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ARTICLE

Constitutional Statecraft in Malaysian Courts: A Naive 'Schmittian' Misappropriation

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Abstract

In her recent book, *Constitutional Statecraft in Asian Courts*, Yvonne Tew develops an ambitious argument for empowering Malaysian judges to promote constitutional democracy. Her arguments rely on the idea of an unamendable constitutional 'basic structure' or 'meta-Constitution' expressive of that ideal. I argue that her proposals are normatively inadequate to this task because Tew relies on resources in constitutional theory traceable to the conservative German thinker Carl Schmitt, whose views about constitutional legitimacy and limits to constitutional amendment form part of an authoritarian political logic designed to subvert constitutional democracy that subordinates legality to power politics. I then argue that Tew's proposals, if applied to Malaysia, risk feeding into elements of Schmittian authoritarian logic that plausibly underwrite Malaysia's ethnocratic context, and conjecture (through case-analysis) that authoritarian judges could easily reconfigure her proposals to legitimate ethno-authoritarian rule. Conversely, conscientious judges who defend constitutional democracy would adopt a non-Schmittian approach that emphasises the normative priority of legality as a constraint on political power to counter ethno-authoritarian rule. Consequently, despite Tew's aspiration to equip judges with tools to defend constitutional democracy, the tools she provides threaten to undermine this aspiration such that her proposals may be characterised as a naïve Schmittian misappropriation.

Yvonne Tew has recently argued that Malaysian judges should defend and develop the elements of an unamendable 'basic structure' of the legally supreme Malaysian Constitution and a vision of constitutional order reflective of the ideal of constitutional democracy.[1] Tew's argument is intended as a

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[1]Yvonne Tew, *Constitutional Statecraft in Asian Courts* (Oxford University Press 2020) (henceforth '*Constitutional Statecraft*'). Tew develops arguments with respect to the Singaporean and Malaysian legal-political systems, though my focus will be exclusively the latter. Recently, there has been increasing interest in the use of the basic structure doctrine traceable to the Indian judiciary as a way for judges to defend constitutional democracy in Malaysia. The interest tracks the fact that over the last decade, the Malaysian courts have been playing with this idea though no court has ever applied it. In addition, this temptation towards the basic structure doctrine coincides with a weakening of ethnocratic rule and the rise of forces for democratic change. Tew's book was written with the confluence of these forces as a background context. I examine the leading Malaysian Court judgment on the subject later in the essay. Tew's is the most developed and sophisticated intervention within the context of this burgeoning scholarly literature. For a sampling of this literature, see Wilson TV Tay, 'Basic Structure Revisited: The Case of Semenyih Jaya and the Defence of Fundamental Constitutional Principles in Malaysia' (2019) 14 Asian Journal of Comparative Law 113; Jaclyn Neo, 'Beyond Mortals? Constitutional Identity, Judicial Power, and the Evolution of Basic Structure Doctrine in Malaysia', in *Identity and Change – The Basic Structure in Asian*

corrective against a long-standing culture of judicial deference in the face of consolidated executive authority in Malaysia. Despite there being a legally supreme written Constitution with features associated with constitutional democracy – including a constitutional bill of rights and features calling for an elected government structured by the principle of the separation of powers (including independent courts) – judges have been reluctant to enforce constitutional controls on state power against government. The practical goal of Tew's arguments is to empower judges by giving them a set of conceptual resources that will help courts advance constitutional democracy. Her arguments are the most ambitious scholarly attempt at developing a set of intellectual resources to empower Malaysian judges and warrant serious consideration and examination.

Tew's arguments have to be evaluated against the backdrop of ethnocratic rule, as Malaysia has long been an ethnocratic state. Ethnocratic rule is one where the primary role of government is to define and defend the identity and interests of a dominant ethnic community.[2] By corollary, those ineligible for membership within the dominant ethnos are deemed politically unequal or 'second-class'. They may engage in an intense struggle for full equality but are subject to legal, political, and social controls. In Malaysia, the formal political doctrine to inform ethnocratic rule is 'Malay Dominance'. Importantly, an irony of ethnocratic rule is that those formally identified as ethnic Malay are themselves subject to intense controls, because an ethnocratic regime's claim to power hinges on there being a socially relevant and unified ethnic community in whose name the regime purports to act.[3]

Ever since the country gained independence from the British in 1957, Malaysia had been subject to ethnocratic rule under a single political party, the United Malay National Organisation, a Malay nationalist party committed to an ethnocratic doctrine of 'Malay Dominance'. After a democratic overturn in 2018 and an internal political coup in 2020, UMNO is not presently the party in power, but the current government nevertheless remains committed to ethnocracy. Indeed, recent political events indicate that the political survival of any government requires that it affirm an ethnocratic approach to governance.

Further, the record suggests that ethnocracy has resulted in authoritarianism. As even Tew puts it, 'identity politics' and the politicisation of race and religion have produced a fragile democracy.[4] I contend that her proposals for judicial empowerment have to be assessed against the backdrop of entrenched ethnocratic rule, where judges are subject to constraints but are not wholly powerless to develop an appealing 'glimmer' of an alternative constitutional vision in service of constitutional democracy.[5]

My primary contention is that Tew's principal argument, which invokes the idea of an unamendable constitutional basic structure or 'meta-Constitution' for judges to defend and develop, is not normatively adequate to the advancement of constitutional democracy by judges in Malaysia. The root problem is Tew's reliance on resources in constitutional theory related to 'unconstitutional constitutional amendments' that implicate ideas traceable to the German conservative thinker and political theorist, Carl Schmitt.[6] As is well known, Schmitt cultivates an authoritarian political logic designed to subvert constitutional democracy.[7] I argue that Tew's position is tainted by this logic

Constitutional Orders (CPG Publication 2019) <https://www.academia.edu/38208858/Beyond_Mortals_Constitutional_Identity_Judicial_Power_and_the_Evolution_of_the_Basic_Structure_Doctrine_in_Malaysia> accessed 31 Mar 2022; Yvonne Tew, 'On the Uneven Journey to Constitutional Redemption: The Malaysian Judiciary and Constitutional Politics' (2016) 25 Washington International Law Journal 674; Low Hong Ping, 'The Doctrine of Unconstitutional Constitutional Amendments in Malaysia: In Search of our Constitutional Identity' (2018) 45 Journal of Malaysian and Comparative Law 53.

[2]Geoff Wade, 'The Origins and Evolution of Ethnocracy in Malaysia' (Asian Research Institute Working Paper Series No 112, Apr 2009) <https://ari.nus.edu.sg/wp-content/uploads/2018/10/wps09_112.pdf> accessed 14 Feb 2022.

[3]Kikue Hamayotsu, 'Once a Muslim, Always a Muslim: The Politics of State Enforcement of *Syariah* in Contemporary Malaysia' (2012) 20 South East Asia Research 399.

[4]Tew, *Constitutional Statecraft* (n 1) 219, 125.

[5]ibid 219.

[6]Tew cites several resources from Yaniv Roznai, especially: Yaniv Roznai, *Unconstitutional Constitutional Amendments: The Limits of Amendment Powers* (Oxford University Press 2017).

[7]I do not enter into the controversy around how far Schmitt's ideas can be detached from his authoritarian logic, as well as his anti-Semitism and his embrace of the Nazi regime. Nevertheless, the argument of this article suggests that any attempt at

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such that her proscriptions turn into a larger problem of normative incoherence, because the authoritarian logic of ethnocracy is none other than Schmittian political logic. Hence, I conjecture that authoritarian judges who are complicit in affirming ethnocratic rule subscribe to Schmittian political logic and could easily reconfigure her proposals to legitimate ethnocratic rule, as evidenced by an examination of legal reasoning in relevant cases. Conversely, conscientious judges who wish to defend constitutional democracy subscribe to anti-Schmittian ideas and are unlikely to embrace Tew's proposals,[8] thus making her vision unlikely to offer the kind of judicial statecraft for which she hopes.

My approach is to develop a critique of the conceptual or theoretical coherence of Tew's primary argument involving the claim that there is an unamendable basic structure bottomed in the idea of 'constituent power,' as that argument applies in a specific social-political setting, the Malaysian ethnocratic state. The approach is thus theoretical and contextual where both dimensions are mutually reinforcing. The theoretical problem is brought out by thinking about a specific authoritarian context while simultaneously showing how that problem helps to constitute authoritarian legal and political practices within that context. My approach focuses on the interaction between theory and practice in the specific context of ethno-authoritarian rule in Malaysia, with a view to establishing that Tew's primary argument is inadequate to her stated ambition of advancing constitutional democracy within that specific context.

My argument proceeds as follows: I first explain the deeper normative assumptions that inform Tew's views about constitutional interpretation and limits to Parliament's powers of constitutional amendment. I begin by setting out the essentials of Schmitt's political logic. I then show how despite her professed commitment to constitutional democracy, Tew's arguments are undermined by elements of that logic and generate a conception of the judicial role where judges are unmoored from the central ideals of constitutional democracy, that is, 'democracy' and 'rule of law'. Finally, in the last two sections of the article, I analyse relevant cases to show how authoritarian judges could repurpose Tew's proposals to legitimate ethno-authoritarian rule while conscientious judges embrace plainly anti-Schmittian assumptions in a bid to resist the authoritarian logic of ethnocracy before concluding.

The 'Meta-Constitution'

Tew's proposals are intended to respond to the fact that, in Malaysia, there is a fragile democracy. Several related facts speak to this fragility. First, two centuries of British colonial rule followed by decades of ethnocratic rule by a single-party, UMNO, a Malay nationalist party committed to the ethnocratic doctrine of 'Malay Dominance,' has produced a political culture that has entrenched an ethnocratic political paradigm.

Second, Parliament has been made a mere rubber-stamp to the executive, thus allowing the ruling government under the country's Westminster model of government – where government is

detachment from his political logic would be illusory and perhaps even dangerous in the Malaysian context. For an important account of the features of this logic, see David Dyzenhaus, *Legality and Legitimacy: Carl Schmitt, Hans Kelsen, and Hermann Heller in Weimar* (Oxford University Press 1997) ch 2. See also William E Scheuerman, *The End of Law: Carl Schmitt in the Twenty First Century* (Rowman & Littlefield 2020).

[8]I cannot refute the claim that it is logically possible for judges to strictly apply her approach and render decisions congenial to constitutional democracy. My analysis assumes that the coherence of Tew's position is not a matter of abstract logic. Instead, if her proposals are intended to work in a specific context shaped by existing ideas about constitutional legitimacy, then conjecture about the likely practical consequences and reception of her approach suggests that her perspective is normatively inadequate. Indeed, even supposing judges did apply her approach to defend constitutional democracy in Malaysia, I have further reservations about whether their proposed justification and ensuing vision of constitutional order would be appropriate in light of Tew's conceptual starting points in a philosophy of 'liberal' constitutionalism. But that is a different argument I do not advance here.

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appointed from the ruling party in Parliament – to dominate Parliament and to enact any legislation almost wholly unopposed.

Third, the legal Constitution has also been vulnerable to easy and abusive constitutional amendments designed to undermine constitutional controls on state power. Constitutional amendments generally require a supermajority in Parliament and since UMNO has nearly always held the required two-thirds majority, it has been able to amend the Constitution more or less at its choosing.[9]

Fourth, as Tew notes, the Malaysian courts have generally been very deferential to government and have not interpreted constitutional controls on state power to effectively check government. As I detail later, when judges tried to do so there was a significant backlash, so judges have returned to a deferential stance, thereby making courts a relatively ineffective check on government. These facts combine to entrench ethno-authoritarian rule and mean that the ideal of constitutional democracy has not found meaningful expression despite a legal Constitution that speaks to that ideal.

As we shall see, Tew's response to this scenario is to carve out a role for the Malaysian courts on the prescription that judges should develop the doctrine of constitutional supremacy by taking seriously the legally supreme status of the written Constitution. But because the legal Constitution has been vulnerable to abusive amendments and because judges have been too deferential to government, the pillar of her argument is that judges should give up a deferential posture and develop constitutional 'meta-norms' or what I will simply refer to as the 'meta-Constitution', comprising an unamendable core or 'basic structure'.[10] The reason for this focus presumably is that the 'meta-Constitution' is not vulnerable to the vagaries of authoritarian politics and therefore offers judges a more secure basis for defending cherished values associated with the ideal of constitutional democracy.

Constitutional history is important to Tew's view of the 'meta-Constitution,' so let me briefly explain her position in relation to this history before explicating her views about an unamendable constitutional core, or 'basic structure'. Constitutional history is germane, because Tew is a constitutional Originalist who thinks that the Malaysian Constitution should be interpreted according to the historical intentions of its Framers. However, she is not wedded to a narrow Originalist perspective that focuses on the psychological beliefs and expectations of the Framers. Rather, she relies on Jack Balkin's theory of 'Framework Originalism', where the constitutional history surrounding the formation of the written Constitution is treated as evidence of a relatively open-ended 'constitutional plan' about the operative form of government. Balkin thinks this plan should be redeemed over time through processes of 'constitutional construction'.[11] The subsequent development of the constitutional plan could take any number of directions but should not stray from the basic form of government evidenced by constitutional history.

The conceptual and normative basis to Balkin's idea of Framework Originalism is the idea of 'popular sovereignty'.[12] As he explains, 'popular sovereignty is not only central to the creation of the written framework, it also underwrites the construction built on top of the framework that flesh it out over time'.[13] Balkin believes that on this account, the activity of constitutional redemption and construction where citizens come to view the constitutional project as inter-generational constitutes the Constitution as both 'higher law' and 'our law' of 'the People'.[14] For Balkin, the tasks of constitutional redemption are primarily a matter of ordinary politics, thereby making his

[9]Article 159(5) of the Federal Constitution stipulates that some amendments must meet the further requirement of approval by the Conference of Rulers comprising the Sultans representing the eleven Royal Houses.

[10]Tew takes the term 'meta-norms' from Jaclyn Neo's discussion of the liberal character of the Malaysian Constitution in Jaclyn Neo, 'Beyond Mortals? (n 1) 22–23. See Tew, *Constitutional Statecraft* (n 1) 144.

[11]Jack M Balkin, *Living Originalism* (Belknap Harvard Press 2011).

[12]Tew, *Constitutional Statecraft* (n 1) 54.

[13]ibid 64.

[14]Balkin, *Living Originalism* (n 11) chs 3 and 4.

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theory a kind of 'popular constitutionalism'. This focus on popular politics is appropriate because the conceptual premise of Balkin's approach is the idea of 'constituent power'; that is, the absolute political authority of the People to determine the form of government and to select a legal Constitution.[15]

Tew ultimately departs from Balkin, because she does not believe politics should be the primary determinant of how to redeem the constitutional plan in Malaysia but that it is up to judges to assert what they believe as an appropriate constitutional direction. For now, the point to note is that Tew adapts Balkin's approach to the Malaysian context and argues that the Framers set out an 'overarching architecture for constitutional governance, with room for various branches of government and the people to engage in constitutional construction. At the same time, the constitution's original framework encapsulates a core of fundamental elements that lie at the heart of the constitutional project.'[16] Here, Tew ascribes to the constitution-making process 'local legitimacy',[17] and asserts that such legitimacy derives from 'the history of the nation's independence' from British colonialism and is 'built on a social contract negotiated among the communal groups in a pluralistic society'.[18]

Keeping in mind that Balkin's theory of Framework Originalism is rooted in the idea of 'constituent power', Tew's rendering of Malaysian constitutional history is an attempt to secure a historical basis to the claim that the constituent power expressing the will of the People suggests that they have chosen constitutional democracy as the operative form of government. Hence, her reference to the idea of a 'social contract' is a reference to the widely held view in the Malaysian context that the Framers of the Constitution had entered into a social-political agreement defining the form of government and the terms of citizenship.[19] Importantly, the social contract both precedes and is subsequently enshrined in the legal Constitution. And it is widely believed that the social contract forms part of the constitutional basic structure and is therefore immune from constitutional amendment.[20] Therefore, Tew's argument appears to be that the social contract broadly defines the content of the 'meta-Constitution' and expresses the will of the People in the exercise of their constituent power, which, importantly, is unamendable.

Tew's tacit reliance on the idea of constituent power cannot be read as a claim of strict historical fact. Unlike the Indian Constitution, which was created by a constituent assembly, the Malaysian Constitution was formulated by a group of foreign jurists headed by the British Law Lord, Lord Reid, that consulted with local elites and segments of the local population. The better reading is that Tew tacitly relies on the idea of constituent power as a conceptual stipulation backed by a loose historical grounding to capture the post-colonial significance of the Constitution as founded on a democratic will of the People, a stipulation needed to establish the normative priority of an unamendable constitutional basic structure or 'meta-Constitution'.

That this is the appropriate interpretation emerges more clearly when we consider that Tew heavily relies on Yaniv Roznai's analyses of the problem of unconstitutional constitutional

[15]Balkin has recently described his argument in terms of 'constituent power'. See Jack M Balkin, 'The Framework Model and Constitutional Interpretation', in David Dyzenhaus & Malcolm Thorburn (eds), *Philosophical Foundations of Constitutional Law* (Oxford University Press 2016) 245.

[16]Tew, *Constitutional Statecraft* (n 1) 79.

[17]ibid 73–75.

[18]ibid 79.

[19]For my analysis of the Malaysian social contract, see R Rueban Balasubramaniam, 'Malaysia's Blocked Social Contract Debate', in Andrew Harding & Dian AH Shah (eds), *Law and Society in Malaysia: Pluralism, Religion and Ethnicity* (Routledge Publications 2018) ch 2.

[20]The provisions of the Constitution generally associated with the idea of the constitutional 'basic structure' are subject to more stringent requirements for constitutional amendment as laid out by Article 159(5). But none of these requirements imply an absolute bar to constitutional amendment. Hence, even those covered by the above provision only suggest that the relevant elements of the Constitution carry great weight so that amendments should be more difficult not that they are immune from amendment.

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amendments and attempts by courts around the world to control this problem.[21] Following Roznai, she argues that Malaysian judges should embrace a technique he calls 'foundational structural interpretation' to identify the features of the basic structure in the Malaysian Constitution.[22] In explaining this technique, Roznai ascribes the normative significance of an unamendable constitutional structure to 'the constitution's foundational substance.' Roznai explains that foundational structuralism assumes that the Constitution 'is not the mere formal existence of the document.'[23] He elaborates that there are basic 'political-philosophical' principles that form the Constitution's 'essence or spirit' such that the Constitution is 'no longer the same' if these principles are undermined.[24] In light of these considerations, Roznai invokes what he calls the 'delegation theory', whereby a distinction exists between the people as 'holders of the constitution-making power and those constitutional organs to which they delegate an amending authority.'[25] Therefore, fundamental questions about the polity remain in the hands of the People who are the 'appropriate holders of the constitution making power.'[26]

It is at this stage that Schmitt enters the picture, since Roznai's arguments are taken from a constitutional perspective that he expressly acknowledges as being most famously developed by Schmitt. Schmitt seeks to defend a critical distance between what he called the 'absolute' Constitution that embodies the will of the People and the 'relative' Constitution, comprising detailed constitutional provisions and the constitutional law.[27] The former is the product of an exercise of constituent power exercised by the People. In this connection, Schmitt is a strong proponent of the idea that there is an 'external' political Constitution that operates as a higher 'law above the law' that therefore controls the meaning of a subsequently enacted legal Constitution. Likewise, Roznai leverages the same distinction to ground a theory of unconstitutional constitutional amendments that should govern how judges apply limits to a legislature's power to enact constitutional amendments. According to this theory, the power of constitutional amendment is merely a 'secondary' constituent power because it is housed in a legal Constitution and is therefore subordinate to a prior and 'primary' constituent power exercised by the People. Hence, when judges articulate and defend limits to constitutional amendment, they are in effect invoking the 'absolute' or prior 'external' Constitution as a check on Parliament.

The 'external' Constitution is the political 'meta-Constitution' that comprises the load-bearing pillar to Tew's arguments. Vicariously through Roznai, Tew follows Schmitt in also trying to create critical distance between the 'meta-Constitution' and the legal Constitution. Since the latter is vulnerable to abusive amendments, her thinking is that the former will be a more secure basis from which to defend constitutional democracy. As I will show, the attempt to create such distance means the foundational premise to Tew's position about constitutional legitimacy and constitutional interpretation by judges will be mainly defined by the conceptual terrain of sociology and politics, not the terrain of the rule of law or legality that typically informs constitutional interpretation. Such terrain turns out to be very problematic for the defence of constitutional democracy in Malaysia's ethno-authoritarian context. But to see why Tew and those sympathetic to her project are led to develop a conception of the judicial role grounded in mainly social and political terrain, and why this is problematic, one has to first briefly appreciate how Schmitt's constitutional perspective are part of an authoritarian political logic.

[21]Roznai, *Unconstitutional Constitutional Amendments* (n 6).
[22]Tew, *Constitutional Statecraft* (n 1) 141.
[23]Roznai, *Unconstitutional Constitutional Amendments* (n 6) 142.
[24]ibid 142.
[25]ibid 8.
[26]ibid.
[27]Carl Schmitt, *Constitutional Theory* (Jeffrey Seitzer tr & ed, Duke University Press 2008) chs 1 and 2.

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Schmittian Political Logic

Constitutional democracy is a form of government that generally aspires to allow for politics between groups that may disagree about the ethical and political identity of the state by affirming that each citizen is subject to the equal protection of the rule of law and has a democratic right to political participation. Political majorities are not politically or legally entitled to dominate political minorities. Therefore, governmental power is typically divided according to a principle of separation of powers and, if there is a written Constitution, there is typically a constitutional bill of rights enforceable by an independent judiciary. A crucial premise behind constitutional democracy is the possibility of pluralistic politics, where disagreeing groups can nevertheless engage in collective decision-making that results in democratically legitimate law.[28]

By contrast, Schmittian political logic is shaped by an apocalyptic view of politics defined by an existential battle between groups defined by a fateful 'friend/enemy' distinction.[29] The 'friend/enemy' distinction defines 'the political' relation where the former consists of a socially homogeneous entity. Schmitt does not specify any marker of homogeneity (these could be race, religion, culture, class, etc). What matters is that the 'political' is an 'intense' form of political association where the group must be willing to engage in mortal combat to assert its identity against an existential 'other' who is the negation of that identity. Schmitt is thus an anti-pluralist.

In his view, the possibility of stable social order and therefore the normal operation of the rule of law requires the making of a political decision about the identity of the state that generates socially homogeneous conditions. Hence, the state is understood as a homogeneous political entity that precedes the creation of an organised legal order. Thus, the most famous sentence of Schmitt's work is: 'Sovereign is who decides on the exception.'[30] The true nature of the political and the identity of the state are revealed in an extreme emergency when the state is under existential threat. In that moment, a sovereign decision asserting the 'friend/enemy' distinction is necessary to bring about the homogeneous conditions needed to enable the ordinary operation of the rule of law.

In making these points, Schmitt describes a political dynamic the logic of which points towards pseudo-democratic executive dictatorship. He argues that the solution to the 'exception' is an exercise of extra-legal political power by a charismatic leader or sovereign who decides the terms of political membership by asserting the 'friend/enemy' distinction. The sovereign decides that there is an 'exception' and how to overcome the emergency, thereby bringing about the conditions needed for normalcy. Here, Schmitt's principles of political 'identity' and 'representation' are important to capture the interplay between the homogeneous group and the sovereign decision.[31] Although the legitimacy of the decision depends upon subsequent acclaim by the group, the sovereign must identify with that group and symbolically represent that group's identity. The group must agree with that identification by registering its acclaim for the decision, but the full public expression of its identity depends on its representation in the persona of a charismatic leader. The political dynamic triangulates social and political elements so that the legitimacy of the sovereign's decision is a matter of power politics that occurs outside justificatory practices associated with constitutional and democratic processes. Consequently, Schmittian authoritarian logic is oriented towards something akin to an executive-dictatorship with populist backing.

Of course, Schmitt never openly rejected constitutional democracy. Nevertheless, his constitutional theory, parts of which underlie Tew's work (via Roznai), indicates a view shaped by his

[28]A powerful and popular exemplar of roughly this position is John Rawls, *Political Liberalism* (Columbia University Press 1993), though Rawls views constitutional democracy as the equivalent of his interpretation of 'liberal democracy'. Perhaps the better model is the one espoused by Hans Kelsen, Schmitt's arch-intellectual enemy. For an articulation of Kelsen's position, see Lars Vinx, *Hans Kelsen's Pure Theory of Law: Legality and Legitimacy* (Oxford University Press 2010)

[29]Carl Schmitt, *The Concept of the Political* (George Schwab tr & ed, University of Chicago Press 2007) 26–27.

[30]Carl Schmitt, *Political Theology: Four Chapters on The Concept of Sovereignty* (George Schwab tr, University of Chicago Press 2005) 5.

[31]Schmitt, *Constitutional Theory* (n 27) 264–267.

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authoritarian political logic. This logic is perhaps most apparent in his critiques of liberalism and liberal legality.[32] The crux of the former is that liberalism is a political theory that emphasises individual autonomy and universal equality that cannot yield any adequate account of the concrete homogenising basis of the state. The crux of the latter is that the liberal attempt to subordinate political authority to legality is untenable because the liberal principle of equality before law is universalistic and unable to differentiate between the equality of citizens and the equality of all humanity and therefore cannot make sense of the distinct political identity of the People as members of a specific political community. In addition, Schmitt argues that the liberal's aspiration to subject political power to the separation of powers introduces insecurity and instability into the constitutional order by encouraging the rise of pluralism and by making more difficult the inevitable need to make a sovereign decision about the identity of the state. In sum, the basic problem is that liberalism and liberal legality fail to account for the exclusionary character of political membership as requiring a homogeneous basis, and correspondingly that the inevitable sovereign decision about the identity of the state is crucial to organised legal-political order.

It is useful to see how Schmitt's critiques of liberalism and liberal legality inform his view of the Weimar Constitution. He attacks liberal elements of the Constitution as embodying fake or 'dilatory' compromises that should be overturned by a sovereign decision.[33] In his view, these compromises only served to delay an inevitable decision asserting the 'friend/enemy' distinction to constitute the identity of a homogeneous German People during a moment of 'exception'. That Schmitt's views are shaped by an authoritarian political logic in the German context are also evident in his view that it was the German President, not the courts, that should be the Guardian of the 'true' Constitution, because the President possesses unlimited emergency powers to make the decision needed to undo these compromises. Finally, Schmitt's authoritarian political logic finds its ultimate expression in his enthusiastic support for Hitler's rise to power.

These aspects of Schmitt's perspective are germane to making sense of his views relating to constitutional legitimacy and limits to constitutional amendment. As noted, Schmitt distinguishes between the 'absolute' and 'relative' constitutions, where the former is the authentic or true Constitution expressing the will of the 'constituent power' of the People and thereby legitimates the latter. He thinks that the 'constituent power' is not subject to prior normative conditioning and is absolute; he also believes the People retain the constituent power in residuum even after a legal Constitution is established so that they can subsequently overturn that Constitution to create a new one.[34] In light of Schmitt's political logic, it is important to see that 'the People' need not be a democratic majority but could be a small but motivated group who is willing to act politically with the backing of a charismatic leader or sovereign that identifies and represents their identity.[35] Accordingly, the elements of Schmitt's political logic suggest that the ultimate and practical bearer of the constituent power will be a sovereign or dictator.

Consequently, when it comes to limits to constitutional amendment, Schmittian political logic means that Schmitt's position does not readily serve constitutional democracy. The Schmittian argument assumed by Tew is that the 'absolute' Constitution operates as a 'meta-Constitution' that hovers above positive law (including positive constitutional law), that is immune from amendment, and that determines the meaning of the legal Constitution. But the question then becomes who determines the content of the former and by what criteria. Following Schmittian political logic, the answers depend on who exercises sovereign power where the values that constitute that identity will also define the 'identity' or content of the Constitution. The relevant criteria become

[32]For an elaboration, see Dyzenhaus, *Legitimacy and Legality* (n 7) ch 2. See also his compelling case that Schmitt's critique applies to Rawls's theory of political liberalism in Chapter 5.

[33]Schmitt, *Constitutional Theory* (n 27) 84–85.

[34]ibid 125–130.

[35]Schmitt, *The Concept of the Political* (n 29) 53. See also Schmitt, *Constitutional Theory* (n 27) 304.

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whatever markers constitute the identity of the group as a unified People. The answers are thus determined by power politics and therefore offer no systematic connection to an outcome favourable to the ideal of constitutional democracy. Indeed, it is likely that the relevant dynamics that shape the typical context that gives rise to the problem of abusive constitutional amendments will not favour a result that benefits constitutional democracy.

Schmitt's political logic suggests that one is unlikely to find the conceptual resources within his constitutional theory to develop a defence of constitutional democracy. As Lars Vinx points out, a key problem is that Schmitt's position cannot ground the democratic right of dissenters, who disagree with the content of positive laws (including constitutional law), to demand a principled justification for the duty to obey law; an expectation that is characteristic of constitutional democracy.[36] Instead, within Schmittian political logic, where the legitimacy of the legal Constitution flows from the politically absolute constituent power of a homogeneous group willing to act politically, such dissenters run the risk of being designated 'enemy'. Indeed, Vinx has also recently argued that Schmitt's constitutional theory is plausibly read as a re-description of the ideal constitutional democracy. His is not an authentic articulation of constitutional democracy, as demonstrated by the authoritarian logic that runs through his theory.[37]

The authoritarian logic of Schmitt's position raises a question of how far Tew's tacit reliance on Schmittian ideas – the notion of an unamendable 'external' political or 'meta-Constitution' that hovers over and regulates the meaning of the legal Constitution – at the conceptual foundations of her argument affect the normative coherence of her position to equip judges with resources to defend and advance constitutional democracy. While Tew is no authoritarian, and her aim is to fight authoritarianism through empowering judges, her position is unfortunately tainted nevertheless by elements of Schmittian political logic so as to generate ambivalence about the values of 'democracy' and 'legality' within her conception of the judicial role. Consequently, judicial decisions about the content of the 'meta-Constitution' are not conceptually oriented to systematically affirm the ideal of constitutional democracy. Put another way, the tools she offers the judiciary undermine the outcome she hopes to achieve.

Constitutional Politics and Political Judges

Democracy

If one takes seriously Tew's account of the legitimating basis to the Malaysian Constitution as residing in the ideal of 'democracy', then the implication is that Tew should espouse a conception of constitutional legitimacy and a corresponding view of the judicial role framed by respect for democratic politics. At a glance, Tew's reliance on Balkin's theory of Framework Originalism is suggestive of this linkage to democracy. Tew is a Framework Originalist and is therefore implicitly committed to the idea that the legitimacy of the Constitution derives from the will of the People, who have chosen to embrace constitutional democracy. In addition, Tew argues that Malaysia's constitutional history reveals a constitutional plan to be subsequently developed or redeemed by 'the various branches of government' and 'the people'.[38] As she says, the Framers understood they were developing a framework for governance with objectives, the future achievement of which could 'only be achieved by the action of the people themselves.'[39]

However, Balkin is a 'popular constitutionalist' who makes the case for Framework Originalism in the American context, where he assumes that the political culture evidences a robust

[36]Lars Vinx, 'Ernst-Wolfgang Bockenforde and the politics of constituent power' (2019) 10 Jurisprudence 15, especially 28–29.

[37]Lars Vinx, 'Carl Schmitt and the authoritarian subversion of democracy' (2021) 47 Philosophy and Social Criticism 173.

[38]Tew, *Constitutional Statecraft* (n 1) 79.

[39]ibid.

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commitment to democracy. Even though it is judges who are the intended recipients of his theory, Balkin thinks they should take their cue from popular democratic politics, especially 'social and political mobilizations that change public opinion.'[40] The difficulty for Tew is that Malaysian democracy is 'fragile', so that Malaysia's political culture does not display a robust commitment to democratic politics. Hence, unlike Balkin, Tew's argument lacks a similarly convincing social and political basis evidencing a commitment to meaningful democratic politics practiced by citizens and recognised by officials. Malaysia's social, political, and legal history is not the same as that of the United States, and the differences matter greatly, because of Malaysia's authoritarian tendencies and history.

Indeed, Tew is ambivalent about the relevance of social and political culture as grounding the democratic ideal and as a potential guide for constitutional redemption and construction. The historical argument she makes about the Malaysian social contract and the local legitimacy of the Malaysian Constitution invokes a democratic grounding for the legitimacy of the Malaysian Constitution. But this grounding is undercut by her skepticism about commitments held by citizens towards democratic ideals, noting that one cannot assume any 'general societal commitment' with respect to individual and minority rights. It is striking that she also says that one cannot assume that citizens could be counted on to 'defend constitutional values'.[41] Additionally, quite apart from Tew's invocations of constitutional history to spotlight the democratic intentions of the People, Tew relies on recent political and social changes that have generated powerful forces for democratic change to support the claim that 'increased political participation and constitutional awareness among the public in recent years reflect the people's aspiration towards developing a more robust constitutional democracy.'[42] These aspects of Tew's arguments suggest she is unsure about the precise significance of the ideal of democracy in Malaysia.

When it comes to democratic institutions, Tew is again ambivalent. On the one hand, Tew explains that democratic institutions in Malaysia are not in 'working order'.[43] Therefore, Tew vehemently rejects the proposal by other scholars that judges should defer to the democratic authority of Parliament and engage in 'weak' judicial review, a form of judicial review where judges can point out when legislation falls afoul of the Constitution but do not invalidate such legislation, leaving this final decision to the legislature.[44] Tew argues that because an authoritarian executive controls Parliament, it is unrealistic to think the legislature would take seriously intimations by judges to engage in 'constitutional dialogue' about the constitutional legitimacy of legislation, thereby making weak judicial review unsuitable for the Malaysian context. Her argument is informed by the idea that there must be a 'healthy' democratic culture to sustain a dialogic approach.

But on the other hand, even if Tew's concerns are plausible and raise empirical concerns about the institutional health of Parliament, they may well go too far in suggesting a wholly skeptical position about the potential for democratic politics to take place in the legislature. Political science indicates that although Parliament is generally a mere rubber-stamp for executive policy, there remains space for meaningful democratic politics and that such politics can have an impact on legislative makeup and activity.[45] Indeed, Tew's very own argument hinges on this truth. Much of her book

[40]Balkin, 'The Framework Model and Constitutional Interpretation' (n 15) 245.

[41]Tew, *Constitutional Statecraft* (n 1) 120–126.

[42]ibid ch 2, especially 33.

[43]ibid 125.

[44]ibid 127–131. Tew details several practical reservations that negate the efficacy of a dialogic approach to judicial review. But since her main objections are normative and have to do with the claim that the judicial role is appropriately defined by a doctrine of 'constitutional supremacy', I do not deal with her practical objections and concentrate my energies on evaluating her normative position.

[45]Hence a through thread in the various conceptualisations applied to Malaysian politics – 'semi-authoritarian' or 'semi-democratic' or even 'ethnic-democracy' – is that there are simultaneously authoritarian and democratic political forces reflected. At times, the former has reached a zenith in the form of 'executive-dictatorship' but that has not been the abiding

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was written during a period of political activism that actually led to regime change in Malaysia, as UMNO lost the 2018 general elections and a democratic reformist government called the Pakatan Harapan (PH) took office. Simultaneously, this period coincides with attempts by judges to defend constitutional norms, including the idea that there is an unamendable basic structure that Parliament could not amend. And when the reformist government took office, Parliament was engaged in the task of institutional reform and sought to enact democratically sound legislation. These facts indicate that even if there may not be a healthy democratic culture, the political culture nevertheless displays a plausible basis to democratic attitudes and practices, such that institutions are subject to pressures to still to engage in activities that approximate what democracy requires.[46]

Despite plausible empirical concerns about how authoritarian power undermines democratic attitudes, practices, and institutions in Malaysia, these concerns are by themselves indecisive regarding how judges should approach the task of judicial review. Instead, the answer to that question requires a normative response about the legitimating basis to the Malaysian Constitution. Thus, Tew's primary response is normative and invokes a sharp distinction between 'legislative supremacy' and 'constitutional supremacy'. The former holds that courts have no power to strike down legislation as invalid even if an Act of Parliament violates unwritten common law principles. Tew is critical of Malaysian judges for being too deferential to Parliament and for wrongly subscribing to the doctrine of 'legislative supremacy', perhaps a by-product of their British legal educations. She argues that since the Malaysian Constitution is supreme, it is higher law such that judges have an 'inherently different task'. That task involves 'constitutional construction' so that judges are entitled to assert what they believe to be the elements of the unamendable basic structure or constitutional 'meta-norms'.[47]

This normative perspective then informs how Tew believes judges should treat the political significance of Acts of Parliament, where she registers the striking claim that judges should not ascribe to legislation any presumptive democratic authority. In fact, Tew argues 'even where the text of the legislation suggests a clear intent to undermine the separation of powers or the rule of law, I argue that courts should still try to interpret the provision in line with the Constitution's fundamental principles, *regardless of the intent of Parliament*.'[48] The consequence is that Tew's judges are normatively unmoored from the ideal of democracy as that ideal may be interpreted by Parliament. And if one takes seriously her claim that citizens cannot be counted on to display appropriate attitudes in support of democracy, the resulting impression is that judges have absolute power to define the ideal of democracy when they determine the content of the unamendable 'meta-Constitution'.

Now, Tew's position might be read to mean that, contrary to the above argument, judges do not have an absolute authority because their judgments must be shaped by the ideal of democracy because they are expected to work from the premise of Framework Originalism and thus assume that constitutional history reveals a foundational choice by the People to embrace constitutional democracy. However, as I argue in the next section, a threshold difficulty is that if the way judges interpret social, political, and, therefore, historical facts, hinges on normative attitudes that are ambivalent about the significance of the democratic ideal, her approach does not systematically

expression of ethno-authoritarian rule. For an attempt to make sense of how these competing forces operate and relate, see Harold Crouch, *Government and Society in Malaysia* (Talisman Publishing 1996).

[46]Tew relies on Jeremy Waldron's case against strong judicial review as contingent upon there being such a culture. Waldron therefore suggests that absent such a culture, judges should step in to defend fundamental rights and engage in strong judicial review. I am not sure how far this suggestion is very well considered in the context of the precise article that Tew cites given Waldron's focus in that article on healthy democratic contexts. The suggestion relies on the implausible assumption that under authoritarian conditions where the legislature is dysfunctional, courts will somehow remain independent and judges able to meaningfully control an authoritarian regime. As I will later make apparent, Tew's position potentially stumbles on this same problem. See Jeremy Waldron, 'The Core Case against Judicial Review' (2006) 115 Yale Law Journal 1341.

[47]Tew, *Constitutional Statecraft* (n 1) 144.

[48]ibid 146 (emphasis mine).

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connect to the premise that constitutional history fixes the People's choice to embrace constitutional democracy. Alternatively, even if judges accept this premise, nothing guarantees they would subsequently make sense of the constitutional plan in a way that meaningfully serves the democratic interests of citizens. Any such guarantee requires another ideal or value about which Tew turns out to be ambivalent, the value of the rule of law or legality as distinct from arbitrary power.

Rule of Law

In explaining the rule of law, Tew argues that Malaysian judges should not adopt a 'thin' conception of legality comprising seemingly purely procedural pre-conditions that govern rule-based legal ordering: requiring that laws comprise rules that are general, public, clear, non-contradictory, capable of obedience, prospective, and what she calls 'practicable'. Her objection is based on what she sees as a link between 'thin' legality and the doctrine of Parliamentary supremacy she rejects.[49] In this vein, just as judges have been too deferential to government because they wrongly adhere to the latter doctrine, Tew is critical of the 'thin' conception of legality as having 'traditionally dominated Malaysian jurisprudence.'[50]

Instead, according to Tew, judges should embrace a 'thick' conception of legality where the rule of law ties to considerations about justice and human rights. In advocating the latter, Tew also unequivocally rejects the idea of 'common law constitutionalism', a legal tradition where judges can invoke unwritten constitutional values that are part of the common law when making judgments of legal legitimacy. The major reason for this is that Malaysian judges should work from the doctrine of 'constitutional supremacy': the ideal of legality is part of the unamendable constitutional basic structure and 'must be located in an explicitly constitutional basis.'[51] Tew argues that part of the reason why Malaysian judges have been too deferential to Parliament and have failed to enforce constitutional controls on state power is a 'lack of clarity regarding the basis to the rule of law.'[52] Therefore, the rule of law is plainly an important value within Tew's conception of the judicial role.

However, this importance is called into question by Tew's analysis of what she takes to be the more pressing concern when it comes to the rule of law. As she says, 'articulating a rule of law conception is one thing; how a judiciary manages to entrench its authority is another.'[53] Here, the question is one of 'constitutional politics', which involves the triangulation of social and political forces, including and especially estimations of the relative intensity of authoritarian power as relevant to how far judges can make government accountable. Where the relative power of the authoritarian

[49]ibid 112.

[50]In explicating 'thin' legality, Tew cites Lon Fuller and Joseph Raz. In doing so, Tew is wholly unaware that despite advocating similar conceptions of legality as comprising the conditions noted above, Fuller thinks the principles comprise an 'internal' morality of law while Raz thinks such conditions are morally neutral and speak only to the efficacy of legal rules. Hence, Fuller and Raz occupy jurisprudentially opposing poles. In this connection, a source of some irritation is that I am somewhat misleadingly cited in the context of this discussion. Specifically, Tew cites an article where my argument in part conveys (with Fuller as against the legal positivist position associated with Raz) that Malaysian judges would do well to affirm the principles of legality thus as an 'internal morality' of law. See R Rueban Balasubramaniam, 'Has Rule by Law Killed the Rule of Law in Malaysia' (2008) 8 Oxford University Commonwealth Law Journal 211, especially 221–225. Additionally, an accurate study of judicial behaviour in Malaysia would show that the record of judicial deference coincides with the tendency by judges not to attend to the structural conditions of 'thin' legality as constraints on power. Rather, judges are susceptible to legislative intimations to defer to official exercises of discretion intended to operate outside the bounds of legal rules. A general methodological problem with Tew's argument is the tendency to invoke disparate theoretical resources from constitutional as well as legal theory with no deeper consideration about how far these resources conceptually relate to each other in service of her arguments. Of course, the most serious expression of this problem is Tew's indirect reliance on Schmitt.

[51]Tew, *Constitutional Statecraft* (n 1) 112.

[52]ibid

[53]ibid 108.

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regime is weak and there is correspondingly a rise in democratising forces, judges can take advantage of this situation to assume a more empowered judicial stance. Constitutional politics are foundational to making sense of Tew's arguments. Elsewhere, she argues that the lessening of authoritarian power in Malaysia has allowed for an 'uneven' journey by courts towards constitutional redemption.[54] Indeed, the arguments in her book appear to flow from a triangulation of such conditions and the opening of space for judicial empowerment especially in the wake of UMNO's electoral loss in 2018.

These observations about constitutional politics connect to Tew's account of the legitimacy of the Malaysian Constitution as traceable to constituent power in a way that implies that contrary to the foundational normative distinction between the rule of law and arbitrary power, the rule of law is subordinate to political power. If judges are to focus on the 'meta-Constitution' expressive of the constituent power and must triangulate their relative position within the dynamics of power politics, then court decisions are to proceed on the conceptual terrain of politics, not legality. Even if one supposes that Tew's position is that the constituent power commands that judges apply the 'thick' rule of law, the difficulty is that if political terrain remains the foundational basis to judicial decisions, nothing about that terrain necessitates judges to retain firm focus on legality, because everything depends on how far legality is important within background social conditions and power politics. If Tew's observation about the absence of any reliable 'general societal commitment' to protecting individual rights is correct, the conclusion is that political terrain is not congenial to 'thick' legality.

Tew is, therefore, ambivalent about the significance of the ideal of legality within the judicial role in part because she has failed to see that the foundational normative distinction between the rule of law and arbitrary power is crucial to grounding the judicial role in a way that orients towards the perspective and interests of the legal subjects so that the rule of law is the necessary conceptual bridge to the ideal of democracy. The rule of law generates a justificatory dynamic that requires officials to take seriously the perspective of the legal subject as the primary perspective from which to adjudicate questions of legal and political legitimacy, thereby connecting with the democratic ideal.[55] Even on the relatively less normatively demanding 'thin' view of legality, the principles that constitute the rule-governed character of legal order create the basis for a normative framework of justification. Those subject to such authority are entitled to demand that officials interpret and apply the law according to the principles that make up 'thin' legality thereby offering a degree of mitigation against arbitrary power. Where there is a legally supreme Constitution that links 'thin' with 'thick' legality by also including a constitutional bill of rights, this mitigation is further enhanced.

Of course, this is arguably the normative framework embodied in the content and structure of the Malaysian Constitution. But Tew's conception of the judicial role – as captured in a commitment to an over-arching 'Meta-Constitution' – disables judges from availing themselves of the Constitution itself to bridge between legality and democracy, a problem expressive of the Schmittian taint within Tew's general conceptual stance about constitutional legitimacy and the judicial role. To explain, since Tew's position is driven by concerns about the vulnerability of the legal Constitution to abusive constitutional amendments, her argument embraces the Schmittian distinction between an 'absolute' or 'meta-Constitution' as an unamendable 'law above the law' that hovers over the 'legal Constitution'. In Schmitt, this distinction is informed by a desire to establish the priority of arbitrary political power over the rule of law to subvert constitutional democracy. Tew is no authoritarian, but the desire to firewall the 'meta-Constitution' from the fragile legal Constitution means that, like Schmitt, her view also subordinates legality to

[54]Yvonne Tew, 'On the Uneven Journey to Constitutional Redemption: The Malaysian Judiciary and Constitutional Politics' (2016) 25 Washington International Law Journal 674.

[55]David Dyzenhaus, 'Law as Justification: Etienne Mureinik's Conception of Legal Culture' (1998) 14 South African Journal of Human Rights 11.

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arbitrary political power and leads to further consequences emblematic of Schmittian logic. Hence, her argument is also Schmittian, because the idea of judicial politics resembles the dynamics that inform his political logic where questions of constitutional legitimacy are determined by reference to the interplay between social and political factors, and the operation of power politics outside ordinary constitutional law.

Finally, it would seem that, under intense authoritarian conditions, Tew's judges would be under an even stronger duty to set aside the legal Constitution and to attend to social and political factors to make sense of the 'meta-Constitution'. However, the obvious problem that issues from this stance is that potentially these social and political factors and the effect of power politics upon the courts may well lead judges to work against constitutional democracy. As I will now show, this risk is not fanciful as there is evidence to suggest that Schmittian political logic, as the authoritarian logic of ethnocracy, has infiltrated the minds of some judges. Therefore, authoritarian judges could easily reconfigure Tew's approach to legitimate ethno-authoritarian decisions. The ironic result is that even if Tew is not an authoritarian who sets out to make judges Schmittian sovereigns, the logic of her argument would create a situation where judges could come to occupy the position of the full-blooded Schmittian sovereign who exercises a legally uncontrolled power to defend the existential identity of a politically dominant Malay political community.

Authoritarian Reconfiguration

To turn back to Vinx's observations that Schmitt's constitutional theory is an authoritarian re-description of constitutional democracy and offers the resources for authoritarians looking to claim democratic legitimacy, a similar dynamic of authoritarian re-description has been playing out in the Malaysian legal-political context at least for the last five decades. Any careful accounting of why Malaysian constitutionalism has not reflected a meaningful commitment to constitutional democracy requires tracing the influence of the key elements of Schmittian authoritarian logic as informing the attempt at such re-description by officials complicit in advancing an ethnocratic political paradigm. I am not suggesting that ethnocratic ideologues consciously read Schmitt and apply his ideas; rather, the suggestion is that the authoritarian logic behind the primary ideological justification for ethnocracy reflects hallmarks of the Schmittian position.

Ethnocrats argue that there is a 'sacrosanct social contract' embodied in the Malaysian Constitution that affirms a political doctrine of 'Malay Dominance'.[56] In contemporary Malaysian politics, Malay identity is equated with Muslim identity so 'Malay Dominance' now means 'Malay-Muslim Dominance' and even underlies calls to create a theocratic state.[57] Crucial to the ethnocratic argument is the claim that the notion of 'Tanah Melayu' or 'Malay land', that is, the Malay state precedes the formation of the legal Constitution such that the political identity of the state is fundamentally Malay, and that the legal Constitution is built upon this prior political entity.

In light of this claim, it is further argued that non-Malays have rights of political citizenship, but these are subject to absolute deference to the politically dominant position of the ethnic Malays who are 'Bumiputera' or 'sons of the soil'. To back up this claim, ethnocrats caution that any questioning of this dominant position risks triggering 'Malay anger' therefore absolute obedience to the social contract is necessary. By corollary, non-Malays are ultimately characterised as '*pendatang*', roughly translated to mean 'immigrant', 'stranger', or 'outsider'.[58] Ethnocrats emphasise the identities of

[56]For an account and analyses of this position, see Balasubramaniam, 'Malaysia's Blocked Social Contract Debate' (n 19).

[57]See Tamir Moustafa, *Constituting Religion: Islam, Liberal Rights, and the Malaysian State* (Cambridge University Press 2018) for a compelling study of how the effort to operationalise the ethno-Islamic position has Malaysian law, especially constitutional law and adjudication in the courts.

[58]My translation. In some English translations of this position, non-Malays are described as 'guests'. However, this is not the best translation since ethnocratic ideologues would then use the word 'tetamu', which suggests a more congenial relationship between host and guest, not a relation of domination.

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ethnic Malays as the politically 'definitive people' in comparison to non-Malays, who are defined as existentially different or 'other'.[59]

Finally, ethnocrats assert that exercises of state power in the name of the social contract are legally and politically legitimate. Such an assertion is characteristically a response to the complaint that the government has exercised an authoritarian power that violates legal and political controls on state power associated with constitutional democracy. In making this assertion, ethnocrats characteristically also argue that such actions are legitimate in the name of the legal Constitution that reflects the terms of the social contract.

The ideological argument thus outlined implicates elements of Schmittian political logic. For instance, the argument implies that ethnic Malays are willing to act politically in the way that Schmitt requires, and are thus willing to fight and die in the name of their identity. This claim is not merely rhetorical because ethnocrats reference historical events of the Sino-Malay riots that took place in 1969 and that occasioned an actual 22-month state of emergency or 'exception' where ordinary constitutional norms and modes of government were suspended. The riots were triggered by the prospect of UMNO's loss of its two-thirds majority in Parliament to a Chinese-led political party. An orgy of killing and mass destruction of property took place leading to a formal state of emergency. A major consequence of these riots was the express political affirmation of the ethnocratic political paradigm backed by constitutional amendments intended to entrench that paradigm from ordinary political dissent.[60] The argument, as characteristically invoked in contemporary Malaysian politics, is a constant reminder that ethnic Malays are willing to act politically against those who question Malay Dominance, as the latter risk being identified as an existential 'enemy' to be vanquished.

The ideological argument further implies that, regardless of the specific terms of the legal Constitution, there is a historically salient 'meta-Constitution' embodying values constitutive of the identity of a homogeneous Malay-Muslim People that controls the meaning of the legal Constitution. To be sure, ethnocrats focus on specific aspects of the legal Constitution that affirm the official status of Islam as the religion of the Federation and other provisions designating ethnic Malays as having a 'special position' as beneficiaries of a program of affirmative action.[61] But the claim that the Malaysian social contract is 'sacrosanct' is typically invoked as a response to challenges to ethnocratic rule, including challenges that assert a different and democratic reading of the Malaysian Constitution. The claim asserts the normative priority of an ethnocratic political Constitution over the legal Constitution.[62] In addition, such responses are intended to legitimate the idea of a pseudo-democratic dictatorship in the name of the Malay People.

[59]The classic expression of this position and this emphasis on the existentially different identity of non-Malays is Dr Mahathir Mohammad, *The Malay Dilemma* (Federal Publications 1970). See also his articulation of the Malaysian Social Contract in Dr Mahathir Mohammad, *Blogging to Unblock* (Berita Publishing 2008) 92–103. See also the discussion of 'othering' conveyed by the idea of the Malaysian social contract in Mavis C Puthucheary, 'Malaysia's Social Contract: The Invention and Historical Evolution of an Idea', in Norani Othman, Mavis C Puthucheary & Clive S Kessler (eds), *Sharing the Nation: Faith, Difference, Power and the State 50 Years After Merdeka* (SIRD Press 2016).

[60]See R Rueban Balasubramaniam, 'Hobbism and the Problem of Authoritarian Rule in Malaysia' (2012) 4 Hague Journal on the Rule of Law 211, arguing that the 1969 riots allowed for not only a political authoritarian turn but also a jurisprudential shift towards an authoritarian philosophy of law.

[61]The difficulty is that ethnocrats tend to read these provisions in isolation from the rest of the Constitution so that the argument that these provisions serve as a basis for defending an ethno-Islamic political paradigm is dubious from the perspective of sound constitutional interpretation. As Moustafa has pointed out, ethnocrats tend to take a 'selective' interpretation of the Constitution to suit their chosen political paradigm. See Moustafa, *Constituting Religion* (n 57) 148.

[62]Consider Dr. Mahathir's explication of the social contract as a direct reply to arguments made by the Malaysian Bar Council that the Malaysian Constitution presupposes an egalitarian conception of political citizenship opposed to ethnocratic rule. For my analysis of the context to his reply, see Balasubramaniam, 'Malaysia's Blocked Social Contract Debate' (n 19). What is revealing is that while the Bar Council argues from the perspective of legal interpretation, Dr Mahathir recasts their argument as political and attacks the Bar Council for acting like a 'political party.' Of course, this recasting is yet another

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This last point reflects Vinx's observation that Schmittian political logic is an authoritarian re-description of constitutional democracy. In this connection, Tamir Moustafa has recently argued that judges are complicit in a battle of 'rites versus rights' between ethno-Islamists and liberal-secularists about the 'identity' of the Malaysian state.[63] His study of court cases reveals the ongoing dynamics of re-description as public officials and some judges work to re-shape the conceptual terrain that informs questions of legal and political legitimacy, by shifting away from the terrain of legality and onto the terrain of sociology and politics in the way that Schmitt desires. Judges are attempting to actualise the core tenets of the ideological argument for Malay Dominance, including an emphasis on Islam as integral to the political identity of the state. Indeed, Tew has also argued that judges have been complicit in helping to bring about a 'stealth theocracy'; that is, courts have quietly been using procedural and jurisdictional arguments to allow Islamic values to supersede the secular constitutional framework.[64]

The political logic behind this complicity involves the attempt to apply Schmittian political logic in furthering the doctrine of Malay Dominance, where a by-product is the creation of a top-down structure of authoritarian governance where executive power can be exercised absent the control of independent courts. To make sense of these dynamics, consider two constitutional amendments enacted in 1988, arguably at a moment in Malaysian political history that marks an inflection point in the effort to entrench ethno-authoritarian rule. These amendments were triggered by judicial attempts to check the government via judicial review, in response to an especially authoritarian period when the government sought to control political dissent, including through the use of draconian security laws allowing for indefinite detention without trial. These efforts occasioned an official backlash as judges from the apex court, the then Supreme Court (subsequently renamed the Federal Court), were sacked for 'misconduct'. This reaction garnered international attention as an assault on judicial independence and the rule of law.[65]

In addition to the sacking, and to cement political control over the courts, the government amended Article 121(1) of the Constitution (the 'judicial power amendment'). Prior to amendment, the provision read that the 'judicial power of the Federation shall vest in the High Courts', making it clear that the jurisdictional powers of the courts were a creature of the Constitution, not ordinary legislation enacted by Parliament. Upon amendment, the phrase 'judicial power' was deleted, and the provision reworded to say that the jurisdiction of the courts shall be 'subject to federal law'. In the wake of the amendments, it became clear that the point of the amendment was to give Parliament authority to define the scope of judicial review using legislative ouster clauses that either curbed or excluded judicial review. In so doing, Parliament could enact legislation to grant public officials a legally uncontrolled and arbitrary power beyond judicial control and contrary to the doctrine of the separation of powers.[66]

The assault on the courts, and the 'judicial power amendment', understandably overshadowed a further amendment in the form of Article 121(1A), which was politically intended to create an autonomous system of Islamic courts ('Syariah Court amendment'). The Syariah courts were a creature of ordinary legislation. The official reason given for the amendment was that the civil courts had been overturning the decisions of the Islamic courts that have jurisdiction over the private affairs of Muslims, although there was hardly any evidence to support this claim. The real reason was that the heat of political competition for votes necessitated that the ethnocratic UMNO regime

example of how ethnocrats try to shift the conceptual terrain to inform questions of legal and constitutional legitimacy away from the terrain of legality onto the terrain of politics.

[63]Moustafa, *Constituting Religion* (n 57) 76.

[64]Yvonne Tew, 'Stealth Theocracy' (2018) 58 Virginia Journal of International Law 31.

[65]HP Lee, *Constitutional Conflicts in Contemporary Malaysia* (Oxford University Press 1995) ch 3 (explaining the events and details of this backlash).

[66]Balasubramaniam, 'Has Rule by Law Killed the Rule of Law in Malaysia?' (n 50), analysing this problem.

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needed to enhance its Islamic credentials with the ethnic Malay-Muslim population, who formed the majority of grassroots voters.[67]

Over three decades later, the latter amendment has become the focus for the battle of 'rites versus rights' that Moustafa describes. The ruling ethnocratic regime uses Islamic law to enforce a formal definition of Malay-Muslim identity and to control those identified as Muslims. The realm of private Islamic law, especially family law, has become the site for the attempt to construct and defend the Malay-Muslim identity of the state. Hence, a serious problem has been the pressing issue of unilateral child conversions, where one spouse converts to Islam and converts their children to Islam without the consent of the non-Muslim spouse. Of course, this also means that non-Muslims are affected in such cases. However, a serious problem is that civil court judges are generally very reluctant to intervene in such cases, arguing that the 'Syariah court amendment' means civil courts have no jurisdiction to hear appeals in such cases. Since non-Muslims have no standing in Islamic courts, the latter are rendered in effect 'rightless', thereby producing a veritable 'jurisdictional imbroglio'.[68]

The question then becomes why judges are reluctant to intervene, given that the compelling argument that the Syariah Courts are subordinate to civil courts because the former's authority is rooted in legislation, while the latter's authority is rooted in the Constitution itself. Civil courts have been resistant to this argument as judges continue to be unwilling to exercise appropriate constitutional supervision. Scholars argue that the problem has to do with a breakdown in judicial independence and the seepage of ethnocratic ideology in the judiciary.[69] Hence, Dian Shah observes:

> At present, an overwhelming number of judges are Malay-Muslims. It would of course be unfair to insinuate that a judge's ethnic and religious identities can, per se, influence his or her decisions. However, given the climate of Muslim religious fervour and the propaganda of the threat – real or imagined – to Islam and the Malay race, combined with the state's politicization of Islam, we cannot completely discount the possibility these wider elements may shape a judge's personal preferences and decisions.[70]

Shah goes on to describe how some judges declare that they are 'Muslims first, judges second' and view it as their foremost duty to uphold the priority of Malay-Muslim identity in preserving 'Malay power'. In addition, she observes that some judges are keen to defend Malay political power, a view that she characterises as ideological and involves a 'perversion' of constitutional provisions.[71]

The word 'perversion' is revealing because it brings forward the idea that the authoritarian forces that have negatively impacted judicial independence have done so in a manner that is suggestive of

[67]Joseph CY Liow, *Piety and Politics: Islamism in Contemporary Malaysia* (Oxford University Press 2009) (explaining the political dynamics behind the amendment to Article 121(1A)).

[68]Thio Li-Ann, 'Jurisdictional Imbroglio: Civil and Religious Courts, Turf Wars and Article 121(1A) of the Malaysian Constitution', in Andrew Harding & HP Lee (eds), *Constitutional Landmarks in Malaysia* (LexisNexis Press 2007) 197–226.

[69]Amanda Whiting has suggested to me that Malaysian judges have been deferential because of their social and political conditioning as many judges are appointed from the civil service. While this is true, a more subtle and complete explanation for the general record of judicial deference has to take into account the ways in which judges embrace jurisprudential assumptions about the character of legal authority and how these inform the judicial role. In addition, any such account has to also show how these assumptions in the Malaysian context have made judges congenial to authoritarian ideology expressive of Schmittian political logic. Here, the explanation cannot simply be political and boil down to a claim that judges are not independent. The fact remains that despite authoritarian pressures, some judges remain able to render meaningful decisions beneficial to the rule of law. Rather, a nuanced explanation would start with the argument I make elsewhere that judges have traditionally embraced a Hobbist conception of legal authority that emphasises the authority of the legally unlimited sovereign who must nevertheless rule through law and has transformed into a Schmittian juridical outlook where the sovereign's rules politically outside legality. Of course, Schmitt was inspired by Hobbes and sought to radicalise Hobbes's ideas to pave the way for a political dictatorship operating outside the constraints of legality. See Carl Schmitt, *The Leviathan In The State Theory of Thomas Hobbes: Meaning and Failure of a Political Symbol* (George Schwab tr, University of Chicago Press 2008).

[70]Shah, *Constitutions, Religions, and Politics in Asia* (n 19) 196–197.

[71]ibid 197.

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the kind of subversion of constitutional democracy intended by Schmitt's political logic. Authoritarian forces have been utilised so that judges reconceive their judicial role so as to privilege ethnic, religious, and communal values over the values of legality. Importantly, in privileging such values, judges continue to assert that such values are germane legal reasons that should govern the interpretation of the Malaysian Constitution. In so doing, judges are emphasising the priority of an ethnocratic 'meta-Constitution' or social contract expressive of Malay Dominance, and working to affirm the identity and will of an ethically and ethnically homogenous People against the potential threat posed by an 'existential' other. But, as the word 'perversion' implies, these are not defensible interpretive practices but are pathological practices from the perspective of legality. These pathological practices have, in turn, been made possible by damage done to judicial independence.

These realities pose obvious problems for Tew's case for empowering Malaysian judges. If the combination of authoritarian pressures and ideology have made judges susceptible to social and political forces, and the play of power politics intended to affirm the priority of ethnocratic rule, then Tew's position is potentially problematic because she is asking judges to attend to such forces in deciding the content of the 'meta-Constitution'. To be sure, her argument is that judges should extrapolate from constitutional history an understanding of the Malaysian social contract as embodying a commitment to a wider constitutional plan expressive of constitutional democracy, including a principle of secularity. But once judges are asked to operate on political terrain, there is not any systematic reason rooted in politics or sociology to think that judges would render Tew's preferred account of Malaysian constitutional history. Indeed, the evidence suggests that they are likely to subsequently develop a pathological view of that plan as an ethnocratic rendering of constitutional democracy in service of Malay political power.

This danger is amply illustrated by the Court of Appeal decision in the *Allah-Herald* case.[72] The issue before the court was whether the government's attempt to ban the Malaysian Catholic Church from using the word 'Allah' in its weekly Malay language newsletter, The Herald, was lawful. The UMNO-led government argued that the Church should desist from using the word 'Allah' because it is also the Malay-Muslim language word for 'God'. The argument was that the use of this word could confuse Malay-Muslims and somehow lead them to convert to Catholicism. Therefore, it was argued that the use of the word 'Allah' not only potentially inflamed Malay-Muslim racial and religious sensitivities; its usage also threatened national security. The argument was therefore Schmittian in suggesting that the Catholic Church posed an existential threat as 'enemy' to the identity of the state as an ethno-Muslim state, such that its actions could be read as trigging a moment of 'exception' that had to be dealt with appropriately.

In response, the Catholic Church argued its right to practice the freedom of religion under Article 11(1) of the Malaysian Constitution, which declares 'Every person has the right to profess and practice his religion … [and] to propagate it.' In addition, the Church also argued that The Herald was not available publicly but was only available in Church to those present at masses so that there was no credible risk that Muslims would somehow be confused into converting to Catholicism. Hence, in addition to invoking its constitutionally protected rights, the Church tried to show that it was not indifferent to so-called racial and religious sensitivities of ethnic Malay-Muslims.

Apandi Ali JCA, who delivered the leading judgment for the Court of Appeal, upheld the government's ban in a manner reflective of a Schmittian position. He accepted the government's arguments and cited existential considerations about the need to defend Malay-Muslim identity as integral to the identity of the state and the Constitution. He argued that Article 3(1) makes Islam the 'official religion of the Federation' so that the state should give priority to the protection of Islam. In doing so, he took an idiosyncratic interpretation of the rest of Article 3(1), which says:

[72] *Menteri Dalam Negeri & Others v Titular Roman Catholic Archbishop of Kuala Lumpur* [2013] 6 MLJ 468 (Court of Appeal).

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'…but other religions may be practiced in peace elsewhere in the Federation.'[73] Rather than reading this statement as echoing the Constitution's protection of the freedom of religion in Article 10(1), he read the provision to mean other religions could not be practiced if doing so would undermine social peace. He argued that other religions posed an existential threat to Malay-Muslim identity, and thus also risked social stability and security. As such, the government was entitled to control the spread of non-Muslim religions.

It is plausible to view Apandi Ali JCA as taking up the mantle of an interim Schmittian sovereign by declaring and then dealing with an existential threat, or 'exception', and by invoking the 'friend/enemy' distinction to defend the priority of Malay-Muslim identity as against the potential negation of that identity by the Catholic 'other' or 'enemy'. Here, it is striking that the judge invoked the idea of a constitutional basic structure and argued that Article 3(1) is 'on a par with the basic structure' of the Constitution.[74] In fact, he cited the Malaysian 'social contract' and said:

> It is my judgment that the purpose and intention … is to protect the sanctity of Islam as the religion of the country and also to insulate against any threat faced or any possible and probable threat to Islam … It is also my judgment that the most possible and probable threat to Islam, in the context of this country, is the propagation of other religions to the followers of Islam.[75]

These remarks, read alongside the preceding claims about the basic structure, signal the presence of an 'external' ethnocratic 'meta-Constitution' of political Malay Dominance, which hovers over and controls the meaning of the legal Constitution. The 'meta-Constitution' here carries the further implication that the primacy of Islam is sacrosanct and immune from political challenge, indeed immune from constitutional amendment. Of course, this is to echo the official ideological stance behind ethnocratic rule, which rests in the Schmittian distinction between friend and enemy or between Malay-Muslims and others. Indeed, Apandi Ali JCA went on to register his worries about how non-Muslims might 'erode Malay power'.[76]

The Allah-Herald case illustrates the problem that some judges are subject to the ideological argument behind ethnocratic rule and are therefore willing to privilege an ethnocratic 'meta-Constitution' to determine its contents by reference to how social and political factors pose a threat to Malay-Muslim identity. They are therefore complicit in the wider enterprise of authoritarian re-description. Note Apandi Ali JCA still purports to render legal or constitutional reasons for his decision, even if it is plain that his is a badly flawed piece of legal reasoning. It is flawed because it deviates from the epistemic standard of legal coherence that structures good faith legal reasoning, which would require taking a holistic view constitutional text, structure, and history.[77] Instead, echoing Moustafa's and Shah's critique of ethnocratic judgments, the decision displays a dubious and selective view of the Constitution's protection of the freedoms of speech

[73]ibid 493.
[74]ibid 509.
[75]ibid 493.
[76]ibid.
[77]Ronald Dworkin, *Law's Empire* (Harvard University Press 1986) remains the leading account of legal reasoning as requiring interpretive judgments of 'fit' and 'justification'. While Dworkin's theory requires that judges render a morally justified interpretation of the law as a whole, including the Constitution, he argues that judges are bound by an epistemic requirement of interpretive coherence and that such a requirement is likely to curb arbitrary and purely instrumental articulations of the law as working in service of some specific set of political preferences. In this regard, genuine interpretive judgments are not merely puppets being manipulated behind the scenes by a judge's prior political commitments. Interpretive judgments of fit and justification will have a crosscutting effect that disciplines the judge's political convictions as she strives to find interpretive equilibrium between both judgments. In the Malaysian context, it is possible to see how ethnocratic judges render decisions that display egregious failures of interpretive fit thereby suggesting that these judges are not engaged in good faith legal reasoning. The impression is that politics, not legality is doing the real work in these decisions.

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and religion that barely conceals a political defence of Malay power. The judge is not deciding by reference to the interpretive requirements of legality. Rather, as his comments about the need to 'insulate' Malay-Muslims from threats 'in the context of this country' show, Apandi Ali JCA is invoking a social and political claim about that threat as requiring a response.

Of course, the judgment also suggests that Tew's proposed approach to constitutional interpretation could be easily reconfigured as part of an attempt at authoritarian re-description of constitutional democracy in Malaysia to mean some version of populist or 'ethnic-democracy'. Even though Tew's conception of the judicial role is tacitly predicated upon the idea that the legitimacy of the Malaysian Constitution and the ingredients of the unamendable basic structure flow from an exercise of constituent power by the People, her judges need not take the ideal of democracy seriously. The invocation of 'the People' has a fictive air because it makes no contact with the perspective of ordinary citizens and allows judges to simply assert what they believe the constituent power commands as the contents of the 'meta-Constitution'. As well, Tew's conception of the judicial role subordinates the ideal of the rule of law to the constituent power so that the primary judicial focus is on social and political factors that evidence the will of the People. Given a background setting affected by pathologies – authoritarianism, ideology, and weak judicial independence – traceable to elements of Schmittian political logic implicit in ethnocratic rule, authoritarian judges could reconfigure Tew's proposals to reach the conclusion that oppressive ethnocratic laws and policies are part of the 'meta-Constitution' expressing the will of the Malay-Muslim community who are the 'definitive People'.

To emphasise this risk, Apandi Ali JCA's decision appears as a mirror image of Tew's claim that judges should engage in constitutional statecraft by working up the basic structure of the Constitution in service of constitutional democracy. Here, the judge invokes the idea of a constitutional basic structure to engage in ethnocratic statecraft and to further the aims of the ethnocratic state.[78] Consequently, even though Tew is not advocating a conception of the judicial role where judges should operate as authoritarian Schmittian sovereigns, the judgment indicates that her position supplies the basis for judges to make decisions *qua* a Schmittian sovereign.

But perhaps the problem of authoritarian reconfiguration is only a problem if we are thinking about authoritarian judges complicit in upholding ethnocratic ideology. Hence, it might be argued that conscientious Malaysian judges could take up Tew's proposals. Here, Tew relies on the fact that Malaysian Courts have asserted the importance of an unamendable constitutional basic structure to deal with the problematic constitutional amendments enacted in 1988, the 'judicial power' and 'Syariah court' amendments. So, the question is how far conscientious judges would embrace her proposals to defend and develop a vision of constitutionalism expressive of constitutional democracy. I now turn to address this question, and to argue that the conscientious Malaysian judges Tew has in mind apply different non-Schmittian or perhaps even anti-Schmittian conceptual assumptions about constitutional legitimacy in a way that suggests they are unlikely to find the ideas associated with Tew's approach congenial.

[78]Tew might reply that the judgment does not illustrate the risk of authoritarian reconfiguration of her approach but amounts to a distortion that does violence to the logic of her position as premised on the claim that constitutional history indicates a secular social contract as part of a commitment to constitutional democracy. As I have argued elsewhere, any defence of this position necessitates an argument of political morality, not a historical argument. Since Tew is a Framework Originalist, it would seem that she would have to then fall back on a version of Originalism she rejects that focuses on the Framer's expectations about how the Constitution should be interpreted. Indeed, at times, she seems to do precisely this. The difficulty here is not only that a normative argument has to be given to explain why an Originalist approach should be taken seriously to begin with. There is the further problem that the historical record shows discord about what the Framers expected and even discord about who should count as Framers. See Balasubramaniam, 'Malaysia's Blocked Social Contract Debate' (n 19).

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The Priority of Legality

The parameters that define Tew's argument are that, despite the fragility of Malaysian democracy and authoritarian pressures on the courts, there remain some space for judges to engage in constitutional statecraft and to advance the ideal of constitutional democracy. While her arguments are aspirational, they are also supposed to be practically implementable on the basis that there is presently room for Malaysian judges to work up the idea of an unamendable constitutional basic structure as a bulwark against ethno-authoritarian rule. Her argument therefore relies on a claim about descriptive plausibility and invokes recent examples of decisions by Malaysian judges that reflect the possibility of judicial resistance to authoritarian rule.

Perhaps the most significant court decision that informs Tew's arguments and inspires her proposals about how judges could defend and develop the unamendable basic structure is the 2018 Federal Court decision in *Indira Gandhi*, widely considered a landmark judgment that expressly affirms the so-called 'basic structure doctrine' as part of Malaysian constitutional law.[79] The judgment is significant because this affirmation is made in response to the problematic 'judicial power' and 'Syariah court' amendments and responds by arguing that the basic structure of the Malaysian Constitution reflects a commitment to values of political morality reflective of constitutional democracy.

The case is also material because it involved the vexing issue of unilateral child conversions, which resulted in a 'jurisdictional imbroglio' that left the non-Muslim spouse effectively 'rightless'. In this case, the appellant was a mother whose children had both been unilaterally converted and abducted by her husband.

It has to be noted that, although the problem in this case appears at a glance to be a problem of Islamic private law, the problem has political and public dimensions. As Maznah Mohamad has argued, Islamic family law has been the locus for a state-driven project of Islamic homogenisation.[80] As already mentioned, the same issue crops up in apostasy cases where it is practically very difficult – bordering on impossible – for those identified as Malays to exit Islam. Likewise, when it comes to unilateral conversions, the same political logic of ensuring that there is an ethically and socially homogeneous Malay-Muslim community informs how courts approach such cases. As Mohamad has convincingly argued, the goal is to establish the hegemonic status of Muslims in an ethnically diverse social and political setting. Of course, such a goal reflects the aim of Schmittian political logic to establish an authoritarian government acting in the name of a unified political community. Family law has become a site for conscious and active effort by the state to construct and enforce a homogeneous conception of Islamic identity.

It is also for this reason that such decisions garner significant political and social attention. As Moustafa points out in his study of the battle of 'rites versus rights' taking place in the courts, decisions about unilateral child conversions become the focus of a 'political spectacle'.[81] Cases implicating Islamic law garner considerable media scrutiny where the two sides in the battle also disagree in the court of public opinion. Those in the former camp worry that court decisions could generate a threat to the priority of Islam as integral to the ethnocratic Malay-Muslim identity of the state. Those in the latter camp are anxious that court decisions could potentially erode what are believed to be the secular foundations of the Malaysian Constitution and as threatening the importance of individual autonomy and the freedom of conscience. Since these competing viewpoints find expression in the media, it was very likely that the judges were aware of the wider political significance of any decision they would make in context of the battle of rites versus rights.

[79] *Indira Gandhi v Director of Religious Affairs (Perak) & Others* [2018] 1 MLJ 545 (Federal Court) (henceforth '*Indira Gandhi*').

[80] Maznah Mohamad, 'Making majority; undoing family: law, religion and the Islamization of the state in Malaysia' (2010) 39 Economy and Society 360.

[81] Moustafa, *Constituting Religion* (n 57) ch 5.

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Against this background, the Federal Court was at pains to emphasise that its decision was made wholly in accordance with a commitment to legality. In a short concurring judgment that precedes the leading judgment, Zulkefli PCA, sitting as a member of the Federal Court bench, expressly declared that judges were 'not swayed by our own religious convictions and sentiments.' He added, '[i]n the present case in upholding the rule of law we have to decide on the issue strictly on the basis of the relevant laws, case authorities and the provisions of both the state and the Federal Constitution governing the particular issue.'[82] These remarks expressly resist a general tendency reflected in the way such judgments are read in the wider social and political milieu as merely the instrumental expression of the court's ethical, religious, or political beliefs. Rather, the court had approached the decision impartially and interpreted the relevant law by reference to the requirements of legality.

Zainun Ali FCJ delivered the leading judgment containing the central argument affirming the status of an unamendable constitutional basic structure as part of Malaysian constitutional law. The main argument is expressed in the following passage:

> The constitution implements a structure of government and must be understood by reference to 'the constitutional text itself, the historical context, and previous judicial interpretations of constitutional meaning…' The rules of constitutional interpretation require that constitutional documents be interpreted in a broad and purposive manner and placed in their proper linguistic, philosophic, and historical contexts … Generally, constitutional interpretation must be informed by the foundational principles of the Constitution, which include principles such as federalism, democracy, the protection of minorities, as well as constitutionalism and the rule of law … These rules and principles of interpretation have led this Court to conclude that the Constitution should be viewed as having an 'internal architecture', or 'basic constitutional structure.' … The notion of architecture expresses the principles that '[t]he individual elements of the Constitution are linked to others, and must be interpreted by reference to the structure of the Constitution as a whole'.[83]

In this rich passage, the Federal Court invokes the idea that there is an 'internal architecture' within the Constitution or a 'constitutional basic structure'. Of course, this is the idea that Tew wishes to defend and develop by reference (via Roznai) to the Schmittian distinction between the 'absolute' and 'relative' constitutions, where the emphasis is on the former as the operative 'meta-Constitution' that hovers above the legal Constitution. But one should note that even the general idea of an 'internal architecture' appears conceptually different from the Schmittian notion of a political or 'absolute' Constitution that expresses the constituent power. A 'meta-Constitution' suggests a constitutional perspective that is 'above' and 'external' the legal Constitution, whereas the idea of an 'internal architecture' implies a constitutional perspective that remains within the legal Constitution that can be articulated using ordinary techniques of legal reasoning.

The thought that the internal architecture of the Constitution is implicit in the Constitution and could be discerned using ordinary techniques of legal interpretation is material. Noteworthy is that in Roznai's account of the interpretive approach that judges should take to make sense of an unamendable constitutional core, he not only cites Schmitt's views but also the views of Mark Walters as these relate to the idea of the 'spirit' of legality.[84] Walters is a common law constitutionalist who argues that the legitimacy of written Constitutions cannot be separated from unwritten

[82] *Indira Gandhi* (n 79) 556–557.

[83] ibid 562.

[84] Roznai, *Unconstitutional Constitutional Amendments* (n 6) 143 fn 39, citing Mark Walters, 'Written and Unwritten Constitutionalism', in Grant Huscroft (ed), *Expounding the Constitution: Essays in Constitutional Theory* (Cambridge University Press 2008) ch 10.

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constitutionalism, such that the political facts that legitimate the written Constitution are part of ordinary constitutional law.[85] The 'spirit' of the Constitution is a reference to the spirit of law or the rule of law and is a familiar metaphor within the tradition of common law constitutionalism. Of course, Roznai ultimately privileges the Schmittian perspective harking back to constituent power, an idea that implicates sociology and politics over ordinary legal reasoning in making sense of the unamendable 'absolute' or 'meta-Constitution'.

Not only does Tew embrace this perspective, she also resolutely rejects common law constitutionalism as normatively irrelevant to the Malaysian context, where there is a legally supreme written Constitution. By contrast, the Federal Court does not reject the common law tradition and the salience of ordinary techniques of legal interpretation. The court took a comparative approach and invoked judicial precedents from different jurisdictions around the Commonwealth, including and especially the United Kingdom and Canada. Striking is that neither legal order contains a legally supreme written Constitution containing non-derogable constitutional norms that operate as strict criteria of legal validity. Rather, both legal systems contain constitutional documents or their equivalents reflecting a democratic model of constitutionalism where constitutional principles can be expressly curbed or overridden by a democratically elected legislature subject to certain justificatory criteria.[86] Despite differences in constitutional design when compared to the legally supreme Malaysian Constitution, the link that ties these legal orders together is joint membership within the family of common law legal orders.

My point is that the Federal Court's reasoning proceeds from a philosophically very different perspective than Tew's approach. Unlike Tew, whose arguments depend on the idea of a 'constituent power' and a political 'meta-Constitution' that precedes the legal Constitution and the rule of law, the Federal Court is drawing on ideas familiar to common law constitutionalism where reasoning is wholly internal to the rule of law and wholly governed by techniques of ordinary legal reasoning. As the passage quoted above from the judgment conveys, legal interpretation is informed by a focus on achieving an interpretation of the Constitution that reflects purposive coherence that explains and justifies both structural and substantive elements. To go back to my earlier discussion of the rule of law, the judicial role is defined by the idea that legal interpretation assumes a connection between both 'thin' and 'thick' conceptions of legality in a bid to show how structure and substance explain and justify the existing constitutional framework.[87] In doing so, judges are making sense of that framework as an institutional expression of a public culture of justification, where their determinations are wholly internal to the rule of law.

As Dyzenhaus has argued, such an approach applies a 'reconstructive' methodology, a backward looking approach to constitutional interpretation that begins in the assumption that the Constitution is legitimate and a source of binding obligation.[88] The approach is backward looking because it involves an attempt to construct a normative bridge between the past and the present by articulating a set of structural and substantive principles that fit and justify the existing constitutional framework taking into account its wider purposes as evidenced by constitutional history. Here, judges do not look to the historical record to decipher the commands of the constituent

[85]Mark D Walters, 'The Unwritten Constitution as a Legal Concept', in David Dyzenhaus & Malcolm Thorburn (eds), *The Philosophical Foundations of Constitutional Law* (Oxford University Press 2016) 33–52.

[86]David Dyzenhaus, *The Constitution of Law: Legality in a Time of Emergency* (Cambridge University Press 2006), ch 2 (explaining and illustrating the model). Crucial to the democratic model is a distinction between a focus on legal validity and legal legitimacy. The former is about whether a law is valid and fulfills stipulated criteria of for the enactment of law while the latter is the recognition that a law could be valid but illegitimate from the perspective of legality because it does not fulfill the constitutive principles of a legitimate legal order.

[87]The structural and substantive considerations that constitute the judicial role are expressed in Ronald Dworkin's account of legal reasoning as the dimensions of interpretive 'fit' and 'substance'. See Ronald Dworkin, Law's Empire (n 71) chs 7–10.

[88]David Dyzenhaus, 'Constitutionalism in an Old Key: Legality and Constituent Power' (2012) 1 Global Constitutionalism 229, 243.

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power. Instead, they are trying to make sense of an initial decision to embrace the rule of law by way of a legal Constitution that sets out a specific institutional and normative framework that constitutes the practices of justification associated with the public culture of justification. In this case, the identified principles include federalism, democracy, minority rights, and the rule of law.

Importantly, the normative relevance of these values does not wholly depend on there being a written Constitution. Such a constitutional framework formalises and enhances a commitment to the rule of law, perhaps by giving judges the power to strike down legislation that violates such principles. While the Constitution may expressly articulate and enhance the meaning and significance of such principles, their basis lies in the more foundational political fact that state power must be bottomed in and exercised through a normative legal framework expressive of the rule of law. Hence, to go back to Walters, the legitimacy of the written Constitution cannot be divorced from the legitimating significance of unwritten constitutionalism. Therefore, the relevance of foundational principles that speak to the legally legitimate exercises of state power flow from the presupposition that the legitimate uses of state power must flow from a prior commitment to the foundational distinction between legality and arbitrary power.

The foundational status of that distinction helps to explain the Federal Court's defence of an unamendable constitutional basic structure in responding to the vexing 'judicial power' and 'Syariah court' amendments. Thus, Zainun Ali FCJ invoked three reasons for affirming the basic structure doctrine, which combine to immunise certain principles from constitutional amendment and to protect such features 'from the reach of simple majority rule.'[89] First, the role of a Constitution is to protect fundamental human rights from government interference. Second, the Constitution plays a role in protecting vulnerable minorities from 'the assimilative pressures of the majority.'[90] Third, the Constitution may divide powers amongst different levels of government to safeguard against the risk that an organ of government could 'usurp' and arrogate excessive power.

The argument implies the wider idea that the legal Constitution affirms and immunises legal subjects from the risks of domination by political majorities, thus echoing the foundational distinction between legality and arbitrary power. In this connection, Zainun Ali FCJ also notes the constitutional basic structure is itself 'the product of negotiation and political compromise.'[91] And, further, she observes that it is not 'unprincipled' and has to be understood by reference to the other elements of the basic structure.[92] The compromise in question is between 'democracy' and 'legality' so that the legitimate exercise of political power must be justified by reference to the requirements of the rule of law, especially as expressed by the legal Constitution.

Of course, the thought that the ideal of democracy should be chastened by the ideal of legality is wholly antithetical to the Schmittian position where the rule of law is instrumental to the commands of the constituent power expressing the will of a unified People. In Schmittian political logic, this subordination and instrumentalisation of the rule of law makes it vulnerable to an authoritarian re-description as an instrument of political domination by groups willing to act politically as Schmitt requires making legality subordinate to power politics. Within Tew's proposals, we have seen that the rule of law is also subordinate to the commands of the constituent power where, as I have argued, the determination of the content of these commands as they relate to the 'meta-Constitution' are likewise also vulnerable to the sway of power politics.

There is reason to think that the judges in *Indira Gandhi* were aware of this danger, as reflected by the way the authoritarian logic of ethnocracy had worked to subvert the ideals of democracy and legality, rendering them phantom ideas that supply ideological legitimation to ethno-authoritarian rule. Here, a crucial part of Zainun Ali FCJ's judgment is her claim that the need to protect minority

[89] *Indira Gandhi* (n 79) 562.
[90] ibid.
[91] ibid 563.
[92] ibid.

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rights is linked to the importance of resisting the 'assimilative pressures' of the majority. Her point is that political majorities are not legally entitled to use state power to dominate legal subjects, including the use of such power to compel the latter to either embrace or even acquiesce to the values that may constitute the identity of the powerful majority. Resistance to such pressures is crucial to the aspirations of constitutional democracy, thereby suggesting that positive law may not be used to construct and impose upon legal subjects a specific view about the identity of the state.

The point is therefore anti-Schmittian, especially if one keeps in mind that the Federal Court was very much attuned to the ongoing battle of 'rites versus rights' that was salient to how they should decide in the present case. To elaborate, the decision in *Indira Gandhi* touches on the dynamic within this battle where the 'judicial power' and 'Syariah court' amendments are read together to allow the ethnocratic state to both discipline and control those identified as Malay-Muslim while simultaneously rendering non-Malays-Muslims 'rightless' in any case presenting an issue that could threaten the state-driven project of enacting an ethically homogeneous conception of Malay-Muslim identity. As noted earlier, echoing Maznah Mohamad, the state is 'making majority', meaning it is exercising arbitrary power to dominate legal subjects in order to bootstrap into existence the idea of a dominant and homogeneous Malay-Muslim ethnos.

Zainun Ali FCJ renders an anti-Schmittian position that rebukes this project by emphasising the priority of legality over power politics, specifically the power politics of domination. Hence, the judge argued for the 'role of the Judiciary as the ultimate arbiter of lawfulness of state action.'[93] And the judge emphasised, the 'power of the courts is a natural and necessary corollary of the rule of law.'[94] And that an independent judiciary empowered to make determinations of lawfulness is paramount to resisting 'unfettered discretion.'[95] Then, to drive the point home, Zainun Ali FCJ declared that there must be 'legal limits' for 'otherwise there is dictatorship.'[96] The judge is expressly resisting the underlying Schmittian political logic behind efforts to use constitutional law (including abusive constitutional amendments) to create and legitimate what would in effect be an ethnocratic dictatorship. Again, the basis to this argument is legality as Zainun Ali FCJ observed:

> Viewed correctly, constitutionalism and the rule of law are not in conflict with democracy; they are essential to it. Without that relationship, the political will upon which democratic decisions are taken would itself be undermined.[97]

The upshot of her argument is that the basic structure of the Malaysian Constitution affirms values expressive of constitutional democracy and judges are thus entitled to safeguard those values, including against constitutional amendments designed to undermine their relevance in keeping with constitutional democracy.

This general argument supplies the basis for the court's reading of the 'judicial power' and 'Syariah court' amendments in a way that works against the specific political intentions that informed their initial enactment. Zainun Ali FCJ held that the court's powers of judicial review could not be amended away by Parliament. And she reasoned that the Syariah courts did not have exclusive jurisdiction to make decisions that would be immune from review by civil courts on the grounds that the Islamic courts are merely creatures of statute while civil courts derive their authority to defend constitutional norms from the Constitution itself. The judge's decision thus implies that even where religious courts can make decisions by reference to religious values,

[93]ibid.
[94]ibid.
[95]ibid.
[96]ibid.
[97]ibid 565–566.

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the legitimacy of their judgments requires fidelity to the principle of legality as articulated by the Constitution.

Having set out these arguments and clarified the correct constitutional position in relation to the 'judicial power' of the courts, the court did not give effect to Parliament's well-known intentions in enacting that amendment. But it was ambiguous as to the question of whether or not the 'judicial power' amendment was legally valid. Tew argues that the decision is tantamount to a 'de facto invalidation'. And Wilson Tay has suggested that the court had 'airbrushed the amendment out of existence.'[98] However, in my view, a more plausible reading is that the court was purposefully ambiguous on the question of the formal validity of the 'judicial power' amendment.

Such a reading might be defended for four reasons. First, the court would have been mindful of the fact that it had to navigate the risks of an authoritarian backlash in undermining the intentions of the ruling regime in seeking to exercise control over the courts' powers of judicial review.

Second, the judges are likely to have been aware of the fact that any decision to invalidate the amendment would be vulnerable to reversal not only by Parliament but also by a subsequent court more sympathetic to the interests of the ruling regime. As Tay has argued, decisions invalidating legislation are often brought back to life in later court decisions.[99] Therefore, any decision to formally invalidate the amendment might be short-lived even within the ranks of the judiciary.

Third, the logic and character of the Federal Court's judgment suggests that the judges were less concerned about the question of formal legal validity and more interested to spotlight the question of the legitimacy of the 'judicial power' amendment from the perspective of the rule of law. The judgment assumes that Parliament intended to respect the rule of law (despite the well-known political fact that it did not intend to do so), thus allowing the judges to 'read down' the 'judicial power' amendment in light of a detailed argument at the level of constitutional principle defending the legally inviolate status of the judicial power from the perspective of the rule of law. And, given the politically charged issue before the court and the knowledge that its judgment would receive considerable publicity, the Federal Court sent the message to Parliament and the ruling regime that any attempt to undermine the 'judicial power' is not legally legitimate.

Fourth, by omitting to expressly invalidate the 'judicial power' amendment and choosing to 'read down' the amendment by reference to a detailed argument of constitutional principle that focuses on legal legitimacy, the court directly challenges the implicit logic behind the UMNO regime's enactment of the amendment. The amendment is yet another expression of the regime's penchant for 'rule by law', the use of the legal form (typically legislation including constitutional amendments) as a cloak for arbitrary power.[100] Rule by law is a practice long employed by the UMNO regime that leverages the formal quality of a law, as validly enacted in accordance with manner and form requirements for legislation, as sufficient to establish the legitimacy of the law, even if the political purposes to inform that law are authoritarian and seek to grant public officials a legally unaccountable and arbitrary power. Rule by law thus relies on a conceptual and normative link between formal legal validity and legal legitimacy. But by leaving open the question of validity and emphasising a vigorous case in support of judicial power at the level of legal legitimacy, the Federal Court's reasoning suggests that one should not uncritically accept such a link. The judgment opens the space for seeing that the status of a law as formally valid does not imply that that law is legally legitimate. In so doing, the logic of the Federal Court's judgment directly challenges the implicit premise of rule by law.

To bring the analysis to a close, this last observation chimes with Zulkefli PCA's remarks in his short concurring judgment at the beginning of the Federal Court's judgment that the decision taken

[98]Tay made this suggestion to me in email correspondence about an earlier version of this essay.

[99]Tay, 'Basic Structure Revisited' (n 1) 113, 143–144, noting that Malaysian judges have brought back to life legislation previously invalidated by an earlier court.

[100]See Balasubramaniam, 'Has Rule by Law Killed the Rule of Law in Malaysia?' (n 50).

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by the court is in 'accordance with the rule of law.' This opening declaration signifies the stance taken by conscientious judges looking to push back against attempts to leverage the legal and constitutional form, to allow the state a legally uncontrolled power. Of course, this is precisely the cutting edge of Schmittian political logic. The Federal Court's reasoning is important because the logic of that reasoning expressly defends the normative priority of legality as defining the conceptual terrain for determining the legitimate uses of state power as always subject to the discipline of the rule of law.

For conscientious judges whose self-conception of the judicial role is defined by a commitment to the foundational normative distinction between the rule of law and arbitrary power, any answer to authoritarianism must retain a clear-eyed focus on that distinction. *Indira Gandhi* suggests that, contrary to Tew, conscientious judges will respond to abusive constitutional amendments in a manner that remains wholly internal to a commitment to the rule of law and will not resort to the idea of an 'external' and unamendable 'meta-Constitution' that requires them to give up that distinction.

Conclusion

I have argued that Tew's proposals for judicial empowerment in the Malaysian context are rooted in conceptual and normative ideas inappropriate to the ideal of constitutional democracy. In so doing, I have identified the problem as ultimately traceable to Tew's indirect reliance on Carl Schmitt's views about constitutional legitimacy and limits to Parliament's authority to amend the legal Constitution. And I have argued that, because her proposals trade on Schmittian ideas that will feed into elements of his authoritarian logic in Malaysia's ethnocratic context, her proposed approach is vulnerable to authoritarian reconfiguration by judges complicit in affirming ethnocratic rule, while conscientious judges looking to defend constitutional democracy would adopt an approach that is antithetical to such ideas. Indeed, in practice, they embrace an approach that resists attempts to subordinate legality to political power precisely because such attempts underlie ethno-authoritarian rule and work against the ideal of constitutional democracy.

For these reasons, it is appropriate to characterise Tew's argument as a naïve misappropriation of Schmitt's ideas. The phrase is a modification to William Scheuerman's recent observation that there are scholars who engage in the 'naive reappropriation' of Schmitt's insights in constitutional theory to somehow serve the ideal of constitutional democracy. They wish to utilise these insights without reckoning with the connections between his legal-theoretical arguments and his political theology, and therefore without dealing with the deep tensions between his ideas and that ideal.[101] In this instance, Tew may not be a self-conscious Schmittian because her argument draws only vicariously on Schmitt's views about limits to constitutional amendment. Nevertheless, my analysis suggests that there is serious theoretical error if not practical danger in even this level of reliance if applied to the Malaysian context.

Ultimately, as the approach taken by conscientious judges suggests, the answer to the play of Schmittian political logic as the political logic of ethnocracy will be to assert the normative priority of legality. To be sure, any such answer has to confront the objection that where judges are subject to pathology, they might manipulate such a response in a bid to legitimate ethno-authoritarian rule. An answer to this objection would require an entirely different essay, but the starting point to that answer has to be the concession that there is only so much that even conscientious judges could do to contain an authoritarian executive branch.[102] Nevertheless, if one supposes that the role of judges

[101]Scheuerman, *The End of Law* (n 7) x.

[102]As I have mentioned, when one examines the character of decisions taken by judges seeking to legitimate ethno-authoritarian rule, there are glaring deficiencies from the perspective of the epistemic requirements of good faith legal reasoning, especially egregious failures of interpretive fit. The corollary is that where judges are under a duty to reason

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in Malaysia is not meaningless so that they retain some capacity not only to hold the government to account but also to articulate the correct values and principles of political morality that speak to questions of legal legitimacy, then it is vital that judges unequivocally assert the priority of legality.

by reference to the principles of both 'thin' and 'thick' legality (combining relevant common law principles and the content of the Malaysian Constitution) and are required therefore to structure judgments of fit by reference to a coherent interpretation of such principles, it becomes considerably more difficult to justify authoritarian decisions. My argument rests on Lon Fuller's assertion that 'order, coherence, and clarity have an affinity with goodness and moral behaviour.' See Lon L Fuller, 'A Reply to Professors Cohen and Dworkin' [1965] Villanova Law Review 655, 666. See also Ronald Dworkin's observation that the duty to establish interpretive coherence involves a constraint of complexity that is likely to work against bias in legal reasoning, see Ronald Dworkin, *Justice in Robes* (Harvard Belknap Press 2006) 250 ('Chapter 9: Rawls and the Law').

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