CONSTITUTIONALISM IN THE LAND OF THE PEACEFUL THUNDER DRAGON: THE KINGDOM OF BHUTAN'S *MARBURY* MOMENT

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I. INTRODUCTION: A PERSONAL EXPERIENCE

In his novel *Lost Horizon*, the British author James Hilton imagines Shangri-La, a fictional place of utopian perfection located behind the Himalayas where the people live in peace and harmony and where the wisdom of human kind reigns supreme.[1] The secluded Kingdom of Bhutan, nestled high in the eastern Himalayas, may very well be that elusive Shangri-La, as the Bhutanese have managed to preserve their unique spiritual and cultural heritage and live sustainably in harmony with the surrounding natural world.[2]

Unlike the tourism and travel sectors, which constantly search for new and exotic destinations, the legal comparative academy residing outside Bhutan has been largely silent about the country in general and the significance of Bhutanese constitutionalism for the country's success story in particular. This is not due to impenetrable language barriers since the laws of Bhutan are readily accessible in English. While Dzongkha, the language spoken in Bhutan's massive fortresses, is considered preferable for drafting purposes,[3] the Constitution of Bhutan declares both the Dzongkha and English texts as equally authoritative.[4] English is ubiquitous, not only among legal professionals, but also the population at large.

When traveling through the Kingdom of Bhutan in the spring of 2019, we experienced unparalleled hospitality and access.[5] In addition to presenting a colloquium to students and faculty at the Jigme Singye Wangchuck School of Law—Bhutan's first and only law school,[6] which was established in 2015 by Her Ryal Highness Princess Sonam Dechan Wangchuck in honor of Bhutan's Great Fourth King Jigme Singye Wangchuck—we had the

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[1] JAMES HILTON, LOST HORIZON (Macmillan 1933).

[2] *But see* Ceil Miller Bouchet, *Where Is Shangri-La?*, NAT'L GEOGRAPHIC TRAVELER (Aug. 21, 2012), https://www.nationalgeographic.com/travel/intelligent-travel/2012/08/21/where-is-shangri-la/ (identifying Zhongdian in China's southwestern Yunnan Province, which officially refers to itself as Shangri-La County).

[3] Vineet Gill, *When Dzongkha Was Made Bhutan's Mational Language*, TSG GUARDIAN LIVE (Sept. 10, 2018, 11:01 AM), https://www.sundayguardianlive.com/culture/dzongkha-made-bhutans-national-language. *But see* Alessandro Simoni, *A Language for Rules, Another for Symbols: Linguistic Pluralism and Interpretation of Statutes in the Kingdom of Bhutan*, L'INTERPRÉTATION DES TEXTES JURIDIQUES RÉDIGÉS DANS PLUS D'UNE LANGUE 273 (Rodolfo Sacco ed., 2002) (asserting that English has been appreciated for its mature and nimble technical and legal terminology).

[4] BHUTAN CONST. art. 35(4).

[5] For the experience of a pre-arranged tour, which is normally required to enter Bhutan, *see* Elena A. Baylis & Donald J. Munro, *Simple Justice: Judicial Philosophy in the Kingdom of Bhutan*, 6 GREEN BAG 131, 133 (2003).

[6] Kai Schultz, *Centuries of Buddhist Tradition Make Room for Bhutan's First Law School*, THE NY TIMES (Oct. 16, 2016), https://www.nytimes.com/2016/10/09/world/asia/centuries-of-buddhist-tradition-make-room-for-bhutans-first-law-school.html.

opportunity to spend time with constitutional players and witness constitutional practices in action. It was fascinating to learn about the ingredients of a successful constitution. Bhutan's Constitution has selectively borrowed from different external models, but it continues to be deeply rooted in the holistic wisdom of Buddhist spirituality.[7]

Our discussions regarding courts and constitutions with judicial and political members ultimately turned to what many American lawyers will inevitably be tempted to ask their interlocutors abroad—whether and, if so, how the host country experienced its own *Marbury v. Madison*[8] moment. As is well known, William Marbury, an uninstalled appointee of the outgoing President John Adams, sued James Madison, Secretary of State in the new Thomas Jefferson Administration, to procure his commission of justice of the peace.[9] In an opinion delivered by Chief Justice John Marshall, the U.S. Supreme Court decided that Madison should have surrendered the commission to Marbury.[10] However, the U.S. Supreme Court then ruled that the section of the Judiciary Act of 1789, which Marshall read to grant the high court the original power to issue writs of mandamus,[11] was unconstitutional because it was not covered by what he considered the Supreme Court's reservoir of powers under the U.S. Constitution.[12] *Marbury*, which tells a story replete with partisan intrigues and political posturing, has come alive for generations of lawyers all over the world as they discuss Chief Justice Marshall's epic maneuvers for confronting Jefferson, his disputed rationales for recognizing the power of judicial review, and his skillful balancing of institutional powers.[13] According to literature, however, the full realization of *Marbury* and its popularity beyond America's borders in countries that have created or revised their constitutions is a product of the twentieth century.[14]

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[7] BHUTAN CONST. art. 3. *See also* Lyonpo Sonam Tobgye, *His Majesty Jigme Singye Wangchuck: The Master Strokes and Words of Wisdom of the Father of the Constitution of Bhutan*, 10 BHUTAN L. REV. 31, 34 (2018) (listing the sources that were consulted in the course of drafting the Constitution).

[8] Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

[9] *Id.*

[10] *Id.* at 162.

[11] *See id.* at 176, 180.

[12] *Id.* at 179-80.

[13] Winfried Brugger, *Kampf um die Verfassungsgerichtsbarkeit: 200 Jahre Marbury v. Madison*, *in* DEUTSCHLAND UND DIE USA IN DER INTERNATIONALEN GESCHICHTE DES 20. JAHRHUNDERTS: FESTSCHRIFT FÜR DETLEF JUNKER 115 (Manfred Berg & Philipp Gassert eds., 2004).

[14] *See, e.g.*, Mark V. Tushnet, *Marbury v. Madison Around the World*, 71 TENN. L. REV. 251, 251 (2004) (asserting that foreign "lawmaking system designers [that] have created courts with the power to determine constitutionality [have not simply emulated] the U.S. institution of judicial review").

All over the world, *Marbury* has come to be known as a central authority in the field of constitutionalism.[15]

The Bhutanese elaborations on the themes raised by *Marbury* are bundled in litigation less dramatically dubbed *Opposition Party v. The Government of Bhutan*.[16] The case was brought by the Representative of the Opposition Party against the Government of Bhutan to quash the rationalization and expansion of the extant tax structure that, said the complaint, was undertaken by mere executive fiat and without proper parliamentary legislation.[17] In a landmark decision, the Constitutional Bench of the High Court held for the petitioner[18] and the Supreme Court of Bhutan affirmed.[19] Accordingly, the Government of Bhutan's use of purely administrative short cuts violated the Bhutanese Constitution, which prohibits taxation unless it is imposed or altered by law.[20] Therefore, the Government of Bhutan had to follow the lengthier process through Bhutan's Parliament.

Our article discusses the case within the larger context of constitutionalism, which, for our purposes, shall be broadly understood as "the study of the constitutive elements of legal and political practice that are central for the assessment of its legality or legitimacy."[21] More specifically, constitutionalism is a doctrine that is designed to prevent the arbitrary exercise of government power.[22] According to the political theories of John Locke and through the prism of the American framers, constitutionalism reflects the dual proposition that government can and should be restrained in the scope and exercise of its powers and that the authority of government hinges on the observance of these limits.[23]

The remainder of the article will analyze the Bhutanese *Marbury* against the American original and the questions raised by *Marbury*. Are these

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[15] Louis Favoreu, *Constitutional Review in Europe*, *in* CONSTITUTIONALISM AND RIGHTS: THE INFLUENCE OF THE UNITED STATES CONSTITUTION ABROAD 38 (Louis Henkin & Albert J. Rosenthal eds., 1990).

[16] *Opposition Party v. Government*, Judgment 11-1, Sup. Ct. of Bhutan (Feb. 24, 2011), http://www.judiciary.gov.bt/judg/2011/englishj.pdf [hereinafter, *Opposition Party*, SC Judgment 11-1; *Opposition Leader v. Government*, Judgment 10-100, High Ct. of Bhutan 1, 3 (Nov. 18, 2010), http://oag.gov.bt/wp-content/uploads/2011/02/Constitutional-Case-English.pdf [hereinafter, *Opposition Party*, HC Judgment 10-100].

[17] *Id.* at 3-4.

[18] *Id.* at 67-68.

[19] *Opposition Party*, SC Judgment 11-1, *supra* note 16.

[20] BHUTAN CONST. art. 14(1).

[21] Cambridge Univ. Press, *Call for Papers: Manuscript Submission*, https://www.cambridge.org/core/journals/global-constitutionalism/call-for-papers (last visited Nov. 1, 2021).

[22] Alec Stone Sweet, *Constitutions and Judicial Power*, *in* COMPARATIVE POLITICS 218, 219 (Daniele Caramani, ed. 2017).

[23] Tohid Asadi, *En Route to the US Constitution: Founding Fathers and Lockean Philosophy*, 16 HISTORIA CONSTITUCIONAL 407, 411 (2015).

types of constitutional disputes typically precipitated when a unique story and particular actors combine? Where does the power of constitutional review repose? How is constitutional jurisdiction organized? What role do prudential gatekeeper doctrines that patrol access to the courts play? How do judicial canons of interpretation act to limit judicial activism? What are the trajectories for countries wishing to entrench the constitutional rule of law?

II. PRECIPITATORS OF CONSTITUTIONAL DISPUTES: UNIQUE NARRATIVE AND POLITICAL ACTORS

The stories behind both cases boast unique circumstances and actors. *Marbury* features a political kabuki theatre of events and protagonists that has fascinated generations of readers. The case arose in the wake of the election of 1800, which had featured a fierce contest between John Adams, the Federalist incumbent, and Thomas Jefferson, the Democratic-Republican challenger.[24] Thomas Jefferson prevailed.[25] But John Adams embarked on a program to execute a plan to perpetuate power by using his remaining time in office, which, at the time, lasted until March 4, 1801, to make the judiciary a last Federalist bastion.[26] Fresh legislation creating hundreds of new judgeships had conveniently been passed by the lame duck Federalist Congress—the Judiciary Act of 1801 and the Justice of the Peace Act of 1801.[27] Just before the Federalist hold in the political branches ended, John Adams appointed, and the Senate confirmed several dozen "midnight judges."[28] But time ran out before a certain number of the commissions, which carried the President's signature and the Senate's seal, could have been delivered by John Marshall, the outgoing Secretary of State.[29] One of those commissions never delivered was intended for William Marbury, a veteran of the Revolutionary War from Maryland and a superbly networked Federalist of great influence and financial acumen.[30] He had been slated to serve as Justice of the Peace for the District of Columbia—a judgeship typically overseeing cases that involve small claims, marriages, adoptions, and divorces.[31] After assuming the presidency, Thomas Jefferson, however, ordered his Secretary of State, James Madison, a founding father from Virginia and major player in Thomas Jefferson's cabinet, not to deliver the

[24] Burt Likko, *The Great Cases, No. 1: Marbury v. Madison*, ORDINARY TIMES (Dec. 15, 2011), https://arc.ordinary-times.com/notapottedplant/2011/12/15/the-great-cases-no-1-marbury-v-madison/.
[25] *See id.*
[26] *See id.*
[27] *See id.*
[28] *Id.*
[29] *Id.*
[30] *See* Likko, *supra* note 24.
[31] *Id.*

commissions.[32] Interestingly, if the Supreme Court, with John Marshall now at the helm, had ruled for William Marbury, James Madison would have been in the unenviable position to enforce the order against himself.[33] Also, John Marshall's own involvement in the case raised the specters of partialities and bias, as he had been responsible for the delivery of the commissions as John Adams's Secretary of State.[34] Finally, Chief Justice Marshall must have been well aware of the sword of impeachment that was hanging over him.[35]

At first blush, Bhutan's *Opposition Party* does not appear to rise to a level of drama on par with the cocktail of partisan politics ginned up in *Marbury*. The litigation in *Opposition Party*, which pitted the executive against the legislature, was steered by Former Lyonpo Damcho Dorji, who was a Member of Parliament in the National Assembly of Bhutan.[36] Educated at Delhi University, the Government Law College in Mumbai and the Georgetown University Law Center in Washington D.C., Lyonpo Damcho Dorji was steeped in the teachings of *Marbury*.[37] He had previously served as a judge before being appointed the first Attorney General of Bhutan.[38] Also, after the People's Democratic Party had won the election in 2013, he served as Bhutan's Home Minister and later as Foreign Minister.[39] When the case took shape, he was keenly aware that Bhutan's *Marbury* moment had arrived.[40] At the time, the two parties represented in the National Assembly of Bhutan included the Bhutan Peace and Prosperity Party (*Druk Phuensum Tshogpa* or BPPP), which had won the elections with forty-five seats, and the People's Democratic Party (*Miser Dmangstsoi Tshogspa* or PDP), which

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[32] *Id.*

[33] *See* William W. Van Alstyne, *A Critical Guide to Marbury v. Madison*, 18 DUKE L.J. 1 (1969) ("If Madison, on Jefferson's instruction, had refused to honor that writ how would it have been enforced?").

[34] *Id.*

[35] *Id.*

[36] *See* Sonam Ongmo, *Bhutan: Tax or No Tax for Development*, GLOBAL VOICES (Feb. 24, 2011, 9:22 PM), https://globalvoices.org/2011/02/24/bhutan-tax-or-no-tax-for-development/.

[37] BUNDESMINISTERIUM FÜR UNTERRICHT, KUNST UND KULTUR, Curriculum vitae, *Bhutan: Minister for Home and Cultural Affairs Damcho Dorji*, https://bilaterales.bmbwf.gv.at/wp-content/uploads/2013/10/bilaterales_dok_2189.pdf (last visited Nov. 1, 2021).

[38] *History*, OFFICE OF THE ATTORNEY GENERAL (ROYAL GOVERNMENT OF BHUTAN), https://www.oag.gov.bt/language/en/history/ (last visited Nov. 1, 2021).

[39] *Bhutan Foreign Minister to Be Sacked*, THE DAILY STAR (July 22, 2015, 12:42 PM), https://www.thedailystar.net/world/bhutan-foreign-minister-be-sacked-115018. *See also Background*, MINISTRY OF FOREIGN AFFAIRS, ROYAL GOVERNMENT OF BHUTAN, https://www.mfa.gov.bt/?page_id=8681 (last visited Feb. 21, 2022) (offering that Lyonpo Damcho Dorji served as Foreign Minister from August 2015 until August 2018).

[40] Personal conversation with Lyonpo Damcho Dorji, Former-Attorney General, Foreign Minister, and Member of Parliament of Bhutan, in Thimphu, Bhutan (May 26, 2019).

formed the opposition with only two members[41]—Opposition Leader Dasho Tshering Tobgay and Former Lyonpo Damcho Dorji.[42] In the lawsuit, the Ruling Government was represented by the State Prosecutor from the Office of Attorney General.[43] Notably, several judges and justices of Bhutan, who had spent significant amounts of time in the United States and other countries—whether for purposes of post-graduate education, research stints and conference interventions—were intimately familiar with *Marbury*.[44]

III. CONSTITUTIONAL REVIEW THROUGH THE JUDICIAL DEPARTMENT: POWER BASE AND ORGANIZATION OF CONSTITUTIONAL JURISDICTION

In general, constitutional review occurs when acts of government come into conflict with a constitution that sits at the apex in a hierarchy of legal norms. Both *Marbury* and *Opposition Party* are premised on "higher law" constitutions,[45] as opposed to legislative supremacy constitutions[46] or absolutist constitutions.[47] The higher law constitution, which is typically written and entrenched, embodies real law equipped with primacy.[48] *Marbury* speaks of the U.S. Constitution as "fundamental and paramount law."[49] In *Opposition Party*, the High Court of Bhutan explains that "[t]he Constitution is the embodiment of best practices and recognizes the doctrine of Separation of Powers . . . ."[50]

Marbury and *Opposition Party* further agree in assigning the review power to the judicial department, as opposed to everyone within the ambit of the constitution. Echoing *Marbury* almost verbatim, the High Court of Bhutan

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[41] *See* BERTELSMANN STIFTUNG, BTI 2020 COUNTRY REPORT – BHUTAN 4 (2020), https://www.bti-project.org/content/en/downloads/reports/country_report_2020_BTN.pdf.

[42] *See* Kuenzang Choden, *PDP MP Damcho Dorji Ready to Join a New Party If PDP Does Not Make It Past the Primary Round*, THE BHUTANESE (May 23, 2012), https://thebhutanese.bt/pdp-mp-damcho-dorji-ready-to-join-a-new-party-if-pdp-does-not-make-it-past-the-primary-round/.

[43] Press Release, Off. of the Att'y Gen. (Royal Government of Bhutan), Appointment of New Attorney General 2010, https://www.oag.gov.bt/language/en/appointment-of-new-attorney-general-2010/ (last visited Nov. 1, 2021).

[44] Personal conversation with The Hon. Mr. Justice Lyonpo Tshering Wangchuk (Chief Justice, Supreme Court of Bhutan), in Thimphu, Bhutan (May 30, 2019) (recalling his own LL.M. studies at the George Washington University School of Law).

[45] Sweet, *supra* note 22, at 221.

[46] *Id.* at 220-21 (identifying the British and New Zealand parliamentary systems as examples).

[47] *Id.* at 220 (offering that this type of constitution no longer exists as a viable model).

[48] *Id.* at 221 (observing that legislative sovereignty is rejected under this type of constitution).

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

[50] *Opposition Party*, HC Judgment 10-100, at 33.

declares that "the Constitution emphatically expounds the province and duty of the judicial branch to say what the law is or the Constitution means."[51]

Thematically both decisions are thus rooted in constitutional frameworks predicated upon the separation of powers and checks and balances. These topics echo the works of Lord Bolingbroke, who recognized the ideal of an approximate equilibrium short of a perfectly balanced system,[52] and Montesquieu, who identified the locution of "*le pouvoir arrête le pouvoir*" or, power limiting power, as the remedy against abuse.[53]

Marbury and *Opposition Party* mark the rise of robust judicial review: *Marbury* addressed the unconstitutionality of a jurisdiction grant in an act of the Congress, while *Opposition Party* focused on the unconstitutional arrogation of lawmaking power by the government. Both cases embody a rejection of alternative models for the design of constitutional review. New Zealand, for example, does not give the courts the prerogative to strike down legislation deemed to exceed constitutional limits; rather, the legislative bodies themselves are charged to observe and enforce those limits.[54] Incidentally, the American constitutional convention discussed, but ultimately rejected a hybrid model—a "Council of Revision" consisting of the Justices of the Supreme Court and the President of the United States, equipped with the power to veto Acts of Congress.[55]

According to the Supreme Court of Bhutan, "[j]udicial review is an example of the functioning of separation of powers in a modern governmental system."[56] Chief Justice Marshall and his successors, especially those of the modern era, would certainly agree. But under the magnifying glass, specific design features associated with judicial review in Bhutan and the United States exhibit important distinctions.

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[51] *Id.*

[52] Michael Sheehan, *The Place of the Balancer in Balance of Power Theory*, 15 REV. INT'L STUD. 123, 125 (1989).

[53] DE L'ESPRIT DES LOIS, PAR MONTESQUIEU – PRÉCÉDÉ DE L'ANALYSE DE CET OUVRAGE PAR D'ALEMBERT, TOME PREMIER 291 (Paris, P. Pourrat Brothers eds., 1831).

[54] Andrew Geddis, *Parliamentary Government in New Zealand: Lines of Continuity and Moments of Change*, 15 INT'L J. CONST. L. 99 (2016).

[55] *See* Tushnet, *supra* note 14, at 254. *See also* Robert L. Jones, *Lessons from a Lost Constitution: The Council of Revision, the Bill of Rights, and the Role of the Judiciary in Democratic Governance*, 27 J. L. & POL. 459 (2012); James T. Barry, *The Council of Revision and the Limits of Judicial Power*, 56 U. CHI. L. REV. 235, 235 (1989).

[56] *Opposition Party*, SC Judgment 11-1, *supra* note 16, at para. 5.4. *See also* Yeshey Dorji, *Constitution of Kingdom of Bhutan: Ten Salient Features*, 10 BHUTAN L. REV. 67, 78 (2018) (anchoring judicial review in the combination of constitutional provisions: Article 9, Section 3, which mandates creation of a civil society based on the rule of law and protection of the fundamental rights and freedoms of the people, and Article 1, Section 11, which identifies the Supreme Court as guardian).

A. The Power Base

A central message shared by *Marbury* and *Opposition Party* pertains to positioning the judicial review power within a constitutional system of government. This then raises the question of who, in the words of Abbé Sieyès, is the "*pouvoir constituant*," the enabler of all government power?[57]

i. Constitutional Silence and Sovereign Will of the People in the United States

In *Marbury*, Chief Justice Marshall had to overcome the constitutional silence with regard to the basis and scope of the judicial review power he ultimately extracted.[58] The U.S. Constitution is, of course, the product of historical experiences and vigorous debates. For example, during colonial times some state judiciaries had adopted the practice of reviewing colonial acts of legislation as to whether they were ultra vires under the colonial charter.[59] Also, the Privy Council in London, which advised the monarch as to matters of state, exercised the power to control colonial decisions and legislation.[60] Finally, the topic was extensively discussed in Philadelphia and the ratification conventions in the various states.[61]

Because neither the text nor the intent of Article III of the U.S. Constitution itself are dispositive, *Marbury* boldly anchors the judicial review power in the constitutional system of government created by the people through the exercise of their "original right" and their "original and supreme will."[62] Popular sovereignty thus is the organizing principle behind all government power.[63]

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[57] EMMANUEL JOSEPH SIEYÈS, POLITISCHE SCHRIFTEN 1788-1790, at 166, 214, 250 (Eberhard Schmitt & Rolf Reichart eds., 1975).

[58] ANDREW NOLAN, CONG. RSCH. SERV., R43706, THE DOCTRINE OF CONSTITUTIONAL AVOIDANCE: A LEGAL OVERVIEW 3 (2014).

[59] CHARLES F. ABERNATHY & MARKUS G. PUDER, LAW OF THE UNITED STATES – CASES AND COMMENTARIES 164 (3d ed. 2021).

[60] *Id.*

[61] *Compare* The Federalist No. 78 (Alexander Hamilton) (advocating constitutional review by the judicial department), *with* Brutus No. 15, *in* THE COMPLETE ANTI-FEDERALIST 2:437-42 (Herbert J. Storing ed., 1981) (warning against "exalt[ing the Supreme Court] above all other power in the government . . . ."). *See also* James Bradley Thayer, *The Origin and Scope of the American Doctrine of Constitutional Review*, 7 HARV. L. REV. 129 (1893).

[62] *Marbury*, 5 U.S. (1 Cranch) at 176, 179-80.

[63] *See* Sanford Levinson, *Popular Sovereignty and the United States Constitution: Tensions in the Ackermanian Program*, 123 YALE L. J. 2644 (2014) (offering a critical discussion of Bruce Ackerman's three-volume work "We the People").

ii. The People's Constitution in Bhutan

In *Opposition Party*, the crucial language for the repository of the judicial review power in Bhutan's constitutional system of government arrives with the solemn and flowery language directed by the Supreme Court of Bhutan at the Bhutanese people at large. By declaring its own unwavering commitment to the Constitution of Bhutan, the Supreme Court makes clear that the judicial review power springs from the people. Yet, in light of the central role played by the King (Druk Gyalpo) in this process, some commentators have offered that constitutionalism in Bhutan has been a "top down" exercise,[64] with the King having gifted the constitution to his people.[65]

This diagnosis, however, ignores the transcendental position held by the King in Bhutanese spiritual life. Moreover, it disregards the mysticism associated with the reincarnations of the lamas in Bhutan's cultural heritage in general and Bhutan's revered unifier Zhabdrung Ngawang Namgyal in particular.[66] If one were to invoke the notion of a gift, the entire constitutional process could be considered as such because it was predicated upon a peaceful, orderly, and popular process rather than untidy revolutionary convulsions.[67] Significantly, when the constitution was consecrated in 2008, the King, who symbolizes the unity of Bhutan and its people,[68] embraced the occasion to emphasize the idea of popular sovereignty in the constitution when he observed that "[e]ach word ha[d] earned its place with the blessings of every citizen" and that it was "the [P]eople's Constitution."[69] Moreover, at the outset of the drafting process, his predecessor had declared that Bhutan's destiny was "in the hands of our people" and that the future constitution "should not be considered as a gift from the King."[70] Both Kings thus underline the idea of popular sovereignty as government power that ultimately

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[64] Venkat Iyer, *Constitution-Making in Bhutan: A Complex and Sui Generis Experience*, 7 CHINA J. COMPAR. L. 359, 383 (2019).

[65] Winnie Bothe, *The Monarch's Gift: Critical Notes on the Constitutional Process in Bhutan*, 40 EUR. BULL. HIMALAYAN RSCH. 27, 27 (2012).

[66] *See generally* Royal Education Council (Royal Government of Bhutan), A History of Bhutan (2019) (narrating the life history of eight great pioneers of Kagyud and Drukpa Kagyud traditions). *See also* Alessandro Simoni & Richard W. Whitecross, *Gross National Happiness and the Heavenly Stream of Justice: Modernization and Dispute Resolution in the Kingdom of Bhutan*, 55 AM. J. COMPAR. L. 165, 169 (2007) (translating the honorific *Zhabdrung* with "at whose feet one prostrates").

[67] The Hon. Mr. Justice Lyonpo Tshering Wangchuk, *Constitution, Rule of Law and Democracy in Bhutan*, 10 BHUTAN L. REV. 6, 7 (2018).

[68] BHUTAN CONST. art. 2(1).

[69] United Nations Development Programme Bhutan & Parliament of the Kingdom of Bhutan, Bhutan National Human Development Report – Ten Years of Democracy in Bhutan 52 (2019) (offering Justice Sonam Tobgye's quote from His Majesty the Fourth King's Address to the Nation at the Launch of the Constitution, Thimphu, Sept. 20, 2018).

[70] *See* Wangchuk, *supra* note 67, at 7.

resides in the sovereign people.[71] Finally, the Preamble to the Constitution attributes the rise of the document to "WE, the people of Bhutan."[72] In addition to identifying the source of the document, the Preamble elevates the people's authority by explaining who the people are and how they came to be.[73] It completes the circle by declaring the people one with Bhutan's religious, spiritual, and cultural heritage.[74]

B. The Organization of Constitutional Jurisdiction

In most countries, constitutional jurisdiction is organized as some variant of two basic models. Under the diffuse paradigm, which is also known as the American model, the function of constitutional jurisdiction tends to be exercised by all courts within the system.[75] Contrariwise, under the concentrated paradigm, which is also known as the Austrian or Kelsenian model, constitutional jurisdiction falls to a separate and specialized court.[76]

i. Court Structure in Bhutan

The judiciary of Bhutan, which is generically referred to as the Royal Court of Justice,[77] is a separate and self-governing branch of the Bhutanese government.[78] In contrast to American judicial federalism and the dual court structure in the United States,[79] the Judiciary of Bhutan, which features four

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[71] *See* JOHN L. AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED 48-49 (1995) (expounding the command theory). *But see* H.L.A. HART, THE CONCEPT OF LAW 25-29 (3d ed. 2012) (pointing to the paradox of the commanders commanding the commanders).

[72] BHUTAN. CONST. prmbl.

[73] Adeno Addis, *Constitutional Preambles as Narratives of Peoplehood*, 12 VIENNA J. INT'L CONST. L. 125 (2018) ("preambles are performative in nature: they constitute the people as they at the same time declare that the people are their authors").

[74] BHUTAN CONST. prmbl. ("BLESSED by the Triple Gem, the protection of our guardian deities, the wisdom of our leaders, the everlasting fortunes of the Pelden Drukpa and the guidance of His Majesty the Druk Gyalpo Jigme Khesar Namgyel Wangchuck").

[75] Matthias Jestaedt, *Verfassungsgericht ist nicht gleich Verfassungsgericht* [Constitutional Court Does Not Equal Constitutional Court], 74/10 JURISTENZEITUNG (JZ) 473, 476 (2019) (dating the emergence to the establishment of a supreme court by the U.S. Constitution of 1787).

[76] Jestaedt, *supra* note 75, at 476 (observing that this model is owed to the Austrian Federal Constitutional Law of 1920, which installed a constitutional court). *See also* Christoph Bezemek, *A Kelsenian Model of Constitutional Adjudication – The Austrian Constitutional Court*, 67 ZEITSCHRIFT FÜR ÖFFENTLICHES RECHT [ZÖR] 115 (2012).

[77] BHUTAN CONST. art. 21(2).

[78] Wangchuk, *supra* note 67, at 8.

[79] For the proposition that this dimension of duality has frequently been overlooked, *see* John W. Winkle III, *Dimensions of Judicial Federalism*, 416 ANNALS AM. ACAD. POL. & SOC. SCI. 67 (1974) (arguing that the duality not only affects litigant behavior, judicial

tiers,[80] is unitary. The Supreme Court sits at the apex of the Royal Court of Justice, followed by the High Court, and, at the district and certain sub-district levels, the Dzongkhag and Dungkhag courts.[81] Bhutan does not have courts or tribunals of special jurisdiction.[82] Significantly, the Dzongkhag courts[83] and the Dungkhag courts[84] do not enjoy the jurisdictional competence to perform constitutional review.[85] Rather, the High Court is the designated court of first instance for all constitutional cases[86] and its Constitutional Bench will hear substantial questions of law of general importance relating to the interpretation of the Constitution of Bhutan.[87] Once the High Court's judgment has been rendered, the aggrieved party to the litigation may appeal to the Larger Bench of the High Court and then to the higher appellate court—the Supreme Court of Bhutan—which exercises its appellate constitutional jurisdiction as the Apex Court. However, while the case is pending before any other lower court, the Supreme Court may by its own motion, or on the application by either party to the lawsuit, take over the case and decide it.[88] The Supreme Court, a court of record,[89] is the designated guardian of the Constitution and final authority on interpreting the Constitution.[90] Bhutan's take on constitutional jurisdiction cannot be neatly captured with the categories of diffuse and concentrated. Rather, Bhutan has found its own version, which, in addition to relying on its cultural and traditional values and practices, creatively blends both models to achieve a modern judiciary for the Bhutanese people. Indeed, the Supreme Court of Bhutan exhibits hybrid features.

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policy making and court administration but also raises questions of intersystem reconciliation).

[80] BHUTAN CONST. art. 21(2).

[81] Royal Court of Justice Bhutan, *Structure of the Royal Court of Justice*, http://www.judiciary.gov.bt/index.php/Welcome/get_pages?id=22%20&cat=5 (last visited Nov. 5, 2021).

[82] *See id.*

[83] *Id.* (explaining how each of Bhutan's twenty districts has one court that acts either as first instance court or appellate court).

[84] *Id.* (describing how fifteen sub-district courts act as first instance courts operate in six districts).

[85] *Opposition Party*, SC Judgment 11-1, *supra* note 16, at para. 5.5. *See also* Baylis & Munro, *supra* note 5, at 134-35 (addressing the role of the district court).

[86] *Id.*

[87] *Id.*

[88] BHUTAN CONST. art. 21(9).

[89] Royal Court of Justice Bhutan, *supra* note 81.

[90] BHUTAN CONST. art. 1(11).

ii. Diffuse and Concentrated Features of the Supreme Court of Bhutan

In similarity to the U.S. Supreme Court, which is competent to hear a variety of cases, the Supreme Court of Bhutan serves as a court of last resort with general jurisdiction.[91] Like its American counterpart, the Supreme Court of Bhutan does not entertain requests for preliminary rulings submitted by the lower courts. Such a device of constitutional jurisdiction is known in Germany as concrete judicial review (*konkrete Normenkontrolle*).[92] It functions like a conversation between judges. If a German court within its hierarchical system considers that its decision will hinge on a law it deems unconstitutional, the court is bound to make a reference to the Federal Constitutional Court (*Bundesverfassungsgericht*).[93] The lawsuit pauses until the Federal Constitutional Court decides the constitutionality questions referred to it.[94] A French analogue was brought online by way of a constitutional reform that added *ex post* review (*contrôle a posteriori*) to the portfolio of the Constitutional Council (*Conseil Constitutionnel*).[95] The new device, which may be functionally described as a reference for a preliminary ruling on the constitutionality of laws already in force, is literally called "priority question of constitutionality" (*question prioritaire de constitutionalité* or QPC).[96] The QPC is available to all litigants at any stage of the proceedings before a court of first instance and courts of appeal in administrative as well as civil and criminal matters.[97] Unlike Germany's concrete judicial review, the QPC installs a filtered version, which is steered by tight timelines.[98] At the outset, the court petitioned by a litigant must determine whether the statutory conditions for the QPC are met.[99] If the determination is affirmative, the lower court transmits the QPC to the highest hierarchical court within its system—

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[91] *See id.* at art. 21(7-10).
[92] Jestaedt, *supra* note 75, at 478.
[93] Grundgesetz [GG] [Basic Law] art. 100(1) (Ger.).
[94] Donald P. Kommers, *German Constitutionalism: A Prolegomenon*, 40 EMORY L. J. 837, 841 (1991) (emphasizing that judges in regular proceedings may not declare laws unconstitutional).
[95] CONST. art. 61-1 (Fra.). *See* Assemblée Nationale, *Fiche de Synthèse n° 39: Le Contrôle de la Constitutionnalité des Lois*, http://www2.assemblee-nationale.fr/decouvrir-l-assemblee/role-et-pouvoirs-de-l-assemblee-nationale/les-fonctions-de-l-assemblee-nationale/les-fonctions-legislatives/le-controle-de-la-constitutionnalite-des-lois (last visited Nov. 5, 2021).
[96] Ann Creelman, *US-Style Judicial Review for France?*, PRIMERUS (Oct. 2010), https://www.primerus.com/files/US-Style%20Judicial%20Review%20for%20France(2).pdf .
[97] *Id.* at 2.
[98] Arthur Dyevre, *Filtered Constitutional Review and the Reconfiguration of Inter-Judicial Relations*, 61 AM. J. COMPAR. L. 729, 744 (2013).
[99] *Id.* at 743.

the Council of State (*Conseil d'État*) in administrative matters and the Court of Cassation (*Cour de Cassation*) in civil and criminal law matters.[100] These then make their own admissibility determination before referring the QPC to the Constitutional Council.[101] Finally, for both Germany and France, there is also a European Union dimension, with its own reference proceeding for a preliminary ruling.[102]

While not engaging in concrete judicial review, the Supreme Court of Bhutan exercises a form of abstract judicial review that is normally attributed to the concentrated model. In addition to being equipped with appellate constitutional jurisdiction, subject to a prerogative to seize pending constitutional cases, the Supreme Court of Bhutan also abstractly functions as a constitutional advisor to the King[103] who has been given the prerogative to refer a question of law or fact that is of such of public importance that it requires judicial resolution.[104] Such a request for advice may, for example, pertain to the compatibility of a statute with the Constitution.[105] The Bhutanese version of advisory review, which creatively borrows from the Kelsenian model and invokes the image of the executive watchdog (*chien de garde de l'exécutif*) wrought into institutional designs in France[106] and the European Union,[107] distinguishes the Supreme Court of Bhutan from the design of the U.S. Supreme Court, which does not give the U.S. President the right to initiate such a review.[108] The question of whether the King's prerogative also envelops what the Europeans call pre-enforcement review has yet to be put to a judicial test.[109] A variant of this type of review has been known in France. Accordingly, a political authority (the President of the

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[100] *Id.* at 744 fig. 4.

[101] Creelman, *supra* note 96, at 2.

[102] See generally François-Xavier Millet & Nicoletta Perlo, *The First Preliminary Reference of the French Constitutional Court to the CJEU:* Révolution de Palais *or Revolution in French Constitutional Law*, 16 GERMAN L. J. 1471 (2015).

[103] *Opposition Party*, SC Judgment 11-1, *supra* note 16, at para. 5.4.

[104] BHUTAN CONST. art. 21(8).

[105] *Opposition Party*, SC Judgment 11-1, *supra* note 16, at para. 5.4.

[106] *See* Jestaedt, *supra* note 75, at 475-76 (discussing the French Constitution of the Fifth Republic).

[107] *See* Consolidated Version of the Treaty on European Union art. 17, Oct. 26, 2012, 2012 O.J. (C 326) 13, art. 17 (European Commission to "ensure the application of the Treaties, and of measures adopted by the institutions pursuant to them . . . [and to] oversee the application of Union law under the control of the Court of Justice of the European Union."); Consolidated Version of the Treaty on the Functioning of the European Union arts. 258, 260, Oct. 26, 2012, 2012 O.J. (C 326) 154 (European Commission standing to see through the Member State infringement procedure).

[108] *See* Alec Stone Sweet, *Why Europe Rejected American Judicial Review*, 101 MICH. L. REV. 2744, 2771 (2003).

[109] *See Opposition Party*, SC Judgment 11-1, *supra* note 16, at para. 5.4(a) (speaking of "Abstract Judicial Review" in this context).

Republic, the Prime Minister, the Presidents of the Senate and National Assembly) as well as sixty members or senators have the prerogative to trigger the French Constitutional Council (*Conseil Constitutionnel*) into a review of legislation, but only before promulgation.[110] When exercising *ex ante* review (*contrôle a priori*), the Constitutional Council has been characterized as a third legislative chamber.[111] Incidentally, certain *ex ante* advisory functions with regard to legislation also reside in the Council of State (*Conseil d'État*).[112] In addition to advising the Government on its bills and draft ordinances,[113] the Council of State may be asked for its opinion by the President of the National Assembly and the President of the Senate with regard to a draft bill tabled by a member of their respective chamber before it is considered in committee, unless that member objects.[114]

Unlike the United States, where the power exercised in *Marbury* falls upon all federal and state courts, which have jurisdiction over cases arising under federal law,[115] judicial review in Bhutan is not diffuse.[116] Accordingly, as Bhutan's district and sub-district courts do not hear constitutional matters,[117] there is no debate surrounding a relatively recent but significant phenomenon that has received much attention in the United States—"nationwide" or "universal" injunctions issued by individual judges. These injunctions are uniquely sweeping in their purported effects.[118] They do not only command the government to obey the court's orders beyond its territorial jurisdiction, but also operate to block government policies from being enforced against anyone across the United States, as opposed to being concretely confined to the litigants of the case at bar.[119] Not surprisingly, the practice has witnessed the rise of partisan advocates and detractors from

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[110] CONST. art. 61(2) (Fra.). For a concise overview, see Assemblée Nationale, Fiche de Synthèse nº 39: Le Contrôle de la Constitutionnalité des Lois, http://www2.assemblee-nationale.fr/decouvrir-l-assemblee/role-et-pouvoirs-de-l-assemblee-nationale/les-fonctions-de-l-assemblee-nationale/les-fonctions-legislatives/le-controle-de-la-constitutionnalite-des-lois.

[111] TOM GINSBURG, COMPARATIVE CONSTITUTIONAL REVIEW, U.S. INST. PEACE 4 (2011), https://www.usip.org/sites/default/files/ROL/TG_Memo_on_Constitutional_Review%20for%202011_v4.pdf (comparing the pre-reform Council to a third house of the legislator as opposed to a court).

[112] CONSEIL D'ÉTAT, THE COUNSEIL D'ÉTAT AND THE ADMINISTRATIVE JUSTICE SYSTEM 3 (2012), *available at* https://www.conseil-etat.fr/Media/actualites/documents/reprise-_contenus/bilans-d-activite/ra-conseil-etat-2012-english.pdf.

[113] CONST. arts. 39(2), 38(2) (Fra.).

[114] CONST. art. 39(5) (Fra.).

[115] ABERNATHY & PUDER, *supra* note 59, at 169.

[116] *Opposition Party*, SC Judgment 11-1, *supra* note 16, at para. 5.5

[117] *Id.*

[118] Mila Sohoni, *The Lost History of the "Universal" Injunction*, 133 HARV. L. REV. 920 (2020).

[119] ABERNATHY & PUDER, *supra* note 59, at 169-70.

across party lines.[120] Supporters have argued that national injunctions are a necessary adjunct to the type of decentralized judicial review ushered in by *Marbury*.[121] Critics have countered that "the routine issuance of universal injunctions is patently unworkable, sowing chaos for litigants, the government, courts, and all those affected by these conflicting decisions."[122]

Another design feature that distinguishes constitutional jurisdiction in Bhutan from the American counterpart pertains to the effects of unconstitutionality rulings. In *Marbury*, the U.S. Supreme Court explains that "a legislative act contrary to the [C]onstitution is not law.[123] The Court further declares that "a law repugnant to the [C]onstitution is void."[124] American courts, however, do not technically wipe away legislation when they declare laws in part or in their entirety unconstitutional. Rather, such legislation, even if it remains on the books, is disabled in that no court will enforce it. It may very well be that this approach reflects Montesquieu's famous locution about the third power—that it was "in some measure next to nothing" (*en quelque façon nulle*).[125]

In contrast to American practice, concentrated systems equip their guardian courts with the power to quash legislation with immediate effects.[126] Germany's Federal Constitutional Court, for example, declares unconstitutional legislation either null and void (*nichtig*), which means the legislation is gone for all intents and purposes, or incompatible (*unvereinbar*), which gives the legislature a window in time to change the legislation so as to bring it into constitutional compliance.[127]

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[120] For an illustrative debate between Professors Samuel Bray and Amanda Frost, see, for example, *Are Nationwide Injunctions Legal?*, 102 JUDICATURE 70 (2018).

[121] *See id.* at 72 (Professor Bray's response as to why nationwide injunctions are becoming more commonplace: "[o]nce we're in the grip of metaphorical language about judges 'striking down' statutes, then it's only a short downhill step to the national injunction . . . [because once it is struck down] why is it still doing something to someone?"). *See also* Memorandum from Jefferson B. Sessions III, Att'y Gen., to Heads of Civil Litigation Components U.S. Att'ys, Litigation Guidelines for Cases Presenting the Possibility of Nationwide Injunctions (Sept. 13, 2018), https://www.justice.gov/opa/press-release/file/1093881/download (recalling that "[t]he Department [of Justice] consistently has argued against granting relief outside of the parties to the case").

[122] *See* Adam White, *Congress Should Fix the Nationwide Injunction Problem with a Lottery*, YALE J. ON REG. (Feb. 11, 2020), https://www.yalejreg.com/nc/congress-should-fix-the-nationwide-injunction-problem-with-a-lottery/ (quoting from J. Gorsuch's concurring opinion in Department of Homeland Security v. New York).

[123] *Marbury*, 5 U.S. (1 Cranch) at 177-78.

[124] *Id.* at 180.

[125] MONTESQUIEU, s*upra* note 53, at 300.

[126] Ginsburg, *supra* note 111, at 4.

[127] *Id.* at 5.

Bhutan squarely follows the concentrated model with regard to the effects of unconstitutionality.[128] In *Opposition Party*, the High Court and the Supreme Court strike down the introduction of taxation measures, declare the scheme null and void, and direct the Government to refund all taxes that were collected on the basis of unconstitutional law.[129]

IV. GATEKEEPER DOCTRINES: RULES OF STANDING AND THE POLITICAL QUESTION DOCTRINE

Marbury and *Opposition Party* identify and discuss thresholds that must be met before a plaintiff is allowed into the courtroom. These include, in contemporary American parlance, the rules of standing and the political question doctrine. Under the rules of standing, which embody the U.S. Supreme Court's gloss with regard to the Case or Controversy Clause in the U.S. Constitution,[130] the plaintiff must be injured in fact, the injury must be traceable to the defendant's action that the plaintiff challenges, and the injury must be amenable to being redressed by a favorable decision from the court.[131] The U.S. Supreme Court's political question doctrine queries whether a court is properly seized or whether the political system of accountability is the best mechanism for resolving a matter.[132] Doctrines related to standing and

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[128] BHUTAN CONST. art. 1, § 10, cl. 2 ("However, the provisions of any law, whether made before or after the coming into force of this Constitution, which are inconsistent with this Constitution, shall be null and void").

[129] *Opposition Party*, HC Judgment 10-100, *supra* note 16, at 67 (23.3) & 68 (23.4); *Opposition Party*, SC Judgment 11-1, *supra* note 16, at para. 6.6.

[130] U.S. CONST. art. III, § 2. For the assertion that the standing doctrine has been fabricated by the U.S. Supreme Court, see John A. Ferejohn & Larry D. Kramer, *Independent Judges, Dependent Judiciary: Institutionalizing Judicial Restraint*, 77 N.Y.U. L. REV. 962, 1009 (2002).

[131] *See, e.g.*, Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992) (setting forth the three prongs required for standing: (1) injury-in-fact; (2) causation; and (3) redressability). For a critical appraisal of those rules and other limitations to having your day in court, *see* ERWIN CHEMERINSKY, CLOSING THE COURTHOUSE DOOR: HOW YOUR CONSTITUTIONAL RIGHTS BECAME UNENFORCEABLE 133-35 (2017).

[132] For the famous six alternative factors that may trigger the political question doctrine, *see* Baker v. Carr, 369 U.S. 186, 217 (1962) ("[A] textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question"). *See also* Drew McLelland & Sam Walsh, Student Briefing Paper, Litigating Challenges to Federal Spending Decisions: The Role of Standing and Political Question Doctrine, Briefing Paper No. 33 (May 1, 2006) (Harvard Law School, Federal Budget Policy Seminar) at 24

political question inquiries include the "no advisory doctrine," which forbids federal courts to adjudge the constitutionality of a law before it has been adopted, and the "ripeness doctrine," which bars courts from hearing claims before the government has finalized a decision that could affect a particular plaintiff.[133]

A. Convergence of the Standing and Political Question Doctrines in the United States

As both gatekeeper doctrines—standing and political question—implicate justiciability and separation of powers, contemporary literature has asserted that under *Marbury*, the rules of standing, which focus on the person of the particular plaintiff who alleges concrete injury, and the political question doctrine, which shields certain decision spaces from judicial patrol, have been characterized as "two sides of the same coin."[134] If a plaintiff asserts that an individual right has been injured, the lawsuit can by definition not raise a political question.[135] In other words, the standing analysis could be deployed to supplant the attributes of the political doctrine query of cognizability.[136] Literature has confirmed a trend to this regard in the U.S. Supreme Court over the past several decades.[137]

In *Marbury*, Chief Justice Marshall famously plants the seeds for the rise of the political question doctrine by "[i]nquir[ing] whether there be in its composition any ingredient which shall exempt from legal investigation, or exclude the injured party from legal redress."[138] He concludes:

> [T]hat, where the heads of departments are the political or confidential agents of the [E]xecutive, merely to execute the will of the President, or rather to act in cases in which the

(summarizing that the first factor involves textual analysis, the second factor raises institutional competence, and the last four factors concern prudential interests); Markus G. Puder, *Guidance and Control Mechanisms for the Construction of UN-System Law—Sung and Unsung Tales from the Coalition of the Willing, or Not*, 121 PENN. ST. L. REV. 143, 165-69 (comparing foreign analogues of the political question doctrine in the context of the Second Gulf War: (1) the United Kingdom, with its threshold of (non-)justiciability, (2) Costa Rica, with its trend towards judicialization; and (3) Germany, with its notion of a certain non-judicial space of appraisal and prognosis).

[133] JOHN E. NOWAK & RONALD ROTUNDA, CONSTITUTIONAL LAW § 2.12 (8th ed. 2010).

[134] McLelland & Walsh, *supra* note 132, at 2.

[135] HOWARD FINK & MARK TUSHNET, FEDERAL JURISDICTION: POLICY AND PRACTICE 231 (1987).

[136] Linda Sandstrom Simard, *Standing Alone: Do We Still Need The Political Question Doctrine?*, 100 DICK. L. REV. 303, 306, 333 (1996).

[137] McLelland & Walsh, *supra* note 132, at 32-34 (noting that the Court has found a political question only twice since *Baker*).

[138] *Marbury*, 5 U.S. (1 Cranch) at 163.

> [E]xecutive possesses a constitutional or legal discretion, nothing can be more perfectly clear than that their acts are only politically examinable.[139]

One could facetiously query whether constitutional review itself is not of a political nature, rather than being strictly legal.[140] Conversely, standing subtly rears its head in *Marbury* in the passages covering injury and remedy: where there is a right, there is a remedy (*ubi ius ibi remedium*).[141] At the time, access to court hinged on the substantive law at bar and the Common Law's stringent pleading and other form requirements kept most suits within the confines of a case sufficiently judicial in nature.[142] *Marbury* thus recognizes that certain prudential rules and doctrines, though designed to have the most closely affected parties, at the right time, in the courtroom, have the potential to limit judicial review.

B. Operations and Variants of Standing Doctrines in Bhutan

Opposition Party zeroes in on the standing side of the coin. In general, judicial review in Bhutan requires a live controversy.[143] Bhutan's High Court recites the framework of component elements developed in the United States with regard to the case-and-controversy requirement: a proper plaintiff must have suffered an actual injury in fact that is causally connected to the defendant's actions and that can be redressed by a decision from the adjudging court.[144] The analysis then branches into subvariants of "locus standi"—opposition party standing, taxpayer standing and public interest standing.[145]

i. Opposition Party Standing

In general and in contrast to the U.S. Constitution, which makes no mention of political parties, not the least because the framers were wary of

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[139] *Id.* at 166.
[140] ABERNATHY & PUDER, *supra* note 59, at 191-92. *See also* Louis Henkin, *Is There a Political Question Doctrine?*, 85 YALE L.J. 597 (1976) (arguing that the act of consulting the text to determine who has power to decide the case, joined with the act of consulting cases for legal standards, is the act of constitutional adjudication in *Marbury*).
[141] ABERNATHY & PUDER, *supra* note 59, at 163-73.
[142] Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371, 1395 (1988) ("syllogism of forms").
[143] *Opposition Party*, SC Judgment 11-1, *supra* note 16, at para. 5.4.
[144] *Opposition Party*, HC Judgment, 10-100, *supra* note 16, at 29.
[145] *Id.* at 27-35.

political factions and partisan bickering,[146] Bhutan's Constitution expressly endows political parties with a full-fledged constitutional status.[147] At first blush, this approach seems reminiscent of language in Germany's Constitution, which tasks political parties with partaking "in the formation of the political will of the people."[148] But under closer scrutiny, Bhutan's version reflects the yin-and-yang of fundamental rights and fundamental duties under the Constitution of Bhutan.[149] Political parties in Bhutan are constitutionally committed to the national interests[150] and purposed to offer the Bhutanese people different choices to promote Bhutan's sustainable and balanced development for the well-being of its people[151] in pursuit of Gross National Happiness.[152] The Constitution of Bhutan further establishes interconnected dyads—a primary and a general round of elections to ensure a two-party system in parliament[153] and, in reflection of the outcomes, a bifurcation into the Ruling Party and the Opposition Party.[154]

Opposition Party standing, which embodies a legal interest separate from the petitioner in his or her individual capacity as an aggrieved party, is moored to the institutional role of the parliamentary opposition under Bhutan's Constitution.[155] The constitutional function of the Opposition Party embodies the proper participation of all governed. Within Bhutan's holistic system of democratic governance, the Opposition Party is absolutely essential—not only to ensure the accountability of those who govern but also

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[146] *See e.g.*, Lee Drutman, *America Is Now the Divided Republic the Framers Feared*, THE ATLANTIC (Jan. 2, 2020), https://www.theatlantic.com/ideas/archive/2020/01/two-party-system-broke-constitution/604213/ (offering two famous quotes: (1) "[t]he alternate domination of one faction over another, sharpened by the spirit of revenge, natural to party dissension, which in different ages and countries has perpetrated the most horrid enormities, is itself a frightful despotism" (George Washington); and (2) "a division of the republic into two great parties … is to be dreaded as the great political evil" (John Adams)); John C. Fortier, *Polarised and Fractured U.S. Political Parties and the Challenges of Governing*, 14 EUR. VIEW 51 (2015) (observing a rise in polarization between the two parties and the emergence of political independents).

[147] BHUTAN CONST. art. 15.

[148] Basic Law art. 21(1)[1].

[149] BHUTAN CONST. arts. 7-8.

[150] *Id.* at art. 15(1).

[151] *Id.* at art. 15(2).

[152] *Id.* at art. 9(2). For more detail regarding the uniquely Bhutanese concept of happiness over domestic product coined by the Great Fourth King Jigme Singye Wangchuck in the 1990s, see, for example, Dorji, *supra* note 56, at 79-80.

[153] *Id.* at art. 15(5)-(7).

[154] *Id.* at art. 15(8).

[155] *Opposition Party*, HC Judgment, 10-100, *supra* note 16, at 27; *Opposition Party*, SC Judgment 11-1, *supra* note 16, at para. 5.1. *See* BT. CONST. art. 18(1) ("The Opposition Party shall play a constructive role to ensure that the Government and the ruling party function in accordance with the provisions of this Constitution, provide good governance and strive to promote the national interest and fulfill the aspirations of the people.").

to contribute to the welfare of the Bhutanese nation, the Bhutanese society, and the Bhutanese people.[156]

The High Court of Bhutan explains that Opposition Party standing accrues collectively, not individually.[157] Therefore, the Opposition Leader acting alone does not have prima facie standing in the absence of securing the signatures or expressions of written consent from all members of the Opposition Party.[158] Although the petition had only been signed by the leader of the Opposition Party, the High Court deemed the submission in court by the other member of the Opposition Party, which had consisted of only two members, curative enough for purposes of implied consent.[159]

The Supreme Court of Bhutan adds several clarifications regarding Opposition Party standing. A constitutional complaint by the Opposition Party as a group can only be filed by the Opposition Leader who must produce a writing that exhibits the written consent of all the party members and bears the countersignature of the Secretary General of the National Assembly who acts as a kind of notary public.[160] In substance, such Opposition Party standing requires that the trifecta of injury, causation and redressability be analyzed with regard to the Opposition Party as a group.[161] Incidentally, the Supreme Court explains that members of the Opposition Party who wish to initiate constitutional proceedings based on their individual standing must still meet the form required for Opposition Party standing.[162] Finally, according to the Supreme Court in strong dicta, no standing analogue is available to a member of the National Assembly in the Ruling Government because of the constitutional bar with regard to party defections.[163]

Compared to the American doctrine of legislative standing, which must clear a rigorous inquiry, Opposition Party standing in Bhutan has a constitutional anchor. Under the U.S. Supreme Court's case law for interbranch litigation with regard to the proper calibration between the legislative and executive powers, a purely "institutional" injury short of a complete nullification of votes is generally not sufficient for the requisite

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[156] *Opposition Party*, SC Judgment 11-1, *supra* note 16, at para. 5.1.
[157] *Opposition Party*, HC Judgment, 10-100, *supra* note 16, at 28.
[158] *Id.*
[159] *See id.* at 30 (deciding to not move into merits of case based on outdated technical hitches associated with the rules of standing would result in a grave lacuna and irreparable harm; court called to remedy lack of consent of the other member of the Opposition Party).
[160] *Opposition Party*, SC Judgment 11-1, *supra* note 16, at paras. 4.22.1.1, 5.1(b).
[161] *Id.* at para. 5.2 (denying Opposition Party standing because the Opposition Party as such was not affected by the Government's executive decision to suspend the import of all light vehicles).
[162] *See id.*
[163] *Id.* at para. 4.22.1.3.

personal stake.[164] In *Opposition Party*, the entire legislature was bypassed, as, in the course of the Ruling Government's maneuver, no vote whatsoever was taken.

In addition to Opposition Party standing, the High Court and the Supreme Court of Bhutan in *Opposition Party* explore two other variants of standing that could allow the plaintiff into the courtroom.[165] These doctrines include taxpayer standing and public interest standing.

ii. Taxpayer Standing

According to the High Court of Bhutan in *Opposition Party*, any person who pays taxes has standing to initiate proceedings against the taxing authority if the tax has been imposed in contravention of Bhutan's Constitution. This, says the court, flows from every person's "right to approach the courts in matters arising out of the Constitution."[166]

The Bhutanese version of taxpayer standing thus appears less constrained than its counterpart in the United States. While American theory likewise allows those into court who claim to have been injured in the wake of footing a share of expenditure that is unconstitutional, the U.S. Supreme Court has in practice tightened the screws by imposing conditions that are designed to curtail lawsuits against the government over expenditures.[167] Under the Supreme Court's modern test, where the plaintiff alleges an injury connected to his or her status as a taxpayer, the plaintiff's challenge must be directed at an exercise of congressional power under the taxing and spending clause and, in addition, there must be a sufficient nexus between the plaintiff's taxpayer status and the concrete nature of the unconstitutionality alleged in the complaint.[168]

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[164] *See, e.g.*, Virginia House of Delegates v. Bethune-Hill, 587 U.S. ___, 139 S.Ct. 1945, 204 L.Ed.2d 305 (2019) (Virginia state representatives lack standing to appeal lower court ruling that state's governor did not oppose); Raines v. Byrd, 521 U.S. 811, 117 S.Ct. 2312 (1997) (a group of six members of Congress challenging the constitutionality of the Line Item Veto passed by the 104th Congress without standing in their lawsuit against the Secretary of the Treasury and the Director of the Office of Management and Budget). For scholarship, *see* Neal Devins & Michael A. Fitts, *Essay, The Triumph of Timing: Raines v. Byrd and the Modern Supreme Court's Attempt to Control Constitutional Confrontation*, 86 GEO. L.J. 351 (1997).

[165] *Opposition Party*, HC Judgment 10-100, *supra* note 16, at 31.

[166] BHUTAN CONST. art. 21(18).

[167] McLelland & Walsh, *supra* note 132, at 15-16.

[168] *Id.* at 16-20 (dissecting Flast v. Cohen, 392 U.S. 83 (1968) and progeny).

iii. Public Interest Standing

The plaintiff's locus standi under the variant of the public interest principle was affirmed by the High Court of Bhutan in *Opposition Party*.[169] According to the High Court, the allegation of procedural and substantive breaches associated with the introduction of tax measures in violation of constitutional law is sufficient to trigger the principle.[170] On appeal, the appellant asserted that this type of standing had not been recognized by the laws of Bhutan;[171] however, the Supreme Court of Bhutan did not decide the question or offer dicta in this regard.

Public interest standing is a Canadian doctrine. In Canada, the design of the civil litigation system is generally predicated upon "standing as of right" or "private standing,"[172] which resembles the American standing doctrine in that it is to ensure that only those with a personal investment and sufficient stake in a case will have their day in court. In departure from the norm, public interest standing enlarges the circle of plaintiffs by allowing more remote actors such as interested parties or civil advocacy organizations to bring a case when the law or policy subject to the challenge is deemed to affect important matters of broader social import.[173]

Significant procedural and substantive requisites, however, limit the scope of the public interest standing variant. Procedurally, the applicant must successfully petition the court.[174] In substance, the applicant must meet a three-pronged test: first, the law or policy complained of raises a serious validity issue that is justiciable; second, the plaintiff is either directly affected by the law or policy or has a genuine interest with regard to its validity; and third, there is no alternative reasonable and effective way to bring the issue into a courtroom.[175]

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[169] *Opposition Party*, HC Judgment 10-100, *supra* note 16, at 29.
[170] *Id.*
[171] *Opposition Party*, SC Judgment 11-1, *supra* note 16, at para. 3.1, pt. III, no. 11.
[172] *The Expansion of Public Interest Standing*, ALBERTA C.L. RSCH. CTR., http://www.aclrc.com/public-interest-standing (last visited Nov. 8, 2021).
[173] Canadian Council of Churches v. R., [1992] 1 S.C.R. 236 (Can.) (referring to a trilogy of cases handed down by the Supreme Court of Canada). For comparative scholarship, *see* Gwendolyn McKee, *Standing on a Spectrum: Third Party Standing in the United States, Canada, and Australia*, 16 BARRY L. REV. 115 (2011) (characterizing Canadian public interest standing as a model of enhanced predictability and stability).
[174] ALBERTA C.L. RSCH. CTR , *supra* note 172.
[175] Canadian Council of Churches v. Canada (Minister of Employment and Immigration), [1992] 1 S.C.R. 236, para. 37 (Can.). *See also* ALBERTA C.L. RSCH. CTR , *supra* note 172 (discussing case law in support of the proposition that the strict third prong has given way to "a more purposive approach").

V. JUDICIAL MANEUVERS: DECISIONAL SEQUENCING, STYLES OF REASONING AND CANONS OF INTERPRETATION

Deciding the order under which a judicial opinion proceeds ranks amongst the most fundamental thresholds in adjudging a case. Literature has observed that while the parties generally control the issues they bring to the court, the sequencing decision is generally made by the judge.[176]

In *Marbury*, Chief Justice Marshall skips the jurisdiction stage, although it was common practice at the time to start with probing whether the court had the power to decide the case in the first place.[177] If he had started with jurisdiction, then he would have needed to dismiss the case because Marbury was not an ambassador, public minister or consul. This would have relegated his constitutional discussion to mere dicta.[178] Opting for a merits-based flow of analysis through the prism of three substantive questions, Chief Justice Marshall was able to say that Marbury was right in principle, but he had chosen the wrong court.[179] Expressed in modern categories, Chief Justice Marshall's maneuvering connotes what has been called "porzia" or purposive jurisprudence towards a desired result. [180]

Opposition Party is much more conventional in this sense. Before launching into the merits stage, the High Court of Bhutan pauses to identify the standing questions it will answer before determining the constitutionality questions raised in the case.[181] On appeal, the Supreme Court of Bhutan addresses jurisdiction before merits when elaborating the High Court's original jurisdiction in matters "involving a substantial question of law of general importance relating to the interpretation of this Constitution."[182]

Both *Marbury* and *Opposition Party* appear influenced by continental conceptions of rationalist respect for texts and principles. Citations to case law are sparse in both decisions. In *Marbury*, Chief Justice Marshall, however, refers to a common law tandem of universally renowned jurists that have shaped Anglo-American legal history—William Blackstone, the author of the Commentaries, and Lord Mansfield, the Chief Justice of the King's Bench.[183]

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[176] Kevin M. Clermont, *Sequencing the Issues for Judicial Decisionmaking: Limitations from Jurisdictional Primacy and Intrasuit Preclusion*, 63 FLA. L. REV. 301, 303 (2011).
[177] ABERNATHY & PUDER, *supra* note 59, at 171.
[178] *Id.*
[179] *See* Susan Low Bloch, *The Marbury Mystery: Why Did William Marbury Sue in the Supreme Court?*, 18 CONST. COMMENT. 607, 610 (2001).
[180] ERNST FUCHS, GERECHTIGKEITSWISSENSCHAFT – AUSGEWÄHLTE SCHRIFTEN ZUR FREIRECHTSLEHRE 26 (Albert S. Foulkes & Arthur Kaufmann eds., 1965) (invoking Shakespeare's The Merchant of Venice).
[181] *Opposition Party*, HC Judgment 10-100, *supra* note 16, at para. 15, p.26.
[182] *Opposition Party*, SC Judgment 11-1, *supra* note 16, at para. 5.5.
[183] Julian S. Waterman, *Mansfield and Blackstone's Commentaries*, 1 U. CHI. L. REV. 549, 549 (1934).

Both authorities are ostensibly invoked to explain the operations of the writ of mandamus. But, at a psychological level, this could have been another subtlety directed at Jefferson who considered the "honied Mansfieldism of Blackstone"[184] anathema to democratic government. In *Opposition Party*, neither the High Court of Bhutan nor the Supreme Court of Bhutan refer to case law. But in its final exhortation of its power of judicial review, the Supreme Court enlists the transcendental authority associated with the rule of law and the wisdom of the Noble King of Bhutan.[185]

In exercising their judicial review power, the U.S. Supreme Court in *Marbury* and the High Court of Bhutan and the Supreme Court of Bhutan in *Opposition Party* run canons of constitutional and statutory construction that, at first blush, promise to limit predisposed posturing of judges and therefore, guard against judicial activism. Under closer scrutiny, however, a more complex picture emerges.[186] In *Marbury*, Chief Justice Marshall does not identify particular canons of interpretation beyond assuring the reader of his commitment to obey the text as the expression of rationally determinate law—an approach we would today associate with the school of legal formalism.[187] When holding that Congress was not in the legal position to add by statute to the Supreme Court's original jurisdiction, Chief Justice Marshall reads the affirmative reference to appellate jurisdiction in the constitutional text as an implied negation of Congress's prerogative to expand the Supreme Court's original jurisdiction.[188] Chief Justice Marshall thus effectively deploys the Latin maxim of "expressio unius est exclusio alterius,"[189] which means that the expression of one thing implies negatively that anything else not identified

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[184] *Id.* at 553, n.27.

[185] *Opposition Party*, SC Judgment 11-1, *supra* note 16, at 91 ("court order").

[186] *See* Anita S. Krishnakumar, *Academic Highlight: Substantive Canons in the Roberts Court*, SCOTUSBLOG (Jan. 5, 2018, 11:12 AM), https://www.scotusblog.com/2018/01/academic-highlight-substantive-canons-roberts-court/ ("The conventional wisdom is that substantive canons serve as unpredictable interpretive trump cards, the equivalent of a rabbit pulled out of a hat by judges seeking to reject the statute's plain meaning or congressional intent in favor of a reading they like better."). For more detailed scholarly elaboration, Anita S. Krishnakumar, *Reconsidering Substantive Canons*, 84 U. CHI. L. REV. 825 (2017).

[187] *See e.g.*, Paul Troop, *Why Legal Formalism Is Not a Stupid Thing*, 31 RATIO JURIS 428, 428 (2018) (distinguishing "doctrinal formalism" as "the view that judicial behavior can be represented using rules" and "rule formalism" as "the view that judges follow external rules when they are deciding cases"); Ernest J. Weinrib, *Legal Formalism: On the Immanent Rationality of Law*, 97 YALE L.J. 949 (1988) ("Formalist doctrine is characterized by working out of the implications of law from a standpoint internal to law").

[188] *Marbury*, 5 U.S. (1 Cranch) at 174-75.

[189] Stephen M. Durden, *Textualist Canons: Cabining Rules or Predilective Tools*, 33 CAMPBELL L. REV. 115, 130-31 (2010); David M. Golove, *Against Free-Form Formalism*, 73 N.Y.U. L. REV. 1791, 1919 (1998).

is excluded.[190] Literature has split not only as to the propriety of this canon for purposes of constitutional interpretation,[191] but also as to the inevitability of the outcome suggested by Chief Justice Marshall.[192] Moreover, Chief Justice Marshall makes no effort to save the statute and avoid its unconstitutionality. As has been noted in the literature, he could very well have given it a construction within the constitutional envelope and without changing the ultimate outcome of the case.[193] In this light, Chief Justice Marshall eschews what in modern legal parlance has come to be known as the Brandeis rule of constitutional avoidance.[194] In judicial practice, the canon is enormously significant as it operates to curtail the potential sweep of judicial review by permitting a court to interpret statutes in a manner that avoids delving into difficult questions of constitutional law.[195] Avoiding constitutional questions was not a novel idea as Chief Justice Marshall himself was to confirm in a decision only three decades after *Marbury*.[196] Indeed, in yet another decision from the *Marbury* era, Chief Justice Marshall had announced a similar canon when holding that national statutes should be interpreted in a way that avoided a collision with the law of nations.[197]

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[190] Stephen M. Durden, *Textualist Canons: Cabining Rules or Predilective Tools*, 33 CAMPBELL L. REV. 115, 130-31 (2010).

[191] *Id.* at 131-33 (offering quotes from the leading voices in a debate conducted at the turn of the millennium).

[192] Golove, *supra* note 189, at 1921-22 (explaining in the text and in the footnotes that most modern scholars read the constitutional clause as non-exclusive).

[193] Lisa A. Kloppenberg, *Avoiding Constitutional Questions*, 35 B.C. L. REV. 1003, 1028-29 n. 128 (194) ("First, the statute in *Marbury* might have been construed to apply only to the Court's appellate jurisdiction, because no other type of jurisdiction was mentioned in the statute. Second, the statute could have been construed as only granting the Court remedial power to issue mandamus when the Court has jurisdiction.").

[194] Ashwander v. Tennessee Valley Auth., 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) ("The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of."). *See* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 16-17 (1962).

[195] For a comprehensive review of the doctrine, along with numerous references to jurisprudence and literature, *see* ANDREW NOLAN, CONG. RSCH. SERV., R43706, THE DOCTRINE OF CONSTITUTIONAL AVOIDANCE: A LEGAL OVERVIEW 3 (2014).

[196] *Ex parte* Randolph, 20 F. Cas. 242 (C.C.D. Va. 1833) (No. 11,558) (no questions of "greater delicacy" can be presented to the federal courts than those that raise a constitutional challenge to a legislative act).

[197] Murray v. The Charming Betsy, 6 U.S. (2 Cranch) 64 (1804). For scholarship, see, for example, Justin Hughes, *The Charming Betsy Canon, American Legal Doctrine, and Global Rule of Law*, 53 VAND. J. TRANSNAT'L L. 1147 (2020); *See The Charming Betsy Canon, Separation of Powers, and Customary International Law*, 121 HARV. L. REV. 1215 (2008); Roger P. Alford, *Foreign Relations as a Matter of Interpretation: The Use and Abuse of Charming Betsy*, 67 OHIO ST. L.J. 1339 (2006).

Ultimately then, despite its formalist veneer, *Marbury* could be characterized as an early expression of legal realism.[198]

Unlike *Marbury*, the High Court of Bhutan in *Opposition Party* positively identifies the construction rules or tests it will use to decide the case: "the words, of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament."[199] This language recalls the classic methods of interpretation in Germany, which go back to Friedrich Carl von Savigny, the founder of the historical school of the 19th Century, who had distinguished between textual or grammatical interpretation, contextual interpretation, historical interpretation and teleological or purposive interpretation.[200] In regards to interpretation across statutes enacted at different times but related to the same subject, the High Court looks for answers by deploying the principles of "harmonious construction" and "in pari materia"—tools known all over the world that allow courts to treat two statutes as though they were one.[201] Finally, the High Court of Bhutan and the Supreme Court of Bhutan offer insights into the operations and limits of constitutional avoidance in their judicial practice. Both courts note their commitment and adherence to the doctrine, which, according to Supreme Court of Bhutan, flows from what it calls "the canon of judicial self-restraint."[202] By the same token, says the Supreme Court, the doctrine of constitutional avoidance "is intertwined with the debate over the proper scope of judicial review and the allocation of power among the three branches of the government."[203] Therefore, the doctrine cannot operate to chip away at the constitutionally mandated robustness of judicial review entrusted with the Supreme Court of Bhutan as the guardian of Bhutan's Constitution and final authority when it comes to its interpretation.[204]

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[198] For the proposition that the legal regime in the United States accommodates a formalist-realist blend, *see* Lawrence B. Solum, *The Positive Foundations of Formalism: False Necessity and American Legal Realism*, 127 HARV. L. REV. 2464, 2491, 2493 (2014) ("There may not be any absolute formalists on [the courts], but it may also be the case that perfect realists are very scarce or even nonexistent.").

[199] *Opposition Party*, HC Judgment 10-100, *supra* note 16, at 42.

[200] Winfried Brugger, *Legal Interpretation, Schools of Jurisprudence, and Anthropology: Some Remarks from the German Perspective*, 42 AM. J. COMPAR. L. 395 (1994).

[201] *See generally* Anuj C. Desai, *The Dilemma of Interstatutory Interpretation*, 77 WASH. & LEE L. REV. 177 (2020). *See also* Francis J. McCaffrey, *The Rule in Pari Materia As an Aid to Statutory Construction*, 3 LAW & L. NOTES 11 (1949).

[202] *Opposition Party*, SC Judgment 11-1, *supra* note 16, at para. 6.3.

[203] *Id.*

[204] *Id.*

VI. LEGACIES AND PERSPECTIVES

Under a narrow read, *Marbury* literally holds that the judicial branch will not behave unconstitutionally when asked by the political branches. But the contemporary understanding of judicial review construes *Marbury* as a rejection of the conception of coordination and self-examination in favor of judicial primacy.[205] Judicial review, as we know it today, really took off in the era of the New Deal of the 1930s. Faced with a U.S. Supreme Court they saw disposed to declare the crucial legislation unconstitutional, the proponents of the New Deal did not argue for a narrow construction of judicial review, but rather embarked upon a strategy of capturing the high court to harness its power to their advantage.[206] These efforts culminated in President Franklin Delano Roosevelt's court packing plan to stack the court with allies and secure the survival of the New Deal. [207] The plan was never enacted,[208] but "the switch in time that saved nine"[209] left the New Deal intact. Yet, over the decades, the battles over the high court have continued. They have not only led to new terminology such as "borking" to describe the stalling of nominees in the confirmation process,[210] but also to renewed discussions about control tools such as revisiting the size of the Supreme Court,[211] installing age or term

[205] Aaron v. Cooper, 358 U.S. 1 (1958) (*Marbury* "declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that the principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system.").

[206] Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 463 (1987).

[207] Andrew Glass, *This Day in Politics – FDR Unveils 'Court-Packing' Plan*, POLITICO (Feb. 5, 2019, 12:02 AM), https://www.politico.com/story/2019/02/05/fdr-court-packing-1937-1144296.

[208] *FDR's "Court-Packing" Plan,* FED. JUD. CTR., https://www.fjc.gov/history/timeline/fdrs-court-packing-plan (last visited Nov. 9, 2021).

[209] For a wealth of quantitative evidence to elucidate Justice Robert's transformation, see Daniel E. Ho & Kevin M. Quinn, *Did a Switch in Time Save Nine?*, 2 J. LEG. ANALYSIS 69, 70 (2010).

[210] Jane Coaston, *"Borking," Explained: Why a Failed Supreme Court Nomination in 1987 Matters*, VOX (Sept. 27, 2018, 4:02 PM), https://www.vox.com/2018/9/26/17896126/bork-kavanaugh-supreme-court-conservatives-republicans.

[211] Richard Wolf, *Pack the Court? Battles between Republicans and Democrats Fuel Clash over Supreme Court's Future*, USA TODAY (Oct. 25, 2020, 3:56 PM), https://www.usatoday.com/story/news/politics/2020/10/25/could-amy-coney-barretts-confirmation-fuel-supreme-court-expansion/3716562001/.

limits for the Justices,[212] rotating Justices off the high court,[213] or restricting the cases the high court can hear.[214]

Opposition Party is unequivocal with regard to the full power of judicial review. Yet, over the past decade, the High Court of Bhutan and the Supreme Court of Bhutan have exercised their judicial review powers on limited occasions only.[215] But even if the trend were to accelerate, the design approach chosen by Bhutan's Constitution for the Supreme Court of Bhutan appears, at first blush, more resilient against the political drama and mischief seen in the United States. Unlike the U.S. Constitution, which does not establish the size of the U.S. Supreme Court, Bhutan's Constitution prescribes that the Supreme Court of Bhutan shall consist of one Chief Justice and four Associate Justices (Drangpons).[216] Moreover, in contrast to their American colleagues, the Chief Justice and the Associate Justices of Supreme Court of Bhutan are subject to limited tenures of five and ten years respectively, with an absolute maximum age of sixty-five years.[217]

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[212] Russell Berman, *No Other Western Democracy Allows This: Only in America Does So Much Power Rest in the Hands of Elderly Judges*, THE ATLANTIC (Sept. 25, 2020), https://www.theatlantic.com/politics/archive/2020/09/supreme-court-retirement-age/616458/; Maggie Jo Buchanan, *The Need for Supreme Court Term Limits*, CTR. AM. PROGRESS (Aug. 3, 2020, 4:00 AM), https://www.americanprogress.org/issues/courts/reports/2020/08/03/488518/need-supreme-court-term-limits/.

[213] Maria L. Hodge, *The Feasibility of 'Rotating' Supreme Court Justices*, JURIST (July 1, 2019, 7:30 PM), https://www.jurist.org/commentary/2019/07/maria-hodge-rotating-justices/.

[214] Kia Rahnama, *The Other Tool Democrats Have to Rein in the Supreme Court*, POLITICO (Oct. 26, 2020, 5:46 PM), https://www.politico.com/news/magazine/2020/10/26/amy-coney-barrett-confirmation-court-packing-jursidiction-stripping-432566.

[215] *See* Michael Peil, *Comparing Apples and Apples: Ten Years of Constitutional Experience in Bhutan, India and the United States*, 10 BHUTAN L. REV. 44, 51 (2008) ("In the second [case showcasing judicial review], the [Supreme] Court exercised extra-constitutional (though arguably statutorily granted) powers to authorize the Bhutan Narcotics Control Authority – over express language in the Narcotic Drugs, Psychotropic Substance and Substance Abuse Act of Bhutan 2015 – to list Spasmo Proxyon Plus (SP+) in the statutory schedule of controlled substances."). *See also* Changa Dorji, *Supreme Court Judgment Allows Convicts in SP+ Cases to Pay Thrimthue*, BBS (July 27, 2017), http://www.bbs.bt/news/?p=77038. For a summary of the 2018 amendments of the Narcotic Drugs, Psychotropic Substance and Substance Abuse Act of Bhutan, which included, among others, the transfer of the competence to amend those schedules from the Parliament to the Narcotics Control Authority, with the Parliament retaining the right to be informed of changes in the scope of national control, *see* International Narcotics Control Board, *Report of the International Narcotics Control Board for 2018*, at 80 (2019), https://www.incb.org/documents/Publications/AnnualReports/AR2018/Annual_Report/Annual_Report_2018_E_.pdf.

[216] BHUTAN CONST. art. 21(7).

[217] *Id.* at art. 21(6).

Finally, the appointment clauses in the United States and in Bhutan differ considerably. In the United States, the power is shared between the President and the Senate.[218] Before receiving the ultimate appointment by the President, the candidate nominated by the President must be approved by the Senate.[219] Under Bhutan's Constitution, the King holds the appointment power, with advisory input from the National Judicial Commission,[220] which consists of the Chief Justice of Bhutan as Chair, the most senior Drangpon of the Supreme Court, the Chair of the Legislative Committee of the National Assembly, and the Attorney General.[221] Thus, when the National Judicial Commission forwards a name, the recommendation reflects the involvement of all three branches of government. This constitutional design was put to a test when the previous Chief Justice was selected.[222] As his predecessor had already left the office, the National Judicial Commission lacked one of its four members.[223] For purposes of avoiding a vacuum, the King stepped in by issuing a royal decree constituting an ad hoc committee to put forward a name.[224] Literature has asserted that the fix was not in line with the letter of Bhutan's Constitution.[225] Yet, the power of appointment ultimately resides with the King, while the prerogative of the National Judicial Commission is one of process and input—consultation. This is perhaps one of the reasons why there was no talk whatsoever among political actors about the potential for a constitutional crisis in Bhutan.

Despite its archaic and terse language, *Marbury* has been revered and cited worldwide as a model for countries with a constitution and courts. Our journey revealed that Bhutan's *Marbury* moment arrived with the seminal judgments of the High Court of Bhutan and the Supreme Court of Bhutan in *Opposition Party*. But the couplet of decisions also shows that, guided by the Constitution of Bhutan and with the Supreme Court of Bhutan as its guardian, Bhutan has charted its own path towards weaving a tapestry of vibrant constitutionalism.

In *Opposition Party*, the Supreme Court closes its judgment with a powerful summation of what constitutionalism means for Bhutan's commitment to a successful system of democratic governance:

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[218] *See* JOSEPH P. HARRIS, THE ADVICE AND CONSENT OF THE SENATE: A STUDY OF THE CONFIRMATION OF APPOINTMENTS BY THE UNITED STATES SENATE 33 (1968) (describing the distribution of roles as a compromise between those who favored appointments by the legislature and those who militated for the chief executive).
[219] *Id.*
[220] BHUTAN CONST. art. 21(4).
[221] *Id.* at art. 21(17).
[222] Iyer, *supra* note 64, at 383 (speaking of a "glitch").
[223] *Id.*
[224] *Id.*
[225] *Id.*

> Constitutionalism is an anti-thesis to autocracy. Therefore, the Constitution has different centers of power under vertical, horizontal and intra check and balance ensured through separation of power. The Constitution has carefully crafted the checks and balance inherent to constitutionalism. It prevents power from being concentrated in too few hands, which could result in an autocratic and dictatorial government. Constitutionalism embodies the philosophy of limited government and Bhutan has established a constitutional democratic system of governance as clarified by His Majesty the King during the public consultation of the Constitution in Trashi Yangtse that *"in future we must have strong and stable country befitting to the people's welfare*". Therefore, the Constitution prevents power from being fragmented in a manner that could lead to an ineffectual and unstable government.[226]

The Supreme Court's auspicious incantation of constitutionalism as a resilient bulwark of democracy and a safe haven of harmony reminds us of *lozé* (ལྷོད), Bhutan's rich genre of storytelling,[227] albeit reduced to writing. Sis felix!

[226] *Opposition Party*, SC Judgment 11-1, *supra* note 16, at p. 91 ("court order").
[227] For a detailed explanation of Lozé Ballades, *see* Karma Phuntsho, *Lozé Ballads*, BHUTAN CULTURAL LIBRARY (2017), https://texts.shanti.virginia.edu/book_pubreader/40787.