights—an instrument that applied in all the British colonies (including Singapore and Malaysia) prior to their independence—clearly illustrated that

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<sup>27</sup> See generally Antonin Scalia, *Commentary*, 40 ST. LOUIS U. L.J. 1119 (1996).

<sup>28</sup> *Yong Vui Kong v. Public Prosecutor* [2010] SING. C.A. 20.

<sup>29</sup> Constitution of the Republic of Singapore (1999 Reprint) Art 9(1) (“No person shall be deprived of his life or personal liberty save in accordance with law.”).

<sup>30</sup> See generally *Reyes v. The Queen*, [2002] 2 App. Cas. 235; *Fox v. The Queen*, [2002] 2 App. Cas. 284; *R v. Hughes*, [2002] 1 App. Cas. 259.

<sup>31</sup> Singapore became a constituent state of Malaysia in 1963 and gained full independence as a sovereign republic in 1965.

the omission was deliberate and was not due to ignorance or oversight.<sup>32</sup> Furthermore, the Chief Justice noted that in 1969 the Singapore Government had unambiguously rejected a proposal by Singapore's Constitutional Commission to initiate a constitutional amendment that would have expressly prohibited the state imposition of inhuman punishment.<sup>33</sup> Therefore, according to the Court of Appeal, it was "not legitimate for this court to read into Art[icle] 9(1) a constitutional right which was decisively rejected by the Government in 1969, especially given the historical context in which that right was rejected."<sup>34</sup> Ergo, the Court of Appeal espoused an originalist understanding of the Singapore Constitution and would in turn only invalidate "legislation of so absurd or arbitrary a nature that it could not possibly have been contemplated by [Singapore's] constitutional framers as being 'law' when they crafted the constitutional provisions protecting fundamental liberties."<sup>35</sup>

However, the espousal of "hard originalism" as the preferred theory of constitutional adjudication in Singapore by the Court of Appeal in *Yong Vui Kong* is not unproblematic. First, the text of Singapore's Fundamental Liberties Clauses, which include the due process clause, was not deliberated upon by a Constituent Assembly of the independent state in question. Instead, upon gaining independence from Malaysia in 1965, the Singapore legislature simply made most Fundamental Liberties provisions found in the Malaysia Federal Constitution applicable to Singapore via the Republic of Singapore Independence Act.<sup>36</sup> Certainly, the fact that the legislature of a newly sovereign republic consciously adopted those provisions conferred upon these Singaporean liberties a legal life of their own. Mere enactment of the law alone, however, does not provide a clue as to the original meaning the framers of the Singapore Constitution attached to those provisions they adopted. Furthermore, since the Singapore constitutional framers did not deliberate upon the phraseology of the Fundamental Liberties Clauses, but merely imported them as a matter of expedience from Malaysia, one does

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<sup>32</sup> *Yong Vui Kong*, SING. C.A. 20 at [62].

<sup>33</sup> The Singapore Constitutional Commission was tasked by the Singapore government in 1966 with making recommendations on constitutional changes that might be necessary to protect the rights of minorities in Singapore.

<sup>34</sup> *Yong Vui Kong*, SING. C.A. 20 at [72].

<sup>35</sup> *Id.* at [16].

<sup>36</sup> For example, the Singapore Parliament deliberately omitted to include Article 13 of the Federal Constitution, which guarantees the right to property and provides for adequate compensation for depreciation of this right. See generally KEVIN TAN & MIN-YEO THIO, CONSTITUTIONAL LAW IN MALAYSIA AND SINGAPORE 74 (2010); Kevin YL Tan, *State and Institution Building Through the Singapore Constitution 1965–2005*, in EVOLUTION OF A REVOLUTION: FORTY YEARS OF THE SINGAPORE CONSTITUTION 54 (Li-ann Thio & Kevin Tan eds., 2010).

wonder whether it is even possible to discern the original meaning they attached to those adopted provisions. At best, one can try to discern the original intent of the framers (and the members of the Reid Constitutional Commission) when the Malaysian Constitution was drafted and adopted, but it would be a very curious state of affairs for Singaporean judges in modern independent Singapore to give effect to and be fettered by the original intent of another nation state's constitutional framers.<sup>37</sup>

Second, the Court of Appeal's originalist mode of interpretation in *Yong Vui Kong* is also problematic. The Chief Justice was unwilling to accept that Article 9(1) could be interpreted to include an implied general prohibition against inhuman punishment, as the Singapore Government had unambiguously rejected a proposal by a Constitutional Commission to amend the Constitution and provide for such an express right in 1969. However, the Fundamental Liberties Clauses of the Singapore Constitution came into effect in 1965, the same year Singapore gained independence. Hence, it is unclear, even based on an originalist understanding of the Singapore Constitution, whether it was legitimate for the Court to discern the original intent of the constitutional framers in 1965—when they imported the applicable Fundamental Liberties Clauses from Malaysia—from a Parliamentary decision made four years later to reject a proposal that would have provided for an express prohibition against inhuman punishment.

Third, even if one assumes that the intent of the constitutional framers in 1969 in rejecting a constitutional prohibition against inhuman punishment mirrored a similar intent among the framers in 1965, this would mean that whatever recommendations the Constitutional Commission made in 1966, but were not taken up subsequently by the Government in 1969, should also not be judicially deemed constitutional rights. In particular, the Singapore Government in 1969 also refused to enact a proposed constitutional amendment that would have expressly prohibited the use of torture in Singapore. Fortunately for Singapore, however, the Court of Appeal proved unwilling to take its own argument to its logical conclusion. As observed by the Chief Justice, “this conclusion does not mean that, because the proposed [constitutional amendment] included a prohibition against torture, an Act of Parliament that permits torture can form part of ‘law’ for the purposes of

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<sup>37</sup> For a fuller discussion of this case, see Po Jen Yap, *Constitutionalising Capital Crimes: Judicial Virtue or Originalism Sin?*, SING. J.L. STUD. 281 (2011).

Art[icle] 9(1).”<sup>38</sup> Whilst one should certainly applaud this judicial concession, this pronouncement is very puzzling. As a matter of logic, if the Chief Justice was reluctant to expand, via an interpretive exercise, the scope of Article 9(1) to include a constitutional prohibition against inhuman punishment because Parliament had deliberately refused to confer this constitutional provision expressly, surely this reasoning must also bar any elevation of a prohibition against torture to a constitutional right. After all, this proposal was deliberately rejected by the Government in 1969. The Court of Appeal interestingly justified this distinction on the basis that the Singapore Minister of Home Affairs in 1987 had explicitly recognized that torture was wrong<sup>39</sup> and that torture, insofar as it caused harm to another’s body with criminal intent, had already been criminalized under the Singapore Penal Code.<sup>40</sup> With respect, the logic of this argument eludes me. One must wonder how a mere statement from the Home Minister during Parliamentary Debates in 1987 would license the Court of Appeal, in an originalist understanding of the Singapore Constitution, to elevate a prohibition against torture into a constitutional right. Additionally, the fact that bodily assault is a crime in Singapore would surely not have any bearing on this matter. Perhaps the Chief Justice was a “faint-hearted originalist” and Singapore’s constitutional jurisprudence will be better for it.<sup>41</sup> Unfortunately, the Court of Appeal, whilst recognizing that Article 9(1) prohibits torture, went on to state unequivocally that “currently, no domestic legislation permits torture,” thereby insulating all current official state practices from challenges on this ground, and in particular judicial caning, a commonplace punishment for vandalism and rape in Singapore.<sup>42</sup>

Judicial reliance on originalism persisted in *Lim Meng Suang v. Attorney General*, where the Singapore Court of Appeal upheld a constitutional challenge brought against Section 377A of the Penal Code, which criminalizes any act of gross indecency between men, even where the conduct is consensual and performed in the privacy of one’s home.<sup>43</sup> The plaintiffs were two gay partners who argued that the impugned provision violated their right to equality, as protected under Article 12 of the

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<sup>38</sup> *Yong Vui Kong*, SING. C.A. 20 at [75].

<sup>39</sup> *Singapore Parliamentary Debates, Official Report* (29 July 1987) vol. 49 at cols 1491–92 (Prof. S. Jayakumar, Minister for Home Affairs).

<sup>40</sup> *Yong Vui Kong*, SING. C.A. 20 at [75].

<sup>41</sup> Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 864 (1988–1989).

<sup>42</sup> *Yong Vui Kong*, SING. C.A. 20 at [75].

<sup>43</sup> *Lim Meng Suang v. Attorney General* [2014] SING. C.A. at [53]. Same-sex intercourse between women was legislatively omitted.

Singapore Constitution.<sup>44</sup> According to the Court of Appeal, the applicants' constitutional right to equality was not violated. In particular, the Court held that, during constitutional adjudication, "the duty of a court is to interpret statutes enacted by the legislature; it cannot amend or modify statutes."<sup>45</sup> Since the legislative objective of Section 377A when it was introduced into colonial Singapore by the British in 1938 was to criminalize grossly indecent acts between men, even in private,<sup>46</sup> there was a rational relation between the legislative differentia embodied in Section 377A and the object of the law.<sup>47</sup> Arguably, the Court was appealing to an originalist understanding of the equal protection clause in Singapore's Constitution. Given that Singapore's equal protection clause would not have been originally understood in 1965—when the Constitution entered into force—to prohibit the criminalization of same-sex intercourse between men, the court could not give this constitutional clause an "updated" reading, and declare this law a breach of equal protection in 2013.

However, even if a state practice, such as the criminalization of sodomy or the use of capital punishment, was generally accepted at the time the constitutional provisions were adopted, this does not establish that the framers intended to constitutionalize that statutory practice for subsequent generations to obey. It is equally possible that the framers had given little thought to that issue, or were divided on the issue and preferred to let future generations decide the matter for themselves. This interpretation is also more consistent with a textual reading of the constitutional provisions. The Singapore framers, like framers of other national constitutions, have used both specific and broad provisions within the constitutional text, thus indicating that separate clauses should be interpreted at different levels of generality. Where the framers wanted the constitutional clauses to be read strictly, they used very specific and particular words. For example, a member of the Singapore Parliament must be "of the age of 21 years or above."<sup>48</sup> The Singapore Constitution does not say that a Member of Parliament must be of sufficient maturity or age. Similarly, the Singapore Parliament, unless sooner dissolved, shall continue for five years from the date of its first sitting and shall then stand dissolved.<sup>49</sup> The Constitution

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<sup>44</sup> Constitution of the Republic of Singapore (1999 Reprint) Art. 12(1) ("All persons are equal before the law and entitled to the equal protection of the law.").

<sup>45</sup> *Lim Meng Suang*, SING. C.A. 53 at [77].

<sup>46</sup> *Id.* at [135].

<sup>47</sup> *Id.* at [153].

<sup>48</sup> Constitution of the Republic of Singapore (1999 Reprint) Art. 44(2)(b).

<sup>49</sup> *Id.* art 65(4).

does not say that the Singapore Parliament, unless sooner dissolved, shall continue for a reasonable period of years and shall then stand dissolved.

Given that the Singapore framers intentionally left the constitutional provisions enshrining terms like “in accordance with law” or “equal protection” ambiguously worded, fully comprehending that the language was not specific and could be interpreted in various ways, the choice to adopt a broader principle must thus be respected. After all, if a prohibition’s reach is restricted to the practices that were thought to run afoul of the Constitution at the time the provisions were adopted, it would leave no room for reasoned adjudication of new practices that scientific and technological advancements or changed socio-economic circumstances bring about.<sup>50</sup> Thus, such broadly phrased constitutional clauses must embody abstract principles rather than merely encapsulate and enshrine historical practices.

As Professor Jack Balkin has observed: “[Constitutional adopters] choose vague standards or abstract principles because they want to channel political judgment but delegate the task of construction and application to future generations.”<sup>51</sup>

Fidelity to the Constitution requires judges to respect the framers’ choice of rules or standards in the bill of rights. Instead, the Singapore judiciary has placed dispositive weight on the expectations of the constitutional framers in deciding whether an impugned legislation is constitutional. Such attempts to shackle the Constitution to the framers’ original, specific interpretation of the text (as “hard originalism” would require) may indeed be inconsistent with their original intent of using vague, open-textured language to enact an enduring instrument with standards that allow future generations of lawmakers and judges to design and build over time through the processes of constitutional construction.<sup>52</sup>

Therefore, it is evident that judicial recourse to “hard originalism” in Singapore is not mandated by the text or history of the country’s supreme law. Rather, it is a consequence of the judiciary’s deliberate choice to defer to the contemporary policy choices of the dominant People’s Action Party (PAP) government, which has ruled Singapore without interruption since the nation’s independence and has not taken kindly to robust judicial review.

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<sup>50</sup> Mark D. Greenberg & Harry Litman, *The Meaning of Original Meaning*, 86 GEO. L.J. 569, 580 (1998).

<sup>51</sup> Jack M. Balkin, *Nine Perspectives on Living Originalism*, 2012 U. IL. L. REV. 815, 817.

<sup>52</sup> *Id.* at 815–16.



Originalism, as practiced in Singapore, is at heart a rhetorical mask to disguise judicial passivity and constitutional history that has been relied upon as a “convenient proxy” for judicial inaction.<sup>53</sup>

iii. *Textualism*

Textualism is an interpretive method that allows judges to derive the meaning of the Constitution from its language, as situated within the linguistic practice of the community and alongside accepted canons of interpretation. Proponents of textualism, like advocates of “hard originalism,” argue that the role of a judge is merely to interpret the law, as enacted by the legislature. In their view, the word “interpret” is a transitive verb; that is, judges must interpret text.<sup>54</sup> If judges were to depart from the text of the Constitution, they would be imposing prescriptions that have not been endorsed by the political process on society.

An excellent illustration of textualism in practice would be the High Court of Singapore’s decision in *Chee Siok Chin v. Minister for Home Affairs*.<sup>55</sup> In that case, three applicants commenced proceedings seeking declarations that the Police Commissioner had acted unlawfully in ordering them to disperse when they engaged in a peaceful protest outside a government building. A central issue was whether the Miscellaneous Offences (Public Order and Nuisance) Act could validly curtail their right to assemble. The High Court acknowledged that every Singapore citizen has the right to assemble peaceably, but the learned judge noted that Article 14(2) of the Singapore Constitution also qualifies this right by allowing the government to impose “such restrictions as it considers necessary *or expedient* in the interest of . . . public order.” Notably, the High Court observed as follows:

It bears emphasis that the phrase ‘necessary or expedient’ confers on Parliament an extremely wide discretionary power and remit that permits a multifarious and multifaceted approach towards achieving any of the purposes specified in Art 14(2) of the Constitution . . . there can be no questioning of whether the legislation is ‘reasonable.’ All that needs to be established is a

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<sup>53</sup> Michael Hor, *Singapore’s Death Penalty: The Beginning of the End?*, in CONFRONTING CAPITAL PUNISHMENT IN ASIA: HUMAN RIGHTS, POLITICS, AND THE PUBLIC OPINION 149 (Roger Hood & Surya Deva eds., 2013).

<sup>54</sup> ANTONIN SCALIA & BRYAN A. GARNER, *Preface to READING LAW: THE INTERPRETATION OF LEGAL TEXTS* (2012).

<sup>55</sup> *Chee Siok Chin v. Minister for Home Affairs*, [2006] 1 SLR 582.



nexus between the object of the impugned law and one of the permissible subjects stipulated in Art[icle] 14(2) of the Constitution.<sup>56</sup>

Simply put, the High Court of Singapore was arguing that the literal text of the Singapore Constitution did not authorize the judiciary to examine the reasonableness of the impugned legislative measure. According to the learned judge, the constitutional right to free speech and assembly in Singapore is expressly qualified such that the government may impose “such restrictions as it considers necessary *or expedient*.”<sup>57</sup> Given that the terms “reasonable” and “expedient” are used disjunctively, the court concluded there was no need for the courts to examine whether the impugned legislation is reasonable at all. Mere legislative expedience would suffice to justify the passage of any rights-infringing law on free assembly.

Lest one think that textualism is an interpretive method that is merely employed by conservative judges, it is interesting that textual arguments have been equally deployed by judges in Hong Kong for liberal causes. In *Director of Immigration v. Chong Fung Yuen*, the Hong Kong C.F.A. had to determine the validity of a statutory provision that prevented Chinese citizens, born in Hong Kong to Mainland Chinese parents, from being conferred the constitutional right of permanent residency in Hong Kong at the time of their birth.<sup>58</sup> In interpreting Article 24(2)(1)<sup>59</sup> of the Basic Law, the constitutional provision at issue, the Hong Kong Government wanted the Court to uphold the impugned immigration legislation on the basis that it was consistent with the view expressed in various extrinsic legislative aids, including the Preparatory Committee of the Hong Kong Special Administrative Region’s Opinions.<sup>60</sup> Nevertheless, the C.F.A. unanimously rejected this view.

As observed by Chief Justice Li on behalf of the Court: “[T]he courts are bound to give effect to the clear meaning of the (constitutional) language. The courts will not on the basis of any extrinsic materials depart from that

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<sup>56</sup> *Id.* at [para. 49].

<sup>57</sup> *Id.* at [para. 14].

<sup>58</sup> *Director of Immigration v. Chong Fung Yuen*, [2001] 2 H.K.L.R.D. 533.

<sup>59</sup> Xianggang Jiben Fa (Basic Law of Hong Kong) Art. 24 §(2)(1): “The permanent residents of the Hong Kong Special Administrative Region shall be . . . Chinese citizens born in Hong Kong before or after the establishment of the Hong Kong Special Administrative Region.”

<sup>60</sup> The Preparatory Committee for the Hong Kong Special Administrative Region was a body established by the People’s Republic of China government on January 26, 1996, in preparation for China’s resumption of sovereignty over Hong Kong on July 1, 1997.

clear meaning and give the language a meaning which the language cannot bear.”<sup>61</sup> Given that the Basic Law explicitly provides “permanent residents of the Hong Kong Special Administrative Region shall be . . . Chinese citizens born in Hong Kong,” the C.F.A. could seize upon the express phraseology of the constitutional text and reject the use of extrinsic legislative materials to aid its interpretation, ruling boldly in favor of the claimants. In so doing, the CFA also cunningly avoided having to give legal effect to extrinsic materials issued by the Central Government in Beijing *after* the promulgation of the Basic Law.

Judicial application of textualism in both cases is not without problems. In Singapore, where parliamentary supremacy was expressly rejected in favor of a post-independence constitutional arrangement that places fundamental rights beyond the reach of majoritarian politics, it is logically inconceivable that the constitutional right to free assembly can be circumvented merely when it is expedient for the government of the day to override it. Even if one is an ardent textualist, one may note that the absurdity doctrine is a well-accepted canon of interpretation. As Lord Wensleydale observed in the 1857 decision *Grey v. Pearson*:

[I]n construing . . . all written instruments, the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity, or some repugnance or inconsistency with the rest of the instrument, in which case, the grammatical and ordinary sense of the words may be avoided, so as to avoid that absurdity and inconsistency, but no farther.<sup>62</sup>

This, in essence, echoes Blackstone’s observation that “where words bear . . . a very absurd signification, if literally understood, we must a little deviate from the received sense of them.”<sup>63</sup> Therefore, in *Chee Siok Chin*, it would have been perfectly plausible, even as a textualist, for the learned judge to apply the absurdity doctrine and hold that the Singapore Constitution only authorizes Parliament to pass such legislative restrictions that are necessary *and* expedient in the interest of public order. Otherwise, *any* ordinary legislation that Parliament passes to further public order may

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<sup>61</sup> Director of Immigration v. Chong Fung Yuen, [2001] 57 H.K.C.F.A.R. 547. See also Eric C. Ip, *The Politics of Constitutional Common Law in Honk Kong Under Chinese Sovereignty*, 25 WASH. INT’LLJ. 565, 582–83 (2016).

<sup>62</sup> *Grey v. Pearson*, (1857) 6 H.L.C. 61, 106 (U.K. H.L.).

<sup>63</sup> WILLIAM BLACKSTONE, COMMENTARIES ON THE LAW 34 (Bernard. C. Gavit ed., Washington Law Book Co. 1941) (1892).

automatically trump the constitutionally enshrined right to free assembly. By reading the words “necessary” and “expedient” conjunctively, rather than disjunctively, the court would have corrected an obviously absurd and unintended interpretation that would allow an exception to swallow the constitutional rule that seeks to safeguard citizens’ fundamental freedoms. The key feature of textualism, as applied in the *Chin Siok Chin* decision, is that it allows judges to focus on the literal language of the constitutional text, narrow the range of decisional opportunities open to them, and leave it to the legislature to make any changes to the impugned legislation.

On the other hand, in the Hong Kong C.F.A. decision *Chong Fung Yuen*, textualism was deployed to serve progressive causes, but the court’s denial of choice in the matter was equally disingenuous. Even though the text of the Basic Law expressly provides that permanent residents of the H.K.S.A.R. shall be Chinese citizens born in Hong Kong, constitutional rights in Hong Kong (or elsewhere) are rarely upheld as absolute trumps.<sup>64</sup> Therefore, it would be wholly possible for the C.F.A. to have devised a doctrinal test to examine whether it was reasonable to exclude Chinese citizens, who are born in Hong Kong but to non-Hong Kong Permanent Residents, from being conferred the right of abode at the time of their birth. By purporting to apply a textual reading of Article 24, the C.F.A. sought to insulate itself from any public outrage the judges were deliberately conferring upon children born to Mainland Chinese tourists, illegal immigrants, or over-stayers, the constitutional right of permanent residency at the time of their birth in Hong Kong.

The appeal of textualism is that it allows judges to defend the legal result they hope to achieve by disguising their choice “in the language of definitional inexorability.”<sup>65</sup> This “our Constitution made us do it” argument allows judges to deny that they have other options in the matter, and obfuscates questions on how the judicial decision was made and whether it could have been made differently.<sup>66</sup> But the reality is there is almost always an alternative reading of the Constitution the court wants to disavow, but the Court pretends it does not exist.

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<sup>64</sup> For example, the Hong Kong C.F.A. has applied the proportionality doctrine to assess legislative restrictions on the constitutional right to equality (*Secretary for Justice v. Yau Yuk Lung*, [2007] 3 H.K.L.R.D 903), and the constitutional right to be presumed innocent until proven guilty (*H.K.S.A.R. v. Lam Kwong Wai*, [2006] 3 H.K.L.R.D. 808), even though Basic Law does not expressly enshrine any limitations on these rights.

<sup>65</sup> Frederick Schauer, *Formalism*, 97 *YALE L.J.* 509, 513–14 (1988).

<sup>66</sup> *Id.*

### B. *Symbolic Review*

In a democratic state committed to constitutional supremacy, judges are generally vested with the power to invalidate legislation that is deemed inconsistent with enshrined fundamental liberties. In principle, constitutional review serves as a counter-majoritarian check against popular will as expressed in legislation. Yet in Singapore and Malaysia, as discussed above, the courts operate within an illiberal political system with a dominant ruling government that has been able to displace constitutional decisions and even oust judges with remarkable ease. In theory, these courts are supposed to stand as bulwarks against any governmental incursion into individual liberties. In reality, however, the judiciary has engaged in constitutional review that is merely cursory in nature. Formally, judges are committed to the separation of powers, and as a matter of rhetoric they openly proclaim that they will always generously interpret constitutional rights.<sup>67</sup> Nonetheless, in practice judges in Malaysia and Singapore have engaged in a merely symbolic review of state action, for fear of reversals or reprisals.

In Malaysia, since the Constitutional Crisis of 1988, which saw the removal of the Lord President and another Supreme Court Justice, the Federal Court (the nation's court of final resort) has stopped exercising its prerogative to invalidate legislation deemed incompatible with the nation's constitutional bill of rights.<sup>68</sup>

Recently, in the ostensibly landmark *Malaysian Trade Union Congress v. Menteri Tenaga* decision,<sup>69</sup> the Federal Court of Malaysia held that an applicant, in the context of public interest litigation (P.I.L.), merely had to show that he or she had a "real and genuine interest in the subject matter."<sup>70</sup> In so doing, the court overruled longstanding precedent that required applicants to establish the infringement of a private right or the suffering of special damages before they would have standing for P.I.L.

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<sup>67</sup> *Ong Ah Chuan v. Public Prosecutor*, [1979–1980] 2 SLR(R) 710 (Singapore C.A.). See also *Chng Suan Tze v. Minister for Home Affairs*, [1988] 2 SLR(R) 525 (Singapore C.A.); *Dato' Seri Ir Hj Mohammad Nizar bin Jamaluddin v. Dato' Seri Dr Zambry bin Abdul Kadir*, [2010] 2 M.L.J. at para. 25 (Malaysian C.A.); *Ketua Polis Negara v Abdul Ghani Haroon*, [2001] 4 M.L.J. 11, 12 (Malaysia H.C.).

<sup>68</sup> For a discussion on how the Malaysian judiciary's interpretative approaches have evolved since the Constitutional Crisis of 1988, see generally Yvonne Tew, *On the Uneven Journey to Constitutional Redemption: The Malaysian Judiciary and Constitutional Politics*, 25 WASH. INT'L L.J. 669 (2016).

<sup>69</sup> *Malaysian Trade Union Congress v. Menteri Tenaga*, [2014] M.L.J. 92.

<sup>70</sup> *Id.* at para. 58.

cases.<sup>71</sup> In this instance, the Malaysian federal government (the Selangor state government) and a consortium had entered into a tri-partite Agreement allowing the consortium to raise tariffs on the water it was supplying by 15% if certain performance targets were met. The Malaysian Trade Union Congress, a society of trade unions, applied for judicial review when the Government refused to disclose a copy of the Agreement and the Audit Report that justified an increase in water tariffs. While the Federal Court laudably agreed that the Trade Congress had the *locus standi* to bring judicial review proceedings against the government, the Court quickly dashed all hopes that it was remotely interested in providing any substantive relief. The Court held the Audit Report could not be disclosed, as it was tabled and deliberated in a Cabinet meeting and was therefore an “official secret.”<sup>72</sup> As for the Agreement, the Court held it could not be disclosed because it contained a non-disclosure clause forbidding dissemination to third parties without prior mutual agreement between the parties.<sup>73</sup> It would appear then that the “liberalizing” effect of this new *locus standi* rule would have a negligible impact on the substantive development of P.I.L. actions in Malaysia. In the future, the government would merely need to table any documents for the Cabinet’s deliberation to make them immune from disclosure. Similarly, private actors merely had to sign non-disclosure agreements to foil any third-party attempts at discovery. Therefore, any hopes for change in this area are illusory.

In the same vein, in *Yong Vui Kong v. Attorney General*, the Singapore Court of Appeal rightly accepted that the clemency power exercised by the Cabinet of Ministers vis-à-vis a prisoner on death row was subject to judicial review.<sup>74</sup> More importantly, the court held that if “conclusive evidence is produced to the court to show that the Cabinet never met to consider the offender’s case at all, or that the Cabinet did not consider the [clemency] materials before it and merely tossed a coin” to determine the matter, the government would be in breach.<sup>75</sup> But one must note the limited scope of the court’s review of the offender’s clemency petition in practice. For example, the Court of Appeal subsequently went on to hold that the offender had no right to petition for clemency, had no right to be heard during the clemency process, and had no right to see the clemency materials

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<sup>71</sup> *Government of Malaysia v. Lim Kit Siang*, [1988] 2 M.L.J. 12.

<sup>72</sup> *Malaysian Trade Union Congress v. Menteri Tenaga*, [2014] M.L.J. 92. at para. 68.

<sup>73</sup> *Id.* at para. 71.

<sup>74</sup> *Yong Vui Kong v. Attorney General*, [2011] 2 SLR 1189.

<sup>75</sup> *Id.* at [para. 83].

placed before the Cabinet.<sup>76</sup> If this is so, one does wonder how, in practice, the offender would ever prove with “conclusive evidence” that the Cabinet had never met to discuss his or her case, let alone find out that the Ministers had tossed a coin to decide the matter. Unless there is a whistleblower, privy to the Cabinet’s deliberations (or lack thereof), who is willing to come forward, the likelihood that any such constitutional review is taking place in Singapore is imaginary at best.<sup>77</sup> As Professor Michael Hor rightly laments, “the door [to judicial review of the clemency power] is open, but the crack is too small for anyone to pass through.”<sup>78</sup>

Singapore and Malaysia have a semi-permanent form of government in power, and where a dominant, disciplined political party or coalition is in control, the less space domestic courts have to operate.<sup>79</sup> Where legislative and executive power is consolidated in a single party or coalition, the dominant government can display its displeasure more easily by eliminating judicial review or even ousting the judges themselves. Constitutional review does not operate in a political vacuum; where judges are significantly constrained by the actions of other political actors, judicial review of state action becomes merely an exercise in tokenism.

### C. *Vacuous Judicial Doctrines*

The converse of symbolic review is the judicial creation of vacuous doctrines that mask robust intervention under the guise of constitutional interpretation. This article focuses on arguably the most vacuous of such judicial doctrines, the implied “basic structure” doctrine, wherein the judiciary determines the unwritten “essential features” of the Constitution that are beyond any formal constitutional change.<sup>80</sup> Within Asia, the more active courts in India and Taiwan have enforced this “basic structure” doctrine by imposing implied constraints on the substantive content of

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<sup>76</sup> *Id.* at [para. 135].

<sup>77</sup> One must also note that under Section 5 of the Official Secrets Act in Singapore, it is an offense for a person to reveal, directly or indirectly, any information “to which he has had access, owing to his position as a person who holds or has held office under the Government.”

<sup>78</sup> Hor, *supra* note 53, at 154.

<sup>79</sup> PO JEN YAP, CONSTITUTIONAL DIALOGUE IN COMMON LAW ASIA 78 (2015).

<sup>80</sup> In contrast, Germany and Brazil have constitutions that expressly enumerate provisions that may never be amended. For example, Articles 1(1) and 79(3) of the German Basic Law provide that any constitutional amendment “affecting the division of the Federation into Länder” or violating human dignity is prohibited. Grundgesetz [GG] [Basic Law], *translation at* [http://www.gesetze-im-internet.de/englisch\\_gg/englisch\\_gg.html](http://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html). In the same vein, Article 60(4) of the Brazilian Constitution expressly proscribes any constitutional amendments that seek to abolish federalism, universal suffrage, the separation of powers, or individual rights. Constituição Federal [C.F.] [Constitution] art. 60(4).

constitutional amendments and have invalidated any offending constitutional amendments for perceived violations.

In *Kesavananda Bharati v. Kerala*, the Supreme Court of India, by a 7-to-6 majority, invalidated part of the 25th Amendment of the Indian Constitution, which provided that any law passed with a declaration that it was intended to give effect to the Directive Principles on the state's socio-economic policy could not be "called in question in any court on the ground that it does not give effect to such policy."<sup>81</sup> The majority judges argued that such an amendment attempted to eliminate judicial review and thus violated an implied "essential feature" of the Indian Constitution, and was therefore unconstitutional. Since *Kesavananda*, the Supreme Court of India has invalidated constitutional amendments on four other occasions for violating the Constitution's implied basic structure.<sup>82</sup> Similarly, in J.Y. Interpretation No. 499, the Constitutional Court of Taiwan invalidated a constitutional amendment enacted by the Taiwanese National Assembly (an unelected legislative branch of government), which sought to extend its own term of office by allowing political parties with seats in the Legislative Yuan (Taiwan's primary legislative chamber) to "elect" delegates to the Assembly. The impugned constitutional amendment was declared inconsistent with democracy and human rights principles, fundamental norms that were deemed part of the implied "unchangeable provisions" in the Taiwanese Constitution.<sup>83</sup>

Upon close examination, judicial enforcement of the implied "essential features" doctrine nevertheless raises particular questions. Given that the texts of these constitutions are silent on which features are so basic or fundamental that they are beyond abrogation, any judicially created lists of such norms are open to debate and "cannot be objectively deduced or passively discerned in a viewpoint-free way."<sup>84</sup> Even in the Indian *Kesavananda* case, judges were not unanimous on which elements would constitute the basic structure of the Constitution. For example, only four judges considered secularism as forming part of the unamendable basic structure in India, while a different plurality of judges viewed the unity and

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<sup>81</sup> *Kesavananda Bharati v. Kerala*, AIR 1973 SC 1461.

<sup>82</sup> See *Indira Nehru Gandhi v. Raj Narain*, 1975 AIR 1975 SC 2299; *Minerva Mills v. Union of India*, AIR 1980 SC 1789; *P Sambamurthy v. State of Andhra Pradesh*, AIR 1987 SC 663; *L. Chandra Kumar v. Union of India*, AIR 1997 SC 1125.

<sup>83</sup> J.Y. Interpretation No. 199 (Council of Grand Justices: Const. Ct. March 24, 2000).

<sup>84</sup> Laurence Tribe, *A Constitution We Are Amending: in Defence of a Restrained Judicial Role*, 97 HARV. L. REV. 433, 440 (1983).



sovereignty of the nation<sup>85</sup> as a core element.<sup>86</sup> More interestingly, one Indian judge considered that parliamentary democracy is part of the Constitution's implied fundamental features and such a system of government may not be abrogated via a constitutional amendment.<sup>87</sup> The difficulty of identifying what exactly are the implied "essential features" of a constitution was exposed by Ray J. in his dissenting opinion in *Kesavananda*:

To find out essential or non-essential features is an exercise in imponderables. When the Constitution does not make any distinction between essential and non-essential features it is incomprehensible as to how such a distinction can be made . . . On what touchstone are the essential features to be measured? Is there any yardstick by which it can be gauged?<sup>88</sup>

Furthermore, even if one accepts that fundamental rights and judicial review form the inalienable core of any constitutional state committed to the rule of law, it may not always be self-evident whether an impugned constitutional amendment violates these norms in the specific disputes before the court. The trouble with the elusive, divine rule of law ideal is not that people will disagree with its normative force in the abstract, but that this higher-order law, if enforceable, must be given substance and applied.<sup>89</sup> Judges do not uphold the rule of law in the abstract, but have to apply the sacrosanct constitutional norms to particularized facts that come before them.<sup>90</sup> While unelected judges may stand above the rancor of politics and are arguably more impartial vis-à-vis the political branches of government, it is this insulation, as well as the professional homogeneity of the bench, that limits judges' access to the requisite empirical evidence they need to make a fully informed constitutional judgment. Therefore, even if human rights as a general principle may never be abrogated, it is unclear why judges' perception of certain constitutional liberties in *every* concrete context would always be superior and should always trump the amending body's conception each time, such that *all* constitutional amendments may come under the pruning knife of judges. Indeed, pursuant to the "basic structure" doctrine, the scope of the constitutional amendment power is ultimately

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<sup>85</sup> *Kesavananda Bharati*, AIR 1973 SC 1461 at para. 704 (Hegde and Mukherjea J.J.), para. 620 (Shelat and Grover J.J.).

<sup>86</sup> *Id.* at para. 316 (Sikri C.J.), para. 620 (Shelat and Grover J.J.), para. 1480 (Khanna J.).

<sup>87</sup> *Id.* at para. 1206 (Reddy J.).

<sup>88</sup> *Id.* at para. 949 (Ray J.).

<sup>89</sup> J.A.G. Griffith, *The Brave New World of Sir John Laws*, 63 MOD. L. REV. 159, 165 (2000).

<sup>90</sup> Po Jen Yap, *Defending Dialogue*, *supra* note 22, at 538.

circumscribed by what a handful of judges may think constitutes the Constitution's proper limits. In reality, the implied "basic structure" doctrine is no more than a constitutional fig leaf to disguise judges' unspoken political agenda.

In Taiwan, prior to the issuance of J.Y. Interpretation No. 499, constitutional amendments could only be proposed and passed by National Assembly delegates, who were all unelected. The National Assembly was a political institution that was highly unpopular with the public, as its existence harkened back to the authoritarian era in Taiwan's history when elections were suspended and the term of the delegates extended indefinitely.<sup>91</sup> The public was clearly in favor of abolishing the National Assembly and having the Legislative Yuan (the primary legislative chamber) take over its constitutional functions. In 1999, however, the Assembly delegates, by anonymous voting, once again passed a constitutional amendment to prolong their term. In response to the political impasse and to vindicate popular demand, the Constitutional Court of Taiwan intervened decisively and ended the National Assembly's reign in Taiwan.<sup>92</sup>

As for India, the "basic structure" doctrine was first conceived and developed as a judicial response to the legislative excesses of the Indira Gandhi government, which had relied on a supine Parliament to effect constitutional changes that the "hyper-executive" government unilaterally wanted. Following a landslide victory at the 1971 polls, the Congress Party headed by Indira Gandhi was able to pass constitutional amendments with remarkable ease. The 25th Amendment was passed to insulate Gandhi's socialist policies from judicial review. In response to rising political unrest after 1973, a State of Emergency was declared in 1975, which led to the suspension of fundamental rights and the detention of opposition

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<sup>91</sup> See Chien-Chih Lim, *Majoritarian Judicial Review*, 9 NAT. TAIWAN U.L. REV. 103 (2014). See also Ming-Sung Kuo, *Moving Towards a Nominal Constitutional Court? Critical Reflections on the Shift from Judicial Activism to Constitutional Irrelevance in Taiwan's Constitutional Politics*, 25 WASH. INT'L L.J. 595, 598–99.

<sup>92</sup> In 2005, Article 12 of the Amendment of the Taiwan (Republic of China) Constitution was passed and it so reads: "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 held upon expiration of a six-month period of public announcement of the proposal, wherein the number of valid votes in favour exceeds one-half of the total number of electors. The provisions of Article 174 of the Constitution shall not apply." MINGUO XIANFA art. 12 (1947) (Taiwan), [https://www.constituteproject.org/constitution/Taiwan\\_2005.pdf](https://www.constituteproject.org/constitution/Taiwan_2005.pdf) (with Amendments through 2005).

politicians.<sup>93</sup> The Constitution was also amended several more times in quick succession.<sup>94</sup> Specifically, in response to a lower court's finding that the Prime Minister had violated electoral laws and was disqualified from holding public office for six years, the 39th Amendment was passed to insulate the Prime Minister's election from judicial inquiry and render pending proceedings in respect of such elections null and void.<sup>95</sup> Furthermore, the 42nd Amendment made nearly sixty significant changes to the Indian Constitution, which included an express elimination of judicial review over constitutional amendments.<sup>96</sup> The judges were convinced that if they did not intervene, all vestiges of democracy in India would eventually be removed.<sup>97</sup>

These Asian judges, when enforcing the implied "basic structure" doctrine, would emphatically argue that they are impartially applying pre-determined rules, and are constrained by a distinctive methodology of legal reasoning that is closely tethered to their nation's Constitution and its history.<sup>98</sup> Nonetheless, as discussed above, there is no definite way by which judges can discern and decide what these core features are and whether they are violated on the facts of a particular case. The doctrine is inherently vacuous and has been judicially conceived merely as a mechanism to prevent an authoritarian government from harnessing the amending process to "extend its own life indefinitely" or to establish totalitarianism.<sup>99</sup> The sheer attractiveness of this "basic structure" doctrine (to judges) lies in the fact that it purports to draw authority from the nation's foundational instrument and allows judges to sustain the myth that they are merely fulfilling the mandates of the Constitution, when they are in effect

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<sup>93</sup> RAMACHANDRA GUHA, *INDIA AFTER GANDHI: THE HISTORY OF THE WORLD'S LARGEST DEMOCRACY* 491–99 (2007).

<sup>94</sup> See Mahendra Pal Singh, *India*, in *HOW CONSTITUTIONS CHANGE: A COMPARATIVE STUDY* 177–81 (Dawn Oliver & Carlo Fusaro eds., 2011).

<sup>95</sup> In *Indira Nehru Gandhi v. Raj Narain*, AIR 1975 SC 2299, a majority on the Indian Supreme Court invalidated the impugned part of the 39th Amendment, which had sought to insulate the Prime Minister's election from judicial review, on the basis that it violated the implied 'basic features' doctrine, but the Court also unanimously upheld the validity of her election on the facts. For an insightful discussion on the history of the case, see GRANVILLE AUSTIN, *WORKING A DEMOCRATIC CONSTITUTION: A HISTORY OF THE INDIAN CONSTITUTION* 318–24 (1999).

<sup>96</sup> In *Minerva Mills v. Union of India*, AIR 1980 SC 1789, the Supreme Court unanimously invalidated Article 368(4) of the Indian Constitution, which ousted any judicial review over constitutional amendments.

<sup>97</sup> See O. CHINNAPPA REDDY, *THE COURT AND THE CONSTITUTION OF INDIA: SUMMITS AND SHALLOWS* 53–72 (2008).

<sup>98</sup> See generally Lizzie Barmes, *Adjudication and Public Opinion*, 118 L.Q. REV. 600 (2002).

<sup>99</sup> *Kesavananda Bharati v. Kerala* AIR 1973 SC 1461 at para. 704 (Shelat and Grover J.J.).

unilaterally introducing a political safeguard against legislative worse-case scenarios.

### III. CONCLUSION

The constitutional fig leaves used by Asian judges seek to obscure the strategic political choices judges make for both liberal and conservative causes. In Singapore and Malaysia, where courts are confronted with a semi-permanent regime in power, reform-minded judges can typically bring about changes only at “the margins of political life.”<sup>100</sup> Though both former British colonies have retained the Westminster system of government, which is predicated on the separation of powers, the anemic state of the courts’ jurisprudence suggests that their constitutional bills of rights are no more than paper tigers.<sup>101</sup> Nevertheless, by deploying legal fig leaves and maintaining some form of perceived legitimacy, Singaporean and Malaysian judges passively lend a “gloss of legitimacy to the authoritarian regime of which they are a part, precisely because they are a part of it.”<sup>102</sup> As for the liberal courts in India, Hong Kong, and Taiwan, these fig leaves provide constitutional cover for their activism. Insofar as judges purport to draw authority from the constitutional powers vested by their territory’s supreme law, they can deflect any criticisms that they have made unwarranted incursions into the legislative sphere.

So, perhaps, we should not completely chafe against these constitutional fig leaves, for they do serve an important social function by preserving judicial legitimacy.<sup>103</sup> The judicial invocation of such fig leaves allows everyone to keep up appearances. Removing these legal loincloths would do nothing but reveal to the world the ugly truth of what we already all know: the emperor really has no clothes.<sup>104</sup> Whether this game is worth the candle is a discussion we would leave for another day.

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<sup>100</sup> Tom Ginsburg & Tamir Moustafa, *Introduction: The Functions of Courts in Authoritarian Politics*, in *RULE BY LAW: THE POLITICS OF COURTS IN AUTHORITARIAN REGIMES* 15 (Tom Ginsburg & Tamir Moustafa eds., 2008).

<sup>101</sup> Thio Li-ann, *An ‘i’ for an ‘I’? Singapore’s Communitarian Model of Constitutional Adjudication*, 27 H.K. L.J. 152, 152–53 (1997).

<sup>102</sup> Ginsburg & Moustafa, *supra* note 99, at 15.

<sup>103</sup> Forsyth, *supra* note 1, at 136.

<sup>104</sup> *Id.*; Chemerinsky, *supra* note 2, at 1.