

Restraint as a Source of Judicial ‘Apoliticality’

A Functional Reconstruction

Maurits Helmich

1 Introduction

Few legal theorists today would argue that the domain of law exists in isolation from other normative spheres governing society, notably from the domain of ‘politics’. Especially when it comes to constitutional adjudication, the deep intertwinement between law and politics is virtually undisputed.¹ Constitutional cases, after all, deal with the applied meaning of some of the core ideals governing political society, and are meant to settle that meaning in an authoritative fashion. At the same time, however, the implicit norm that judges should *not* act ‘politically’ remains influential and widespread in the debates surrounding controversial court cases. Looking at the Dutch *Urgenda* case,² or *Miller v. Secretary of State* in the UK,³ one finds popular commentators accusing judges of being ‘dikastocrats’⁴ and ‘enemies of the people’.⁵ In academic commentary, similar (though more nuanced) voices can be heard, arguing that judges should restrain themselves and not interfere with the business of ‘politics’.⁶ That provokes a question: If constitutional adjudication necessarily involves an act of political stance-taking in the aforementioned way, then what sense is there in insisting that judges should *not* act ‘politically’?

This article is dedicated to finding an answer to this latter question. In analyzing the problem, it takes the academic controversies surrounding the *Miller* and *Urgenda* cases mentioned above as illustrative case studies. The two cases are entirely different in terms of factual background – the former is about the government’s rights to invoke Brexit, the latter about State duties to prevent

1 Cf. L. Fisher, *The Politics of Shared Power: Congress and the Executive*, 4th ed. (College Station, TX: Texas A&M University Press 1998), xii: ‘Adjudication is politics by another name’; N. Garoupa & T. Ginsburg, ‘Building Reputation in Constitutional Courts: Political and Judicial Audiences’, *Ariz. J. Int’l & Comp. L.* 28, no 3 (2011), 539-568, at 550: ‘Constitutional law is political in nature, and constitutional adjudication is a necessary part of the political process’.

2 HR 20 December 2019, ECLI:NL:HR:2019:2006 (*Klimaatzaak Urgenda*).

3 *R (Miller) v. Secretary of State for Exiting the European Union* [2017] UKSC 5. Due to its high constitutional-theoretical complexity, this article will not go into the somewhat similar and more recent *R (Miller) v The Prime Minister and Cherry v. Advocate General for Scotland* [2019] UKSC 41 case (overturning a five-week prorogation of Parliament).

4 Indeed, according to Dutch MP Thierry Baudet, this ‘dikastocracy’ (rule by judges) is the ‘Achilles’ heel’ of the liberal state. See <https://twitter.com/thierrybaudet/status/1194613924462772224> (13 November 2019).

5 James Slack, ‘Enemies of the People’, *Daily Mail*, 4 November 2016 (suggesting that the three judges ruling on *Miller* at the Divisional Court were ‘out of touch’ and politically compromised).

6 See sections 3 and 4 of this article.

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climate change. Nevertheless, they share certain characteristics on a constitutional-thematic level. Sections 3 and 4 show that, in both cases, both the courts and their critics agree on the abstract norm that adjudication should not be 'political'. That suggests that the 'norm of judicial apoliticality' (hereinafter: NJA) is conceived of as being coherent and normatively important. Still, there seems to be no general agreement on how to interpret this norm. As section 5 explains, there are different conflicting notions of judicial restraint underpinning the NJA. That introduces an important paradox. If what it means for a judge to be 'apolitical' is *itself* a matter of political controversy, then is the NJA not doomed to become a piece of hollow rhetoric?

Section 6 discusses two possible (though mistaken) responses to this problem of 'politically defined apoliticality'. The first response is proceduralism, which concerns the view that there may be disagreement about the NJA, but that this is not political disagreement of the ordinary kind. Rather, the idea is, it concerns second-order disagreement about what constraints can reasonably be imposed on courts in a democracy, given the fact that citizens disagree on substantive issues. The second response, which I ascribe to Ronald Dworkin, is rejectionism, *i.e.*, the view that the NJA is indeed an incoherent concept altogether. Dworkin, I contend, gives convincing reasons to distrust proceduralism, but fails to supply us with a positive argument why the NJA cannot make sense. As I show in section 7, the NJA need not be incoherent if one accepts that the kind of 'apoliticality' it prescribes is not 'lack of political underpinning' in the ideological sense. Rather, the NJA should be understood as a *functional* concept: it regulates what issues are and are not the proper subject of public deliberation, decision and struggle. First, however, we need section 2 to settle some preliminaries, in order to give more focus to the theoretical discussion.

2 Theoretical Preliminaries

Before we can properly start this article's quest of solving the puzzle how judges could ever adjudicate 'apolitically', three questions require an (at least provisional) answer. First, what is roughly the *prescriptive content* of the NJA (*i.e.*, what interpretive guidelines and constitutional norms flow from it)? Second, what *methods* and theoretical frames can we employ in order to make optimal sense of the NJA (do we need a legal lens, a critical-political one, or something else)? Third, is it even justified to speak about the NJA as if it were 'a' norm, whereas it is obvious that constitutionalism has developed in many *different forms* internationally?

The NJA, to answer the first question above, is the sort of norm people are concerned with when they express worries about judicial activism, or ideological adjudication. As suggested in the introductory section, the NJA is probably best understood in the negative: judges are *not* to transgress the limits imposed on them by well-founded constitutionalism. They should stay away from

'philosophical adventurism',⁷ 'imposing their personal preferences',⁸ or 'legislating from the bench'.⁹ The concern underpinning the NJA is often a democratic one: we prefer to be governed by elected legislatures, not by the high-minded guardianship of legal experts (judges).¹⁰ In that vein, one could view the NJA as an answer to the paradox of adjudication within the liberal democracy. That is, given the fact that judges have the task of independently guarding the rule of law, what norms can bind them to make sure they will not abuse that power to 'frustrate the will of the people'?¹¹

Thanks to its old and politically significant tradition of judicial review, the United States harbours the most extensive and theoretically crystallized debates around the NJA. For example, trying (as they see it) to 'depoliticize the law',¹² many American conservatives have endorsed originalism – the view that the constitution only changes meaning when explicitly amended. Liberals have also appealed to the NJA, arguing, for example, that the judiciary should not be politicized by an overzealous revolt against the Warren Court's judgments.¹³ Be that as it may, it would be silly to say that NJA is only (or even primarily) an American concept. True, British legal thought may have a tradition of mystifying judicial power under the veil of the common law's (alleged) self-regulating logic, especially since the introduction of the Human Rights Act 1998, judicial power has come in the middle of scholarly attention.¹⁴ And although principled discussions on constitutional interpretation are virtually absent in Dutch legal literature,¹⁵ there is the doctrine that judges should not 'exceed their lawmaking task'.¹⁶ Whether or not that implies that judges at least have *some* (limited)

- 7 E. Meese III, 'Our Constitutions's Design: The Implications for Its Interpretation', *Marquette Law Review* 38, no. 3 (1987), 381-388, at 382.
- 8 H. Jefferson Powell, 'Rules for Originalists', *Virginia Law Review* 73, no. 4 (1987), 659-700, at 660.
- 9 Thomas L. Jipping, 'Legislating from the Bench: The Greatest Threat to Judicial Independence', *South Texas Law Review* 43, no. 1 (2001), 141-160.
- 10 T. Jennings Peretti, *In Defense of a Political Court* (Princeton, NJ: Princeton University Press 2019), 4.
- 11 Jennings Peretti, *In Defense of a Political Court* (2019), 24.
- 12 See E. Meese III, 'Construing the Constitution', *U.C. Davis Law Review*, 19, no 1 (1986), 22-30, at 29.
- 13 R.C. Post and R.B. Siegel, 'Originalism as a Political Practice: The Right's Living Constitution', *Faculty Scholarship Series*, 171 (2006), 545-574, at 571; R.C. Post and R.B. Siegel, 'Questioning Justice: Law and Politics in Judicial Confirmation Hearings', *Yale L.J. Pocket Part* 115 (2006), 38-51, at 49-50.
- 14 K. Malleon, *The New Judiciary: The effects of expansion and activism* (Abingdon/New York, NY: Routledge [1999]2016), 1-6.
- 15 Presumably due to the Dutch Constitution's explicit prohibition of constitutional review (Art. 120).
- 16 In Dutch: 'de rechtsvormende taak te buiten gaan'. See, for a general discussion, J. Uzman, *Constitutionele remedies bij schending van grondrechten: Over effectieve rechtsbescherming, rechterlijk abstenen en de dialoog tussen rechter en wetgever* (doctoral dissertation, Leiden University 2013), chpt. 4.3.

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lawmaking task,¹⁷ the principle that judges should be modest about their own constitutional position is undisputed.

So how to move from this rough-grained sketch of the content of the NJA to an actual *method* of studying and further explicating it (the second question above)? As it seems, two traditional ways to study legal systems do not quite work in this case. Classical dogmatic analysis, the method that is concerned with reconstructing and systematizing the concepts put forward by courts and lawyers, seems too narrow. The technical ways in which different legal systems implement the NJA are too diverse to capture in one doctrinal scheme, and normative-theoretically, not most important. For similar reasons, general jurisprudence, the discipline concerned with making abstract observations about the nature of law and legal practice, is of auxiliary use only. Though it can help us explicate some of the key concepts underlying the domain of adjudication, a richer account of how the NJA functions requires more context-sensitivity. Call it mid-level legal theory: using more abstract philosophical tools to make sense of the concerns governing legal practice, without aiming to reach universally valid ‘conceptual’ conclusions.

During the last few decades, two jurisprudential schools have provided influential starting points for analyzing the political position of the judge among such mid-level lines. The first is represented by the philosophy of Ronald Dworkin, and proposes to approach court judgments as moral commitments on what rules and principles ought to govern society. A judicial opinion is then ‘itself a piece of legal philosophy, even when the philosophy is hidden and the visible argument is dominated by citation and lists of facts.’¹⁸ The second approach has much less confidence in law’s integrity, and sees law as something that is *exploited*, usually to keep in place systems of hegemony and domination.¹⁹ Indeed, for these ‘critical legal scholars’, the function of legal concepts is rather to cloak conflict and struggle than to neutralize it: ‘Law is simply politics dressed in different garb’.²⁰

This article’s approach does not quite sit comfortably with either tradition. It accepts Dworkin’s idea that legal interpretations are rooted in moral value judgments, but brushes aside his metaphysics of hard legal questions having ‘one right answer’.²¹ It adopts critical scholars’ focus on law’s institutions as objects of use, but chooses not to engage with their attempts to debunk legal discourse as

17 For critical voices, C.A.J.M. Kortmann, ‘De rechtsvormende taak van de hoge raad’, *TREMA*, no. 6 (2006), 250-252; C. Schutte, ‘De ‘rechtsvormende taak’ van de rechter? Een kritische noot: Discussie over de wenselijkheid van rechterlijke rechtsvorming: een gepasseerd station?’, *Ars Aequi*, no. 10 (2009), 676-680.

18 R. Dworkin, *Law’s Empire* (Cambridge, MA/London: Belknap, Harvard University Press, 1986), 90. See for a more elaborate discussion of Dworkin’s thought sections 6 and 7 of this article.

19 A. Hunt, ‘The Theory of Critical Legal Studies’, *Oxford Journal of Legal Studies* 6, no 1 (1986), 1-14, at 11 ff; D.M. Trubek, ‘Where the Action Is: Critical Legal Studies and Empiricism’, *Stanford Law Review* 36, no. 1/2 (1984), 575-622, at 594, 606.

20 A.C. Hutchinson and P.J. Monahan, ‘Law, Politics, and the Critical Legal Scholars: The Unfolding Drama of American Legal Thought’, *Stanford Law Review* 36, no. 1/2 (1984), 199-245, at 206.

21 R. Dworkin, ‘No Right Answer?’, *New York University Law Review* 51, no 1 (1978), 1-32.

ideological and incoherent.²² Instead, this article departs from a simple two-step model. First it assumes that, in hard cases, juridical actors like judges do not simply 'read out' law, but make comparative judgments about what legal interpretation to defend. Second, different actors make these comparative judgments in different ways, meaning that they arrive at different legal answers to the same legal question. In economic-theoretical terms, we could say that, as a result of differences in normative orientation, individual actors show different legal-interpretive 'preferences'. Even if all legal actors defend the legal interpretation they sincerely think is normatively most appropriate, the point is, they may still very well end up disagreeing. Translating that insight to the discursive-conceptual level, we might diagnose that the NJA is an essentially contested concept: 'there is no one clearly definable general use ... which can be set up as the correct or standard use.'²³

Lastly, then, a short word in answer to the third question asked at the beginning of this section. Does it make sense to conceive of the NJA as a single set of norms at all, given the fact that every legal system has its own constitutional logic and history? I think so. Though different jurisdictions may have distinct ways of 'domesticating' constitutional questions, we should not exaggerate the differences in terms of driving normative principle. For instance, the executive's role in the US may be more prominent than in the UK or the Netherlands, but some degree of executive autonomy seems necessary anywhere. The British have a doctrine of Parliamentary sovereignty that the American and Dutch systems lack, but all three recognize the importance of democratic legislative integrity. The US has a much stronger and robust tradition of judicial review than the UK and the Netherlands, but even in the US everyone agrees that judges cannot behave like autocrats; and so on. As long as there is still a shared language of separation of powers, judicial restraint and rule of law spoken, mid-level theoretical analysis seems perfectly possible.

3 The *Miller* Case

Soon after the UK decided to leave the European Union in its 2016 EU referendum, some legal questions arose around the right procedure to realize the Brexit. Gina Miller, a British activist, thought the UK government could not invoke the exit ('Article 50') procedure without explicit authorization from Parliament, and took the issue to court. In principle, nobody denies that government has the autonomous ('prerogative') power to arrange foreign affairs, which includes the power to withdraw from treaties. At first glance, it might seem that this rule also governs UK relations with the EU. That would make the Queen's ministers the competent actors to invoke Article 50 of the Treaty on European Union and initiate the Brexit procedure. Under British law, however,

22 Cf. Trubek, 'Where the Action Is' (1984), 595-600.

23 See W.B. Gallie, 'Essentially Contested Concepts', *Proceedings of the Aristotelian Society*, New Series 56 (1955), 167-98, at 168.

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changes in the law require explicit Parliamentary authorization, and the prerogative power cannot be used to circumvent or frustrate this rule.²⁴ That is where Gina Miller's argument comes in. Have EU rights not effectively become part of UK law, implying that permission from Parliament is required before Article 50 can be invoked?

According to the more formal view, the answer to this latter question is a simple 'no'. The UK has a dualist constitutional system, which means that foreign law can never become part of UK law without implementation by Parliament. Now, it is true that Parliament passed the European Communities Act 1972 (the '1972 Act'). Article 2 of that Act states that EU law that binds internationally also applies domestically in the UK (even without implementation).²⁵ Yet, the formalist insists that such a derived form of validity hardly makes EU law a source of UK law. Yes, *under the conditions that* government chooses to bind the UK to EU law internationally, it is valid law domestically. But the conditional does not prove itself.²⁶ To use an expression popularized by John Finnis, the 1972 Act works like a 'conduit pipe': if government closes the EU law tap internationally, it stops flowing in domestically.²⁷

The UKSC majority did not follow this line of argument. As the Court confirms, it is indeed true that no rule of international law gains the status of UK law unless recognized by a rule of domestic law. Taken in this formalist sense, EU generated rights, powers, privileges, etc. are indeed not part of UK law, because they are only validated through the 1972 Act.²⁸ Yet, 'in a more fundamental sense and ... more realistic sense, where EU law applies in the United Kingdom, it is the EU institutions which are the relevant source of that law'.²⁹ In short, although EU law indeed gains validity *through* the 1972 Act, the ways in which EU law has grown to be part of UK law cannot be defined so formalistically. UK courts and other legal actors treat rules of EU law just as much as valid 'law' as rules made by UK institutions – the former even have primacy.³⁰ Therefore, the majority opines, the 1972 Act 'provided for a new constitutional process for making law in the

24 See *Case of Proclamations* [1610] EWHC KB J22 (ruling that the prerogative cannot be used to change the law); *R v. Secretary of State for the Home Department ex parte Fire Brigades Union* [1995] UKHL 3 (ruling that prerogative powers cannot be used to frustrate the will of Parliament).

25 Art. 2(1) of the 1972 Act: 'All such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the Treaties ... are without further enactment to be given legal effect or used in the United Kingdom shall be recognised and available in law, and be enforced, allowed and followed accordingly'.

26 UKSC, *Miller*, diss. Lord Reed, at 187; M. Elliot, 'The Supreme Court's Judgment in *Miller*: In Search of Constitutional principle', *Cambridge Law Journal* 76, no. 2 (2017), 257-88, at 262.

27 J. Finnis, 'Brexit and the Balance of our Constitution', in *Judicial Power and the Balance of Our Constitution*, ed. R. Ekins (London: Policy Exchange 2018), 152; cited in UKSC, *Miller*, at 65.

28 Although, earlier, the Divisional Court *had* accepted the premise the 1972 Act as such introduced EU rights into domestic law (and thus came to the same conclusion as the UKSC through another legal route). See *R (Miller) v. Secretary of State for Exiting the European Union* [2016] EWHC 2768 (Admin).

29 UKSC, *Miller*, at 61.

30 UKSC, *Miller*, at 66.

United Kingdom'.³¹ And amending such a fundamental rule is not something government can do autonomously. Such a major change in in the UK's constitutional arrangements requires explicit authorization from Parliament.³²

Some commentators have applauded the UKSC's majority opinion. The demand to gain express Parliamentary authorization (which was eventually granted on 16 March 2017³³) would be an important defense of parliamentary principles.³⁴ Similarly, *Miller* has been lauded for its principled constitutionalism, subjecting the power of the executive to the will of the chief representative organ.³⁵ Critics, on the other hand, are less content about the majority's innovative legal reasoning, and think the judgment to be in want of clear legal basis. The UKSC declares that '[i]t would be inconsistent with long-standing and fundamental principle' to allow ministers to take far-reaching decisions like invoking Article 50.³⁶ But where did the UKSC find this 'long-standing' principle that we have never heard of before?³⁷ Yes, it might be true that the conventional dualistic split between UK law and EU law is formalistic when compared to the majority's self-declared 'realistic' approach. But sometimes, formalism is simply another word for commitment to the rule of law.³⁸ To put it in Finnis' words, '[j]udicial appeals to "realism" are not rarely a sign that the legal argument has been lost and the law is being set aside'.³⁹

When looking closely, the theoretical dispute in *Miller* is quite a paradoxical one. Formalists believe that the UKSC majority seizes extra-legal power by creating controversial doctrine out of thin air, thereby being 'more Parliament-minded than Parliament itself'.⁴⁰ Seen in that light, the *Miller* judgment looks like a 'constitutional coup',⁴¹ with the UKSC ruling on matters that pertain to the political, not to the legal domain.⁴² But the proponents of *Miller* simply deny that allegation, and turn the criticism on its head. From their perspective, the dissenters superimpose a distinction between 'legality' and 'extra-legality' that is

31 UKSC, *Miller*, at 62.

32 UKSC, *Miller*, at 82.

33 See the European Union (Notification of Withdrawal) Act 2017 (c. 9).

34 E.g., S. Fredman, 'Miller: A Vital Reaffirmation of Parliamentary Sovereignty', *OxHRH Blog* (24 January 2017) <http://ohrh.law.ox.ac.uk/miller-a-vital-reaffirmation-of-parliamentary-sovereignty>.

35 G. Phillipson, 'EU Law as an Agent of National Constitutional Change: *Miller v Secretary of State for Exiting the European Union*', *Yearbook of European Law* 36, no. 1 (2017), 46-93, at 84.

36 UKSC, *Miller*, at 81.

37 J. Finnis, 'Postscript', in *Judicial Power and the Balance of Our Constitution*, ed. R. Ekins (London: Policy Exchange 2018), 157.

38 Elliot, 'The Supreme Court's Judgment' (2017), 263.

39 J. Finnis, 'The Miller Majority: Reliant on European Perspectives and Counsel's Failings', *Policy Exchange* (25 January 2017), at 3. <http://judicialpowerproject.org.uk/john-finnis-the-miller-majority-reliant-on-european-perspectives-and-counsels-failings/>.

40 Finnis, 'Postscript' (2018), 157.

41 As argued by D. Campbell, 'Marbury v. Madison in the U.K.: Brexit and the Creation of Judicial Supremacy', *Cardozo Law Review* 39 (2018), 921-45, at 922.

42 UKSC, *Miller*, diss. Lord Reed, at 240; UKSC, *Miller*, diss. Lord Carnwath, at 248-49.

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itself rooted in wrongheaded legal principle. One could even say that formalists effectively hide the political ball by presupposing a legality/extra-legality distinction that itself represents a particular political outlook.

Both the *Miller* majority and the dissenters embrace the NJA and agree that courts should be answering legal questions, whilst avoiding political judgments.⁴³ What that precisely means in practice, though, remains rather obscure. There appear to be roughly two answers. The first is that the NJA is a *legal* norm, requiring that judges stick to giving interpretations validated by law, and refrain from superimposing personal preferences. The second is that the NJA is a *political* norm, prescribing that judges act in conformity with rightly conceived ideals of separation of powers, democracy, etc. Yet, in both cases, it is hard to see what practical guidance the NJA can give to judges. If we pick the first answer, and say that NJA concerns a norm of legal fidelity, then it is methodologically hollow. It cannot solve any legal-interpretive disputes, because the only thing it tells us is *that* we ought to interpret (which was already presupposed). The alternative, however, – to admit that NJA is a political norm – also hardly seems a solution. Remember the paradox of politically defined ‘apoliticality’ mentioned in the introduction (section 1). If NJA instructs us to abstract from controversies concerning what norms ought to govern society’s public institutions, then NJA should not be such a controversial norm itself.

4 *Urgenda*

The *Miller* case shows us that attempting to ground the NJA in a doctrine of interpretive constraint is problematic. Though it makes *prima facie* sense to call overly innovative legal interpretations ‘political’, the very act of doing so appears to require making a political judgment in itself. Let us now then look at a second case, *Urgenda*, where slightly different considerations come to the forefront. *Urgenda*, like *Miller*, has become the subject of a legal-theoretical controversy. But unlike in *Miller*, the controversy in *Urgenda* did not focus so much on questions relating to interpretive technique, but rather on more preliminary issues concerning the role of courts. And unlike the UKSC in *Miller*, these broader questions concerning the judge’s constitutional position were actually discussed by the court itself. That has provoked an instructive legal and scholarly debate that is worth reflecting upon here.

In *Urgenda*, the plaintiff (the ‘Urgenda Foundation’) claims that the Dutch State neglected its duty to sufficiently reduce nationwide levels of greenhouse gas emission. And indeed, the Netherlands Supreme Court (hereinafter: NLSC) ruled in favour of this claim – just like the Appellate Court and the District Court had done earlier. The State, the Court declares, had omitted to fulfill its climate obligations. For the last few decades, many organizations have warned for the dangers of climate change as a result of greenhouse gas emission. The fourth

43 UKSC, *Miller*, at 4; diss. Lord Reed, at 240, and UKSC, *Miller*, diss. Lord Carnwath, at 248-49.

assessment report of the Intergovernmental Panel on Climate Change (IPCC), for example, declared in 2007 that emissions had to be reduced by 25-40% by 2020 (compared to 1990).⁴⁴ Similarly, the United Nations Environment Program (UNEP) reported in 2017 that cutting emissions before 2020 is more urgent than ever to achieve reduction targets.⁴⁵ Indeed, the NLSC educates, there is a broad international consensus regarding the urgency of climate action, which has been expressed in several agreements and treaties.⁴⁶ The Netherlands is simply lagging behind in its positive obligations as a State to meet these standards, and has not been able to provide a reasonable justification for that fact.⁴⁷ Therefore, the NLSC affirms, earlier Appellate Court and District Court judgments were correct and the Dutch State should reduce greenhouse gas emission by at least 25% by end-2020.⁴⁸

As mentioned, *Urgenda* proceedings have provoked a considerable amount of constitutional critique, expressed in two different forms. The more moderate version focuses on the legal remedy acknowledged: the fact that the courts *order* their co-equal branches to take measures against climate change. This line of criticism builds strongly on the Dutch prohibition to legislative orders formulated in the *Waterpakt* case,⁴⁹ and argues that such orders are too constitutionally intrusive. Although *Urgenda* strictly speaking does not contain a legislative order, it seems hard to abide by the 25% norm without legislation.⁵⁰ More broadly, if free political process is the good that *Waterpakt* protects, then how appropriate is dictating State policies on the matter anyway?⁵¹

A second, more radical criticism of *Urgenda* is that it was principally misguided for the courts to review the question of the legitimacy of the State's climate policy *at all*.⁵² One way to give shape to this idea is through a political question doctrine,⁵³ which can be traced back to the United States Supreme Court's *Baker v. Carr* case.⁵⁴ Judges, the argument is, should sometimes refuse to rule on an issue, for example, when textual legal clues or a lack of judicially manageable standards

44 NLSC, *Urgenda*, at 2.1; 7.2.1.

45 NLSC, *Urgenda*, at 2.1; 4.6; 7.2.9.

46 NLSC, *Urgenda*, at 7.2.1 ff.

47 NLSC, *Urgenda*, at 7.5.1.

48 NLSC, *Urgenda*, at 9; cf. App. ct. Den Haag 9 October 2018, ECLI:NL:GHDHA:2018:2591 (*Urgenda*), at 76 and Distr. ct. Den Haag 24 June 2015, ECLI:NL:RBDHA:2015:7145 (*Urgenda*), at 5.1.

49 NLSC 21 March 2003, ECLI:NL:HR:2003:AE8462 (*Waterpakt*), at 3.5.

50 G. Boogaard and W. den Hollander, 'Urgenda had slechts gelijk moeten krijgen', *Publiekrecht & Politiek* (30 June 2015) www.publiekrechtropolitiek.nl/urgenda-had-slechts-gelijk-moeten-krijgen/.

51 W. Voermans, 'Staat moet wél in hoger beroep gaan', *de Volkskrant*, 28 August 2015.

52 See for such suggestions, e.g., L. Bergkamp, 'Het Haagse klimaatvonnis', *NJB* 28 September 2015, at 2b; M. Peeters, 'Europees klimaatrecht en nationale beleidsruimte', *NJB*, no. 41 (2014), 2918-25, at 4.

53 Cf. G. Boogaard, 'Urgenda en de rol van de rechter: Over de ondraaglijke leegheid van de trias politica,' *Ars Aequi* (January 2016), 26-33, at 28.

54 369 U.S. 186 (1962).

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make such a refusal appropriate.⁵⁵ Now, the political question doctrine is controversial and barely ever applied by the US Supreme Court,⁵⁶ but some scholars have argued that the doctrine is on the rise in the Netherlands.⁵⁷ The judge in *Urgenda* decided on an issue of nationwide financial and democratic significance, and the climate treaties binding the Netherlands are explicitly meant to be non-binding. Such matters, the argument is, are much better left to substantive treatment by the political branches of government and Parliament.

Considering the NJA, the critical remarks indeed seem to touch a sensitive constitutional nerve, and certainly did not leave the *Urgenda* judges unconcerned. Inspired by the earlier AC judgment and the advisory opinion of the Advocates General (*advocaten-generaal*),⁵⁸ the NLSC parries the attack by appealing to human rights. Just like any other party, the Court declares, the government can be held to account by judges to fulfill its legal duties.⁵⁹ The Court does indeed not have the power to order specific legislation, but there is nothing wrong with ordering the state to take general measures. For the NLSC, the fact that those measures might include legislative measures does not change anything.⁶⁰ Although government and Parliament have a large amount of freedom to make political decisions, it remains up to the courts to review whether they do so within the boundaries of the law.⁶¹ In this case, they did not meet that test. The neglect to respect international duties to take climate action infringes upon the right to life (Art. 2 European Convention on Human Rights) and the right to family life (Art. 8 ECHR).⁶²

The Court presents the issue as if it were a simple matter of *priority*: whenever ‘higher’ human rights concerns apply, the validity of ‘lower’ national legislation is trumped.⁶³ But while that may be correct as a matter of positive law, it tells us little about why the NJA would not require judges to show more restraint in applying legal doctrine. There, the District Court – which did not base its ruling on an appeal to (the supremacy of) human rights – did more explicatory work. Indeed, as the District Court acknowledges, courts are unfit to make major political decisions, and courts should thus show restraint in allowing claims that affect third parties.⁶⁴ The task of making policy is better left to the other powers

55 369 U.S. 186 (1962), at 217.

56 G. Skinner, ‘Misunderstood, Misconstrued, and Now Clearly Dead: The “Political Question Doctrine” as Justiciability Doctrine’, *Journal of Law & Politics* 29, no. 3 (2014), 427-80; L. Henkin, ‘Is There a “Political Question” Doctrine?’, *Yale Law Journal* 85, no. 5 (1976), 597-625.

57 R. van der Hulle, ‘Het vonnis van de Haagse rechtbank over het Oekraïne-referendum’, *NJB*, no. 32 (2017), 2312-19; G. Boogaard and J. Uzman, ‘Noot’, *AB*, no. 47 (2017), 2824-28.

58 A-G 13 September 2019, ECLI:NL:PHR:2019:887 (concl. FF. Langemeijer and M.H. Wissink).

59 NLSC, *Urgenda*, at 5.5.1-5.5.3 and 8.2.1; citing of Art. 13 of the European Convention on Human Rights and Art. 3:296 of the Dutch Civil Code.

60 NLSC, *Urgenda*, at 8.2.7; A-G, *Urgenda*, at 5.60-61.

61 NLSC, *Urgenda*, at 8.3.2; cf. A-G, *Urgenda*, at 5.50 (emphasizing law requires only the bare minimum measures).

62 NLSC, *Urgenda*, at 8.3.4.

63 NLSC, *Urgenda*, at 8.3.3, referring to Art. 93 and 94 of the Dutch Constitution.

64 Distr. ct. Den Haag, *Urgenda*, at 4.96.

of government, which can make a much more encompassing political consideration.⁶⁵ Still, the District Court emphasizes, courts should not forget the source of their own democratic legitimacy: their task is to provide legal protection, even against Government itself.⁶⁶ The fact that the adjudicated issue also happens to be the subject of political decision-making does not free judges of that responsibility.⁶⁷ If a court is truly apolitical, the District Court seems to suggest, it must apply the law no matter how politically controversial that law might be.

5 Judicial Restraint: Two Axes, Three Conceptions

Just like with the *Miller* case, when we compare the opinions of the *Urgenda* courts with their critics, it appears the debate is running in circles. On the one hand, there is the view advocated by the District Court (and, more implicitly, by the NLSC and Appellate Court) that the NJA requires politics-insensitivity, not deference. Call this the *substantive* version of the NJA: as long as courts stick to applying existing law, they may justifiably claim to stay outside of the realm of politics. On the other hand, there is the *institutional* version of the NJA, which concerns the view that some issues are better left untouched by judges. That is to say, the kind of restraint judges need to show are not merely internal to the legal-interpretive process, but have to integrate concerns of relative constitutional position. Even if in theory there might be a legal answer to the questions at hand, the judge could be the wrong actor to provide it (*Baker v. Carr*) or to enforce it (*Waterpakt*).⁶⁸

Balancing the scale, the discussion surrounding the separation of powers in *Miller* and *Urgenda* revolves around roughly two axes. First, there is the legality/extra-legality axis. Some questions, the idea is, fall within the proper domain of legal text and doctrine, whereas others fall outside of it. Judges are only competent to rule on the former, not on the latter. Second, there is the competence/incompetence axis. Even if it is possible to adjudicate a political dispute under a legal header, doing so may not always be appropriate. Legality/illegality debates, in other words, regard questions about what the law requires, whereas competence/incompetence concerns are about whose turn it is to dictate the law.⁶⁹

65 Distr. ct. Den Haag, *Urgenda*, at 4.95.

66 Distr. ct. Den Haag, *Urgenda*, at 4.97; cf. A-G, *Urgenda*, at 6.10.

67 Distr. ct. Den Haag, *Urgenda*, at 4.98.

68 This paragraph (including its terminology) builds heavily on Boogaard, 'Urgenda' en de rol van de rechter: Over de ondraaglijke leegheid van de trias politica (2006), 28-29. As Boogaard notes, the DC does pay some lip service to the institutional conception, but effectively reduces the questions in *Urgenda* to substantive ones.

69 See on Boogaard, 'Urgenda' en de rol van de rechter: Over de ondraaglijke leegheid van de trias politica (2006), 33.

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Notice, for the sake of clarity, that (in)competence concerns as meant above do not merely refer to issues of ‘competence’ in the strictly technical-legal sense. They may well be expressed in terms that are quasi-substantive – e.g., through statements that judges should adjudicate in accordance with government’s official interpretations. In fact, one could even insist that the distinction between (il)legality and (in)competence based concerns is quite illusory anyway. Judges, the point would be, are only competent if the law says so, and legal judgments are only legally valid if made competently. I have no objection against such remarks. My aim here is merely to make an analytically useful distinction: between judging what the substantive law is, and judging who is the appropriate guardian of our legalistic concerns. Distinguishing rights questions from competence questions among such lines allows us to speak in more detail about the kind of restraint the NJA might require.

If you think that legality requires that judges and other interpreters stay close to a certain existing doctrine or legal text, you support a concept of restraint *in interpretation*. Strict interpretative methods are then proposed (e.g., more grammatical approaches), and defended against their allegedly flawed alternatives (e.g., purposive interpretation schemes). If, on the other hand, you even believe judges ought not to interfere with the functioning of other state powers, you support a notion of restraint *in intervention*. That is how one can explain the formal political question doctrine mentioned, but also ‘softer’ notions that courts should review policy of other branches of government only marginally. Then, lastly, there is what one might (somewhat paradoxically) call a notion of restraint *as intervention*. According to this view, the prime moral danger to the judicial craft is not so much an excessive amount of activism, but rather an excessive amount of conformism. For judges, the idea is, it is often easiest to avoid difficult judgments by deferring to the will of political authorities. Proponents of restraint as intervention tell us that courts should refrain from deferring to false standards of neutrality, such as state policy or majority opinion. Instead, they should stick to passing principled judgment, correcting the other branches of government when necessary (even if that is unpopular).⁷⁰

Now, the goal of this article is not to tell the reader which conception of judicial restraint is the ‘right’ implementation of the NJA. In fact, I believe it would be a rather foolish enterprise to try and answer that question on an abstract level. Normatively, everything seems to hinge on when and how the different concepts are used, and what political agenda is behind that use. (For example, the idea that judges should respect the autonomy of political choice might be appropriate when it comes to public art policy, but vulgar when it comes to racism.) That being said, there does seem to be a certain problem with this flexibility of judicial restraint vocabulary. If there is indeed not one intelligible conception of judicial restraint,

70 As T.R.S. Allan puts it: ‘A judge who allows his own view on the merits of any aspect of the case to be displaced by the contrary view of public officials ... forfeits the neutrality that underpins the legitimacy of constitutional adjudication’ (see his ‘Human Rights and Judicial Review: A Critique of “Due Deference”’, *Cambridge Law Journal* 65, no. 3 (2006), 671-95, at 676).

but *three* (often incommensurable) conceptions, then how should we adjudicate when to apply which conception? Once more, there lurks the risk that we simply choose the concept of restraint that happens to fit our political agenda best, making it useless as a tool to operationalize the NJA.

6 NJA: Not Procedural Nor Incoherent

If the previous section teaches us that restraint exists in three forms, and that that triformity risks reducing adjudication to politics, then is there still a way to make sense of the NJA? Ronald Dworkin's position, which this section attacks below, is to answer this question in the negative and rejects the NJA. First, however, let us discuss an attempt to try and save the NJA by subscribing to (what I call) *proceduralism*. It is true, the proceduralist will readily admit, that there is a sense in which judges will always be dealing with political questions, but those are not political questions of the ordinary kind. Rather, they concern questions about *form*: how can we give shape to our democratic institutions in such a way that all political perspectives are included in the conversation? For the proceduralist, then, judges are distinguished from (other) political actors by the fact that they focus on a different type of question. They do not ask 'What do I happen to agree with politically?', but rather: 'How to sustain fair ground rules for political disagreement?'⁷¹

So, does the proceduralist distinction work in practice? Building on Dworkin's work, we can identify at least three reasons to be very skeptical. First, a procedural standard that supposedly helps transcend disagreement needs to be a genuine *procedural* standard, not just another substantive political view in procedural form. Procedural solutions to disputes engage seriously with the concerns people have (*e.g.*, we have a conflict) and then propose norms to mitigate these (*e.g.*, we go to an arbitrator). Contrast that with a situation in which one political agenda simply wins out over another – *e.g.*, you are an anarchist and refuse to pay taxes, we seize your money by force. One might of course insist that collecting taxes by force is a legitimate practice, but that is a matter of substantive political dispute, not of mere procedural disagreement. That is the *prima facie* argument against all 'procedural solutions': if we need to argue for them, who says we are not just imposing our substantive political agenda?⁷²

Second, as soon as ambiguities appear in the procedural standard to be applied, ideological disputes are destined to sneak back in through the backdoor. No one denies that procedural ('rulebook') considerations are normatively significant, but once we have to weigh their relative importance, substantive value judgments

71 A similar distinction, indeed, underlies Rawlsian theories of political liberalism (J. Rawls, *Political Liberalism* (New York, NY: Columbia University Press [1993]1996)).

72 Cf. R. Dworkin, 'The Forum of Principle', *New York University Law Review* 56, nos. 2 and 3 (May-June 1981), 469-518, at 502 (emphasizing the dissensus about the right procedural conception of democracy).

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reappear.⁷³ Take John Hart Ely's proposal to restrain the judicial task to 'policing the mechanisms by which the system seeks to ensure that our elected representatives will actually represent'.⁷⁴ Things like fighting racism are part of the task of judges, Ely thinks, because it defends an underrepresented group, but defending employers' rights to exploit their employees is not.⁷⁵ Now, in some clear-cut cases (e.g., straight-out racism without excuse), this standard will indeed be easy to apply. But now take a more controversial example, such as the recent US Supreme Court's *Masterpiece Cakeshop* case.⁷⁶ The Christian owner of a bakery refuses to provide a wedding cake to a homosexual couple. Whose right is to prevail – the cake shop's owner's freedom of religion, or homosexuals' right to receive equal protection of the laws? Any answer to that question requires an engagement with broader narratives about the nature of human dignity, free society, and what it means to be 'democratically excluded'. Can we really abstract such questions from substantive political argument about what practices are 'properly' part of representative democracy? It seems hard to imagine.⁷⁷

Third, what if the set of rules or practices we are interpreting *itself* forces judges to make certain political-moral judgments in its interpretation? Consider the US Constitution's Eighth Amendment, forbidding the infliction of 'cruel and unusual punishment'. Or take the norm of Dutch civil law that creditor and debtor should treat each other reasonably and fairly (*redelijk en billijk*).⁷⁸ The open language in these norms is not accidental, or due to the fact that their drafters were too lazy to give more specific instructions. Rather, it seems that the (constitutional) legislature deliberately aimed to rely on the well-considered value judgments of the judge. Seen from that light, there may be significant limits to the extent to which the object of legal interpretation lends itself to be subjected to a procedural scheme.⁷⁹

As mentioned, Dworkin thinks all the foregoing can only lead to one possible conclusion: to sweep aside the NJA as incoherent and indefensible. '[O]ur judges' assurances that they do not rely on their personal morality, however honest, are delusional.'⁸⁰ If we want our judges to hold a key position within our constitutional system at all, they will need to make important political decisions.

73 R. Dworkin, 'Political Judges and the Rule of Law', in *A Matter of Principle* (Cambridge, MA/London: Harvard University Press, 1986), 16-17.

74 J. Hart Ely, *Democracy and Distrust* (Cambridge, MA/London: Harvard University Press, 1980), 102.

75 Hart Ely, *Democracy and Distrust* (1980), 65.

76 *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, 584 U.S. ____ (2018)

77 Dworkin, 'The Forum of Principle' (1981), 512 ff.; cf. Dworkin, *Law's Empire* (1986), 259-60.

78 See Art. 6:2 of the Dutch Civil Code.

79 Dworkin, 'The Forum of Principle' (1981), 494-97; R. Dworkin, 'Constitutional Cases', in *Taking Rights Seriously* (Cambridge, MA: Harvard University Press, 1977), 135-36; R. Dworkin, 'Comment', in *A Matter of Interpretation: Federal Courts and the Law*, ed. Amy Gutmann (Princeton, NJ: Princeton University Press, 1997), 115-28.

80 R. Dworkin, 'The Judge's New Role: Should Personal Convictions Count?', *Journal of International Criminal Justice* 1 (2003), 4-12, at 8.

We better stop playing hide and seek and live up to that fact.⁸¹ Now, that does not necessarily entail that we need to accept that our judiciary becomes a second legislator. We may, after all, still demand that our judges answer questions of rights and principles, not of policies.⁸² Sometimes, it might even be reasonable for a judge to defer legal judgment to an external authority (say, the opinion of a government official). But it ultimately *remains* the judge's own political judgment that produces that insight.⁸³

Let us suppose that Dworkin's premise is correct, and that judicial restraint can only be grounded in substantive political principle, not in procedure. Does his conclusion, namely that the NJA should be rejected, follow? No. Dworkin is quite right that the normative requirements of democracy and rule of law are always open to political-moral reevaluation and contestation – at least potentially. To that extent, law is indeed inherently tied to politics. But Dworkin fails to recognize how radical the implications of his own insight are. Indeed, what precise political/apolitical distinctions the NJA requires is (essentially) contested, but that does not mean debate about its prescriptive bite is meaningless. Instead, the opposite principle counts: the fact that a normative concept is *in fact* subject of legal debate suggests that it is *apparently* a meaningful concept. Simply to deny all sense in politicality/apoliticality distinctions is to do what Dworkin reproaches his opponents for: to superimpose an anomalous piece of external skepticism.⁸⁴ The NJA, as used in cases like *Miller* and *Urgenda*, is a concept that assists in evaluating and (dis)crediting the legitimacy of judicial interpretations and interventions. Refusing to engage with the internal logic of that enterprise is to depart from the 'interpretive attitude' of seeing the institution 'in its best light'.⁸⁵

Now, sure enough, Dworkin's theory is not a *carte blanche* for judicial activism. Judges, he emphasizes, cannot put aside the law books and base themselves on pure moral theory – their judgments must remain interpretations of legal practice as it is.⁸⁶ Good judges should always weigh considerations of fit against considerations of justice, and will thus feel a duty not to be too reformative in their interpretations.⁸⁷ But, my point contra Dworkin (and pro the NJA) would be: Who says it is always within *the judge's* power to do such weighing? That simply assumes what it has to prove: that the public cannot tell judges that their hands are tied in deciding how to interpret the law or whether or not to intervene. That raw act of stipulating the intersocial position of judges, I submit, is part of what it means to work with a political/apolitical distinction. If you trust judges, you might want to grant them a broad responsibility in pondering legal-

81 Dworkin, 'The Forum of Principle' (1981), 516; Dworkin, 'Political Judges and the Rule of Law' (1986), 11, 23, 26.

82 R. Dworkin, 'Hard Cases', in *Taking Rights Seriously* (Cambridge, MA: Harvard University Press, (1977), 82-86.

83 Dworkin, 'Hard Cases' (1977), 124.

84 Dworkin, *Law's Empire* (1986), 80-81.

85 Cf. *Law's Empire* (1986), 47.

86 *Law's Empire* (1986), 88 ff.

87 *Law's Empire* (1986), 67-68.

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moral questions, and say that that process is not ‘political’ in a problematic sense. If you do not, you will prescribe norms that declare certain modes of interpretation and intervention off limits (‘political’), and tilt supremacy to other branches of government.⁸⁸ The point is that there is a real choice to make there. Failing to see that would fatally blur the analysis, both of what legal practice is, and of what it ought to be.

7 Concluding: Explaining ‘Political Apoliticality’

Of course, fairness requires to admit that there is still a point of explanation I owe to Dworkin. My argument, so far, has been that we do not have an *a priori* justification to discard the NJA, because there may be legitimate considerations warranting its use. But does the problem introduced in section 1, the paradox of politically defined ‘apoliticality’, not still stand? What is the point in politicality/apoliticality distinctions if they cannot be grounded in pure procedure, but presuppose a commitment to a substantive political program? That seems to be the main point in Dworkin’s critique: you can say your judges are acting apolitically, but that is hardly a credible claim if their judgments are rooted in political value.

In order to answer the charge and resolve the paradox, we need to distinguish two ways in which something can be political. According to the first, *substantive* conception, something is ‘political’ if it has to do with views or preferences about how best to organize society’s public institutions. This is roughly what Dworkin has in mind. Institutions (or ideals) are ‘political’ in this sense if they prescribe what public conduct is required, and ‘apolitical’ only if they do not. Undoubtedly, if this would be the kind of apoliticality required by the NJA, it is surely an incoherent ideal, and the paradox could not be resolved. After all, the NJA is itself a political norm, rooted in certain conceptions on what sorts of behavior are appropriate for public actors (in this case, judges specifically). Asking judges to act in conformity with the NJA would result in the self-defeating ‘There is a political norm that one ought not to consider political norms’.

There is, however, a second, more *functional* sense in which something can be political: to pertain to the domain of legitimate public deliberation, decision and struggle. Definitions of ‘politicality’ in this sense (though morally charged) are themselves not necessarily categories of principled moral theory. Rather, they are forms of social agreement – institutions that regulate what judges are and are not free to do or consider in their judgments (*e.g.*, can or can they not talk about race?). To say that a court, like in *Urgenda*, acted ‘politically’ would then be to say that it privately decided on an issue that is actually the proper object of public decisionmaking. Or to say that court judgments should not be politicized, as one could say in defense of *Miller*, is to say that they are not the proper object of

88 A similar point against Dworkin is made in S. Shapiro, *Legality* (Cambridge, MA/London: Belknap, Harvard University Press, 2011), 33.

public controversy. That latter idea indeed echoes the notion of 'restraint as intervention' discussed in section 5: in order to be apolitical, judicial decision should be *insulated* from popular sentiment.

With the conceptual tools provided by the functional conception of (a)politicality, we can now solve all apparent paradoxes that come with the NJA. We can explain why different conceptions of the NJA can produce incommensurable notions of judicial restraint: the NJA, as section 2 suggests, is an essentially contested concept. Also, we can explain why some lawyers can (coherently) make controversial claims about what count as political arguments, and what count as legal ones. Those claims are effectively *proposals* – assertions that some modes of adjudication are to be classified as 'political' and others as 'apolitical'. Of course, the normative cogency of such proposals remains an open question, and will depend on what you think are proper objects of public controversy. How to answer that question is extremely complicated, and will depend on context (*e.g.*, what social movement is behind an attempt to politicize a court ruling?). What is important for now, however, is that we managed to solve the article's main theoretical puzzle: how the NJA can be coherent, even if it is rooted in political value. There is quite simply no contradiction in making the value judgment that, when it comes to certain issues, judges should be barred from making particular kinds of value judgments.

A last wrinkle. Does my conceptualization of the NJA as essentially a political tool not neglect the internal dimensions to law and legal interpretation? In some instances, a critic might say, there simply is a mode of interpretation that is more loyal to law, independent of political preference. I implicitly conceptualize politics as prior to interpretation, but why should we not see it the other way around? I answer: nobody says you should not. As section 2 explained, this article reconstructs legal practice among economic-theoretical lines: as a product of individual actors' attempts to fulfill their normative preferences. That approach, we should admit, suffers from a bias – or, more accurately, an incompleteness. It fails to explicate the normative context that underlies and defines the terms of actors' comparative legal judgments. Through statutory rules, case law and legal principles, the point is, institutions of law impose significant intersubjective constraints on what interpretations can plausibly be defended. Though the analysis provided in this article is in no way inconsistent with that observation, this autonomy of the 'internal-interpretive' perspective does deserve explicit mention. Law, after all, is not only a resource, or something that we use. It is also a mission that calls us to its service.