

JOHN LOCKE'S POLITICAL PLAN, OR, THERE'S NO SUCH THING AS JUDICIAL IMPARTIALITY (AND IT'S A GOOD THING, TOO)

JOHN M. KANG*

INTRODUCTION

The image of the impartial judge is one that consoles and inspires the liberal imagination. Indeed, while liberalism's worth might not be logically reduced to its insistence on impartial judges, it seems safe to say that liberalism would look downright incoherent without their presence. For impartial judges and their institutional domains represent perhaps the clearest symbols of those values that we routinely associate with liberalism: toleration of social differences; recognition of people's equality; and the denial of prejudice and bias. Judges would thus seem to embody formally those values which everyone in a liberal society is expected to practice to some degree. While the need for impartial judges in a liberal society seems rather undeniable, there is a question that attends the idea of these judges whose answer isn't so clear for liberalism. If we expect judges to be impartial, must they also relinquish or subordinate their partiality?

Intuitively, the answer might seem to be a resounding yes. For we would be appalled at the judge who purports to be impartial but secretly decides the case on the seductive wink of a party's lawyer, its implications for the local Democratic or Republican parties, or some other self-indulgent reason. On the other hand, the insistence that judges be impartial is fraught with theoretical difficulties: what would a "completely" impartial judge look like, and precisely what judgments would qualify as impartial for starkly normative issues like abortion or school prayer? I shall argue in this essay that instead of juxtaposing impartiality against partiality, it is better to clarify the ways in which the latter can be harnessed to underwrite the former. I develop my thesis in the following manner. I demonstrate some flaws with impartiality as conventionally understood by examining the

* Ph.D. Candidate, University of Michigan, Ann Arbor; M.A., University of Michigan, Ann Arbor; J.D., U.C.L.A.; B.A., U.C. Berkeley. The title of the article is a play on Stanley Fish's *There's No Such Thing as Free Speech (And It's a Good Thing, Too)*. The reader familiar with that rewardingly mischievous work will recognize, in the course of reading this essay, that I've chosen to invoke Fish's title because like Fish's book, this article attempts to challenge the view that concepts like judicial impartiality can be logically or practically divorced from their contexts.

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American Bar Association's Model Code of Judicial Conduct—the paradigm by which legislators craft their rules for assessing judges' purported impartiality. I show that the Code presents to judges an ambivalent and potentially unstable set of instructions: at times, it daringly insists that judges embrace impartiality for its own sake, and other times, it guardedly admonishes judges to be sensitive to appearance and hence hide their partiality. The former instruction, I'll argue, suffers from some fatal problems while the latter, although rather limp and ambiguous in its ABA Code form, can be worked up into an attractive theory via the older and more rewarding account of judicial impartiality by John Locke. Contrary to some other liberals, Locke did not position impartiality's exclusive antithesis in its intuitive opposite of partiality. Instead, I suggest, he also juxtaposed it against absolute or arbitrary power. That substitution, I argue, permits us to explore the political uses of impartiality without being encumbered by needlessly difficult and perhaps ultimately unanswerable questions about its ontological character.

I. THE ABA CODE

Before I proceed with the arguments, there is the business of defining terms. It seems intuitive to view impartiality as the antithesis of partiality. I'll have cause later to revise this relationship but given its intuitive resonance, it is worth exploring now. So I'll begin provisionally by stipulating that impartiality is the denial of one's partiality, understood as either "particularity" or "affective attachment or desire."¹ The latter refers to "being partial to something, as when one is partial to chocolate cake, or committed to the principles of liberty and equality, or attached to the philosophic life" while the former means "taking a partial view of some matter, seeing it narrowly or incompletely."² The two forms of partiality have porous boundaries, it seems to me: one's particularity may be conditioned by one's affective attachment or desire (I am partial to America because that is what I have been taught to love), and one's affective attachment or desire can be conditioned by one's particularity (I love America because it is the only country that I have known). My concern then is less to patrol the borders separating particularity from affect and desire than to invoke their properties for purposes of defining impartiality.

The ABA's Code of Judicial Conduct defines impartiality partly by its prohibitions against the indulgence of both forms of partiality. There is the

1. The terms are borrowed from Sharon Krause, *Partial Justice*, 29 POL. THEORY 315, 318–19 (2001).

2. *Id.* at 319.

reference to affective attachment or desire: "A judge shall not allow family, social, political or other relationships to influence the judge's judicial conduct or judgment."³ There is also a warning against particularity: "A judge shall not be swayed by partisan interests, public clamor or fear of criticism."⁴ And there are many more injunctions against partiality that might fall into either category or overlap between the two.⁵ The structure of these prohibitions takes shape in a lengthy series of rules which are accompanied by interpretive "commentaries." Yet instead of clarifying issues regarding judicial impartiality, the ABA Code's constitutive parts merely reflect and duplicate, again and again, a troubling moral ambivalence latent in its subject, an issue to which I turn next.

A. Troubling Ambivalence

At times, the Code solemnly implores a purity of heart whereby the judge acts impartially for impartiality's own sake. Commentary on Section A of Canon 2 says that a judge should "avoid all impropriety" and that she must "accept restrictions . . . that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly."⁶ Other times, the Code, exuding a skeptical instrumentalism, urges the judge to keep up appearances and thus hide her latent partiality. Commentary on Section B(5) of Canon 3 observes that "[f]acial expression and body language, in addition to oral communication, can give to parties or lawyers in the proceeding, jurors, the media and others an appearance of judicial bias. A judge must be alert to avoid behavior that may be perceived as prejudicial."⁷

There is nothing inherently wrong with such ambivalence, but instead of coming across as a knowing paradox about the inevitable tension between moral aspirations and professional realities, it reads more as unselfconscious banality. Section A of Canon 2 at once encapsulates the ambivalence and elides its tension: "A judge must avoid all impropriety and

3. MODEL CODE OF JUDICIAL CONDUCT Canon 2B (1990) [hereinafter ABA CODE].

4. *Id.* Canon 3B(2).

5. *See, e.g., id.* Canon 3B(6) ("A judge shall require lawyers in proceedings before the judge to refrain from manifesting, by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, against parties, witnesses, counsel or others."). *See generally id.* Canons 2–3.

6. *Id.* Canon 2A, cmt.; *see also id.* Pmbl. ("Intrinsic to all sections of this Code are the precepts that judges, individually and collectively, must respect and honor the judicial office as a public trust . . . in our legal system.")

7. *Id.* Canon 3B(5), cmt.; *see also id.* Pmbl. ("Intrinsic to all sections of this Code are the precepts that judges, individually and collectively, must . . . strive to enhance and maintain confidence in our legal system.")

appearance of impropriety.”⁸ Unfortunately, avoiding impropriety and avoiding its appearance aren’t the same thing. Consider the following invented play on a familiar case. When law professors want to teach their students about what doesn’t count as judicial impartiality, Justice Peckham’s majority opinion in *Lochner v. New York*⁹ is habitually summoned as the belabored whipping boy. In *Lochner*, New York passed a statute which stated that no employee shall “work in a biscuit, bread or cake bakery or confectionary establishment more than sixty hours in any one week, or more than ten hours in any one day.”¹⁰ Justice Peckham struck down the statute and justified his decision in the following way:

There is no contention that bakers as a class are not equal in intelligence and capacity to men in other trades or manual occupations, or that they are not able to assert their rights and care for themselves without the protecting arm of the State, interfering with their independence of judgment and of action. They are in no sense wards of the State.¹¹

Legal scholars have tended to ridicule these words, calling them a shameful example of what happens when judges set aside judicial impartiality for partisan politics, which in Justice Peckham’s case was a purportedly excessive dedication to laissez-faire economics.¹²

But suppose Justice Peckham felt himself to be sincerely impartial. Let’s say, hypothetically, that he felt his opinion to be free of any prejudice against a labor-sensitive welfare state and any bias towards a muscular capitalism, and that he sincerely meant every word when he said that “[t]his is not a question of substituting the judgment of the court for that of the legislature.”¹³ His sincerity, I suspect, wouldn’t temper the contempt of his many critics. If anything, his sincerity might engender greater indignation

8. *Id.* Canon 2A, cmt.

9. *Lochner v. New York*, 198 U.S. 45 (1905).

10. *Id.* at 68–69.

11. *Id.* at 57.

12. See, e.g., BERNARD H. SIEGAN, *ECONOMIC LIBERTIES AND THE CONSTITUTION* 23 (1980) (“*Lochner* . . . is one of the most condemned cases in United States history and has been used to symbolize judicial dereliction and abuse.”); Cass R. Sunstein, *Lochner’s Legacy*, 87 COLUM. L. REV. 873, 874–75 (1987) (noting that *Lochner* and modern cases based on similar reasoning involve excessive judicial activism); Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689, 1697, 1718 (1984) (explaining that *Lochner* was based on erroneous assumptions about laissez-faire economics). For a revisionist vindication of *Lochner*, see HOWARD GILLMAN, *THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF LOCHNER ERA POLICE POWERS JURISPRUDENCE* (1993).

13. *Lochner*, 198 U.S. at 56–57.

on their part, for it might then signal a bias and prejudice that would be so comfortably ensconced as to be unproblematically naturalized in his mind. At the very least, anyway, this depiction of a Justice Peckham who sees himself as sincerely impartial wouldn't, I take it, win meaningful moral approbation among his many critics.

By the same token, though, neither would they necessarily withhold such approbation from a judge who appears to be impartial but isn't sincerely so. Take an example (conveniently located in the same case containing Justice Peckham's opinion) that is conventionally applauded as a paradigm of judicial impartiality—Justice Holmes's celebrated dissent. Justice Holmes argued that *Lochner* “is decided upon an economic theory which a large part of the country does not entertain.”¹⁴ But for him, the “Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics”¹⁵ and as a judge, “[his] agreement or disagreement has nothing to do with the right of a majority to embody their opinions in law.”¹⁶ Law professors tend to commend the decision as marvelously clean of the rancid bias and prejudice of Justice Peckham's opinion. But suppose Justice Holmes's opinion was utterly insincere and that he himself could care less for protecting the operations of the democratic process. Let's say, hypothetically, he decided the case in order to serve ends that were grossly disconnected from his judicial opinion: to earn for himself an historic reputation as an impartial judge; to pay indirect homage to a social Darwinism that heroically inspires his worldview; to exact revenge against Justice Peckham for a public slight. If any or all of these were true motivations, we would be disappointed, perhaps, but would we want to formally extinguish Holmes's opinion too and all its legal progeny simply because it was born of partiality? If so, moral purity would seem to be purchased at the vengefully high price of a legally serviceable conception of impartiality and its incidental beneficiary of legislative autonomy. The ABA Code casually enjoins judges to “avoid all impropriety and appearance of impropriety[,]”¹⁷ but the example that I've offered shows why compliance is a less than straightforward normative matter.

The ABA Code introduces, perhaps unknowingly, a logical tension yet does little to justify it nor even consciously recognizes its existence. In the morally complicated landscape of politics in which judges often operate, however, we need an account of judicial impartiality that explicitly addresses the tension and explains what to do about it.

14. *Id.* at 75.

15. *Id.*

16. *Id.*

17. ABA CODE, *supra* note 3, Canon 2.

B. Political Justification

If the ABA Code stumbles and stalls in its internal operation, it also lacks a larger political justification for its entire enterprise. The ABA Code contains a Preamble that briefly outlines the larger political auspices that its numerous rules are to serve:

Our legal system is based on the principle that an independent, fair and competent judiciary will interpret and apply the laws that govern us. The role of the judiciary is central to American concepts of justice and the rule of law. Intrinsic to all sections of this Code are the precepts that judges, individually and collectively, must respect and honor the judicial office as a public trust and strive to enhance and maintain confidence in our legal system. The judge is an arbiter of facts and law for the resolution of disputes and a highly visible symbol of government under the rule of law.¹⁸

The words are harmless because they are stitched together from the thin and well-worn platitudes that high school students encounter daily in their civics classes. And to be fair to the Code's drafters, perhaps this is all that is necessary, for the Code's formal task is to instruct judges in the pressing business of judicial conduct, not to brood over airy issues of political theory; the Preamble is philosophical boilerplate, its defenders may rejoin, but what of it? Still, judicial impartiality is a deeply political enterprise that deserves sustained discussion.

Specifically, in its explicitly political function, what do we make of the following tension in the Preamble between, again, being sincerely impartial versus being guarded and presenting only the appearance of impartiality. The Preamble implores the former: "Intrinsic to all sections of this Code are the precepts that judges, individually and collectively, must respect and honor the judicial office as a public trust"¹⁹ However, the Preamble also silently subordinates impartiality for the promotion of public confidence: "Intrinsic to all sections of this Code are the precepts that judges, individually and collectively, must . . . strive to enhance and maintain confidence in our legal system."²⁰ Which imperative, if conflicting, is more important for purposes of liberal political philosophy? The Code provides no answers and indeed assumes a congenial overlap.

18. *Id.* Pmbl.

19. *Id.*

20. *Id.*

C. Purity of Motive

But if the Code underestimates the political dimensions of judicial impartiality, it overestimates people's potential for impartiality, and in the process, makes its strongest insistence on impartiality as something that should be sincere. Section B of Canon 2 orders that "[a] judge shall not allow family, social, political or other relationships to influence the judge's judicial conduct or judgment."²¹ The expectation comes across as quaintly archaic. It appears as an unintended and stubborn remnant of what the legal realists criticized in mechanical jurisprudence, the faith that judges merely consult their "reason," understood as at once disembodied and discernible, and eschew the silly whims of emotion.²² An early precursor to the legal realists, Justice Holmes, offered the then relatively controversial declaration that:

The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed.²³

Worse than being the collateral target of a famous judge, read straightforwardly, the Code is impossible to follow, for no one including judges can avoid the influences of "family, social, political or other relationships." Without even rolling out the heavy artillery of communitarianism, we can say confidently that when judges consider inherently moral issues of abortion, euthanasia, gay marriage, and the death penalty, they necessarily bring to bear a worldview constructed from an elaborate web of relationships with other people. Of course, a legal positivist like H.L.A. Hart might say that while some legal issues belong to the "penumbra of uncertainty," those outside its purview can be perspicuously adjudicated according to the rules and without consulting one's emotions and their muddled subjectivity.²⁴ But that's not so clear.

Even apparently mundane categories of estate planning may present a judge with vexing moral issues that require her to draw on a set of beliefs

21. *Id.* Canon 2B.

22. See, e.g., Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605, 605 (1908) (explaining the theory of mechanical jurisprudence).

23. OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 1 (Little, Brown & Co. 1949) (1881).

24. H. L. A. Hart, *Positivism and the Separation of Law and Morals*, in *THE PHILOSOPHY OF LAW* 17, 22–29 (Ronald Dworkin ed., 1977).

profoundly influenced by others. Consider Ronald Dworkin's use of *Riggs v. Palmer*²⁵ to criticize the naivety of Hart's legal positivism.²⁶ In that case, a named heir in a will murdered his grandfather.²⁷ A terrible crime to be sure, but what conventionally goes by the name of literal interpretation applied to the New York statute required the court to bestow upon the heir his murderously begotten inheritance.²⁸ The court refused to read the statute so literally, explaining that:

[A]ll laws, as well as all contracts, may be controlled in their operation and effect by general, fundamental maxims of the common law. No one shall be permitted to profit by his own fraud, or to take advantage of his own wrong, or to found any claim upon his own iniquity, or to acquire property by his own crime.²⁹

While formally the product of "the common law," the judge's decision reflects a worldview that was partly pieced together from those sources prohibited by the ABA Code: familial, social, political, and other relationships.³⁰ And we could say the same thing if the judge had decided to construe the statute "literally," for that, too, would be a psychological disposition shaped by relationships with others, including, say, a father who sternly drilled his young son about professionalism or an unpredictably emotional father inspiring in his son the opposite quality.

All of this leads to the subversive conclusion that the Code's injunction for judicial impartiality depends in its practical operation on the very thing that it resists in partiality. As I explained earlier, partiality falls into two categories, particularity (taking a partial view of some matter) or affective attachment (being partial to something). Morally knotty legal questions about abortion or euthanasia invite the judge to consult her affective attachments (this is what her mother's Catholic values taught her) and be guided by particularity (this is the only mother she has known and Catholicism the only religion), and that even in those instances when the judge appears to be removed from them, her professional posture is to an extent partially impelled or repulsed by them and hence partially influenced by them, too. The ABA Code implores a judge to be sincerely impartial,

25. *Riggs v. Palmer*, 22 N.E. 188 (N.Y. 1889).

26. Ronald Dworkin, *Is Law a System of Rules?*, in *THE PHILOSOPHY OF LAW* 38, 44 (Ronald Dworkin ed., 1977).

27. *Id.* at 189.

28. *Id.*

29. *Id.* at 190.

30. ABA CODE, *supra* note 3, Canon 2B.

but interpreted straightforwardly, the order appears impossible by which to abide.

A version of judicial impartiality that can meet this objection and the others that I've identified with the ABA Code is available in Locke's theory of civil society.

II. JUDICIAL IMPARTIALITY IN LOCKE'S CIVIL SOCIETY

A. Equality and Freedom

I'll begin with Locke's most famous work on politics, *The Second Treatise on Government*.³¹ In the beginning of the *Second Treatise*, Locke suggests that there is nothing that makes government logically necessary or desirable and that, in theory, men may live together in a state of nature as long as they properly consult their reason. While the state of nature is also a "State of Liberty," it is "not a State of Licence."³² Specifically, "[t]he State of Nature has a Law of Nature to govern it, which obliges every one: And Reason, which is that Law, teaches all Mankind, who will but consult it, that being all equal and independent, no one ought to harm another in his Life, Health, Liberty, or Possessions."³³ In general, reason, which Locke equates with the law of nature,³⁴ should in the state of nature "willeth the Peace and Preservation of all Mankind."³⁵ The natural state of liberty, then, is circumscribed by what reason allows and, conversely, the failure to exercise reason would not be a reflection of liberty but of an uninformed license incompatible with the law of nature.

The law of nature requires that men exercise their reason not just in its interpretation but in its execution. The law of nature presupposes a power of "Execution . . . whereby every one has a right to punish the transgressors of that Law to such a Degree, as may hinder its Violation."³⁶ The power of execution assumes that "there is no superiority or jurisdiction of one, over another," such that "what any may do in Prosecution of that Law, every one must needs have a Right to do."³⁷ The law of nature expects of men that in executing it, they will not punish the transgressor "according to the

31. JOHN LOCKE, TWO TREATISES ON GOVERNMENT (Peter Laslett ed., Cambridge Univ. Press 1988) (1690) [hereinafter TWO TREATISES].

32. *Id.* at 270.

33. *Id.* at 271.

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.* at 272.

passionate heats” or with “boundless extravagancy of his own Will, but only retribute to him, so far as calm reason and conscience dictates, what is proportionate to his Transgression, which is so much as may serve for *Reparation and Restraint*.”³⁸

Despite these injunctions for men to consult their reason with respect to the law of nature, there is no guarantee that they will or that if they do, they will lead to mutually compatible conclusions, for the condition of freedom and equality permits men to “be Judges in their own Case.”³⁹ Therefore, the same equality and freedom that justify why men should not harm each other in the state of nature cause Locke to worry that injustice may ensue there as well, for “he who was so unjust as to do his Brother an Injury, will scarce be so just as to condemn himself for it.”⁴⁰ Indeed, as a general matter, “it is unreasonable for Men to be Judges in their own Cases,” for “Self-love will make Men partial to themselves and their Friends” while “Ill Nature, Passion and Revenge will carry them too far in punishing others.”⁴¹ Therefore, the freedom and equality of men in the state of nature produces a condition where a man’s “enjoyment of the property he has . . . is very unsafe, very unsecure. . . . [He] is full of fears and continual dangers.”⁴² So “[t]he great and *chief end* therefore, of Mens uniting into Commonwealths, and putting themselves under Government, *is the Preservation of their Property*[.]”⁴³ for it is in government that men can hope to find what is lacking in the state of nature—“*a known and indifferent Judge*, with Authority to determine all differences according to the established Law.”⁴⁴

This is a familiar summary of Locke’s narrative of the state of nature. What interests me is that all (or almost all) of it noticeably turns on juxtaposing the poison of partiality against the antidote of impartiality, a conceptual posture that calls to mind the ABA Code. It is also a summary that tracks with simply more detail a standard rehearsal of Locke’s theory in law review articles. In the law review literature, there is an easy and sometimes almost perfunctory allusion to Locke’s statements about judicial impartiality that tends to elide the disquieting tensions and paradoxes that require further explication. One finds the repeated and familiar observation that men in the state of nature are destructively partisan and require in civil

38. *Id.*

39. *Id.* at 276.

40. *Id.*

41. *Id.* at 275; *see also id.* at 351 (“Men being partial to themselves, Passion and Revenge is very apt to carry them too far . . .”).

42. *Id.* at 350.

43. *Id.*

44. *Id.* at 351.

society “a known and indifferent Judge.”⁴⁵ But even on the face of it, this rendering is incoherent, for how could such irrationally partisan men suddenly invent an indifferent judge from amongst their midst? The answer, I’ll suggest, is that Locke doesn’t actually conceive partiality and impartiality as mutually resistant. He wants to encourage or at least provide theoretical space for governmental officials to exercise forms of partiality that are, somewhat unexpectedly, likely to contribute to impartiality.

B. Different Partialities

Locke explains that impartiality is sometimes threatened by various psychological conditions in man. In the *Second Treatise*, these conditions, Ruth Grant observes, “are understood as failures of reason.”⁴⁶ So too they tend to be examples of what I have called partiality, both affect and particularity. Sometimes the partiality takes the form of aggressive self-assertion: “Men being partial to themselves, Passion and Revenge is very apt to carry them too far, and with too much heat, in their own Cases”⁴⁷ Other times, partiality indulges in lax indifference: “negligence, and unconcernedness [make men] too remiss, in other Mens [cases].”⁴⁸ To passion and biased indifference, add interest as an additional obstacle to impartiality:

For though the Law of Nature be plain and intelligible to all rational Creatures; yet Men being biassed by their Interest, . . . [they] are not apt to allow of it as a Law binding to them in the application of it to their particular Cases.⁴⁹

These passages would seem to suggest that partiality viewed as passion, biased indifference, and interest would be impediments to the realization of impartiality.

Yet that general conclusion requires some qualification. These examples of partiality share a particular form and substance which do not

45. E.g., Albert W. Alschuler, *The Descending Trail: Holmes' Path of the Law One Hundred Years Later*, 49 FLA. L. REV. 353, 377 (1997); Phillip A. Hamburger, *Revolution and Judicial Review: Chief Justice Holt's Opinion in City of London v. Wood*, 94 COLUM. L. REV. 2091, 2134 (1994); Matthew R. Kipp & Paul B. Lewis, *Legislatively Directed Judicial Activism: Some Reflections on the Meaning of the Civil Justice Reform Act*, 28 U. MICH. J. L. REFORM 305, 314–15 (1995); Douglas G. Smith, *A Lockean Analysis of Section One of the Fourteenth Amendment*, 25 HARV. J. L. & PUB. POL'Y 1095, 1161 (2002).

46. RUTH W. GRANT, JOHN LOCKE'S LIBERALISM 181 (1987).

47. TWO TREATISES, *supra* note 31, at 351.

48. *Id.*

49. *Id.*

encompass every kind of partiality. The partiality described by Locke can be distinguished from others in at least two respects.

First, Locke's examples of partiality are not entertained in private nor in silence. Partiality informs the way we see the world, as Locke argues, but we needn't logically share that perspective with others nor act on it. However, the forms of partiality sketched by Locke are projected onto the world where others are made to endure their effects, effects that are heedless of the law of nature. Locke specifically has in mind the partiality by a king or prince that causes "another's harm"⁵⁰ and that "makes use of the Force he has under his Command, to compass that upon the Subject, which the Law allows not."⁵¹

Second, the substance of the partiality described by Locke does not permit of mutual advantage; it is nakedly one-sided. Partiality becomes dangerous when "Princes . . . have distinct and separate Interests from their People."⁵² But partiality as a general matter doesn't logically require such separation. One may be partial to those things that incidentally benefit others. In fact, Locke himself tells us that the reason that men create civil government is not so that they may realize a higher form of impartiality for its own sake, but because civil government's promise of impartiality is intended to better protect men's interests in their individual property. Hence, some forms of partiality, instead of being antagonistic to impartiality, may actually motivate men to realize it.

Locke doesn't seem to allow, at least not formally, partiality to be either mutually advantageous or harmlessly indulged in private, but the logic of his arguments appears more capacious. There are vague if suggestive intimations like the following:

[W]hen *Ambition* and *Luxury*, in future Ages would retain and increase the Power, without doing the Business, for which it was given, and aided by Flattery, taught Princes to have distinct and separate Interest from their People, Men found it necessary to examine more carefully the Original and Rights of Government⁵³

In the passage, Locke says that impartiality is impossible where "interests" between the people and the prince become "separate," thus suggesting that

50. *Id.* at 400.

51. *Id.*

52. *Id.* at 343.

53. *Id.* (adding italics for "Ambition" and "Luxury," and omitting italics for "the Original" and "Government").

impartiality is possible where interests converge. There is also in the passage Locke's reference to passion in "ambition." The ambition for office and prestige doesn't seem to be for Locke inherently antithetical to impartiality. Locke seems to suggest that ambition is dangerous only when it so blinds the governmental official to his duties, making the satisfaction of ambition an end in itself, "without doing the Business, for which [his power] was given."⁵⁴ Yet a limited form of ambition by politicians is inevitable. It is unrealistic to imagine a public official who is indifferent to ambition and its hunger for what Locke calls "luxury" and "flattery" (try to imagine a President who cares nothing for his place in history, for a lavishly decorated White House, or for the countless examples of formal deference).⁵⁵ Instead of trying to do the implausible by theoretically expunging such partiality from human nature, Locke tries to distinguish which of its forms are useful for his political enterprise and which aren't.

I can supplement this interpretation by turning to Locke's discussion of what kinds of power are justifiable for civil government to exercise. By doing so, I want to suggest that the antithesis of impartiality for Locke is better understood as "absolute" or "arbitrary" power than partiality per se. Locke argues that civil government should not exercise absolute or arbitrary power but only "political" power. The definitions for these terms are mutually constitutive, and I want to proceed by explicitly defining political power first and, in the process, obliquely defining arbitrary and absolute powers.

C. Political Power

Political power is "*a Right* of making Laws with Penalties of Death, and consequently all less Penalties, for the Regulating and Preserving of Property, and of employing the force of the Community, in the Execution of such Laws, and in the defence of the Common-wealth from Foreign Injury, and all this only for the Publick Good."⁵⁶ Because political power must be "only for the Publick Good," it would seem to be devoid of partiality and reflective of a form of impartiality. There would seem to be support for that

54. *Id.* Locke worries that when "flattery prevailed with *weak* Princes to make use of this Power, for private ends of their own, and not for the publick good, the People were fain by express Laws to get Prerogative determin'd, in those points, wherein they found disadvantage from it" *Id.* at 376 (emphasis added). The worry here seems to be that *weak* princes will undermine impartiality by being overly preoccupied with flattery, not that flattery per se is a danger to impartiality.

55. For examples of how America's founding fathers, usually apotheosized as selflessly virtuous, were obsessed with their personal fame, see DOUGLASS ADAIR, *FAME AND THE FOUNDING FATHERS* (1998).

56. *TWO TREATISES*, *supra* note 31, at 268.

view in Locke's description of the state of nature. Locke introduced a law of nature that established grounds for what men ought (and ought not) to do, and hence suggested a standard for what constitutes a legitimate use of power. The law of nature "teaches all Mankind, who will but consult it, that being all equal and independent, no one ought to harm another in his Life, Health, Liberty, or Possessions"⁵⁷ and that men should generally "willeth the Peace and *Preservation of all Mankind*."⁵⁸ It is true that these injunctions are not explicitly meant to guide *political* power since in the state of nature, there is no government and hence for Locke no politics to speak of. However, one would think that these injunctions should nonetheless be used to judge the government's use of power because the government was erected to do that which the people alone could not do: to better interpret and better enforce the law of nature.

Or, to define political power negatively, we may look to Locke's description of a slave. Locke says that "in the State of Nature, *one Man comes by a Power over another*; but yet [has] no Absolute or Arbitrary power" over him, for the law of nature forbids it.⁵⁹ Yet a slave's identity, for Locke, is defined by another having both absolute and arbitrary power over him. Locke makes that point by distinguishing an indentured servant from a slave. He says that a "Master" of an indentured servant cannot "kill him, at any time, whom, at a certain time, he was obliged to let go free out of his Service."⁶⁰ Nor does that master "so far from having an Arbitrary Power over his Life, that he could not, at pleasure, so much as maim him, but the loss of an Eye, or Tooth, set him free."⁶¹ By contrast, the master of a slave has the "Absolute, Arbitrary Power of another, to take away his Life, *when he pleases*."⁶² Accordingly, if political power is said to be for the "publick good," it must be something other than the governmental official's "Absolute, Arbitrary power" over men as if they were slaves.

We may say that political power, then, is subject to review by the people (and not absolute) and is, as required by the law of nature, directed to protecting the people's peace and their individual property (and not used by the government for the exploitation of the people). In this way, political power is meant to reinforce Locke's understanding of impartiality while arbitrary and absolute powers are destructive of it. Indeed, for Locke, political power is the only type of power that a legitimate, and hence

57. *Id.* at 271.

58. *Id.*

59. *Id.* at 272.

60. *Id.* at 285.

61. *Id.*

62. *Id.* at 284 (emphasis added).

impartial, government may justifiably exercise.

Another point about political power deserves attention. For Locke, political power isn't logically or practically contingent on being a good person; it's just contingent on good behavior. Locke doesn't seem to require of governmental officials that they be sincerely impartial but only that they act as if they are. So take for example a high-level judge who doesn't sincerely believe that he should act "only for the Publick Good," nor does he sincerely accept Locke's solemn democratic injunction that all men are "equal and independent." For Locke, the judge would still be said to act impartially if he can justify his decisions as exercises in political power by acting according to established procedures; by having his decisions ultimately subject to review by the people; and by persuading the people that his decisions are consistent with the law of nature. Locke's account of impartiality, then, is not necessarily resistant to a judge who is preoccupied with the social esteem that accompanies his office, his handsome salary, and the prospect of having some modest place in legal history. This private preoccupation wouldn't necessarily compromise the judge's capacity to appear impartial—it may very well be the thing that keeps him in line.

My suggestion that for Locke impartiality needn't be sincere to be effective gains support from his proposals for how best to ensure that governmental officials remain impartial. The proposals, I argue, reflect a keen skepticism for the view that judges are impartial because they sincerely want to be.

D. *The Potential Insincerity of the People as Free and Equal*

What is to ensure, or intended to ensure, that governmental officials will act impartially by exercising political—and not arbitrary or absolute—power? In one place, Locke appears to bank his hopes on the virtuous character of the officials themselves when he states that government needs "*indifferent and upright Judges.*"⁶³ Yet Locke, as I've suggested, remains skeptical about entrusting government to men of ostensible virtue or superior intelligence. Locke is interested in developing a theory that is more distrustful of governmental officials. That theory finds expression in his account of the people's right of resistance. Locke argues that "*Governments are dissolved . . . when the Legislative, or the Prince, either of them act contrary to their Trust.*"⁶⁴ The language of a trust establishes a

63. *Id.* at 353.

64. *Id.* at 412.

fiduciary relationship between the people and their government where the latter is expected to act in the best interests of the former. That implies that political power, as opposed to arbitrary or absolute power, does not derive from the traditional model of an absolutely powerful patriarch and his absolutely obedient subjects. Being a fiduciary relationship, the people themselves may judge when the government has failed to exercise political power; by contrast, that assessment in a contractual relationship might require a third-party judge, something whose very existence Locke thinks may be in doubt by the people.

Locke leaves to the people to decide ultimately what is impartial. Much of what animates Locke's arguments is a reaction against what he calls Sir Robert Filmer's justification for "absolute Monarchy" as based on the belief "that *Men are not naturally free*."⁶⁵ Against Filmer, Locke argues that men are naturally free and each other's equals, and thus cannot subject themselves to an absolute monarchy. He begins making his case through a series of foundational assertions about men's natural equality and freedom. Sometimes he invokes religious authority: "For Men being all the Workmanship of one Omnipotent, and infinitely wise Maker . . . they are his Property, whose Workmanship they are, made to last during his, not one another's Pleasure."⁶⁶ Notice the premise that men don't have a property right in each other, a claim that tends to escape the attention of some scholars who portray Locke as obsessed with individual property rights. Notice too how the condition of equality implies that men are equally free, a point made explicit elsewhere: "And being furnished with like Faculties . . . there cannot be supposed any such *Subordination* among us, that may Authorize us to destroy one another, as if we were made for one another's uses, as the inferior ranks of Creatures are for ours."⁶⁷ In addition to these reasons, Locke's most sustained and theoretically powerful arguments come from his explication of the state of nature. Men in the state of nature live in "a *State of perfect Freedom*" whereby they "order their Actions, and dispose of their Possessions, and Persons as they think fit, within the bounds of the Law of Nature, without asking leave, or depending on the Will of any other Man."⁶⁸ It is also a condition of equality:

[W]herein all the Power and Jurisdiction is reciprocal, no one having more than another: there being nothing more evident, than that Creatures of the same species and rank promiscuously born

65. *Id.* at 144.

66. *Id.* at 271.

67. *Id.*

68. *Id.* at 269.

to all the same advantages of Nature, and the use of the same faculties, should also be equal one amongst another without Subordination or Subjection⁶⁹

But this premise would seem intuitively implausible. For it is simply not true that men, strictly speaking, are “furnished with like Faculties.” And there is nothing especially “evident” in the claim that men are “born to all the same advantages of Nature, and the use of the same faculties.” If anything, the opposite seems true. “Faculties” aren’t naturally distributed; men vary radically in all sorts of talents and failings. So in stipulating that men are by nature free and equal, Locke does not intend to make an observation about the social worth of men. It is a point he guardedly acknowledges: “Though I have said above . . . *That all Men by Nature are equal*, I cannot be supposed to understand all sorts of *Equality: Age or Virtue* may give Men a just Precedency: *Excellency of Parts and Merit* may place others above the Common Level”⁷⁰ Given these plain and familiar feelings that people are not equal in many respects, Locke’s staunch invocation of equality and freedom must mean something else than a straightforward claim about social worth.

To begin to determine what they might mean, we need to look to Locke’s repeated exercises in unmasking supposed social betters as insincerely extolling their own self-worth. One of the most telling passages comes from Locke’s indictment of the arrogant professor:

Would it not be an insufferable thing for a learned Professor . . . to have his Authority of forty years standing wrought out of hard Rock Greek and Latin, with no small expense of Time and Candle . . . overturned by an upstart Novelist? Can any one expect that he should be made to confess, That what he taught his Scholars thirty years ago, was all Errour and Mistake . . . ?⁷¹

Here, what normally goes by learning and the pursuit of truth is actually prompted by dire vanity, a theme that Locke rehearses elsewhere: “[T]he Philosophers of old . . . and the Schoolmen since, aiming at Glory and Esteem . . . found this a good Expedient to cover their Ignorance, with a curious and unexplicable Web of perplexed Words, and procure to

69. *Id.*

70. *Id.* at 304.

71. JOHN LOCKE, AN ESSAY CONCERNING HUMAN UNDERSTANDING 714 (Peter H. Nidditch ed., Oxford Univ. Press 1975) (1690).

themselves the admiration of others”⁷² And again:

If we could but see the secret motives, that influenced the Men of Name and Learning in the World, and the Leaders of Parties, we should not always find, that it was the embracing of Truth for its own sake, that made them espouse the Doctrines, they owned and maintained.⁷³

Such injunctions for the people to be prepared to view as insincere the outward virtues of their social betters can be enlisted to interpret what I presented as Locke’s assertions about men’s equality. His airy declaration that all men are naturally free and each other’s equals is meant to serve practical political ends. Recall Locke’s observation that all men are “furnished with like Faculties” and that all men have “the use of the same faculties.” What he meant in both instances was that all men should be presumed to possess the same faculties to reason about what is best for themselves in matters political and not to defer blindly to some ostensible superior. Locke thus prepares the reader for the argument that there is no natural distinction between rulers and subjects and that government and its rulers are neither inevitable through divine right nor natural as an extension of good birth. This premise expresses itself with the cutting rebuke that “notwithstanding these learned Disputants, these all-knowing Doctors, it was . . . from the illiterate and contemned Mechanick, (a Name of Disgrace) that they received the improvements of useful Arts.”⁷⁴

The presumption of equality justifies why “there cannot be supposed any such *Subordination* among us, that may Authorize us to destroy one another, as if we were made for one anothers uses, as the inferior ranks of Creatures are for ours.”⁷⁵ Locke’s biting criticisms of professors and governmental officials are meant to encourage the people to be partial to their own self-interests and not to surrender to those who claim to be their social betters. This doesn’t mean that the premise of men’s natural equality necessarily undermines all forms of political authority but does imply its normative limits. The most basic such limit is consent. If men are said to be naturally equal and free, government can only arise from their consent, not by individual invocations of divine right or good birth. Locke’s language of freedom and equality is thus not intended to describe social variations and rank but to justify the people’s authority to make

72. *Id.* at 494.

73. *Id.* at 718–19.

74. *Id.* at 495.

75. TWO TREATISES, *supra* note 31, at 271.

independent judgments about government.

But by urging people to believe that all are free and equal, Locke must be urging them to be insincere. After all, it simply can't be true that all men are free and equal in their ability to decide what is best for their political future. Some men are irresponsible, lazy, selfish, or, as the religious civil wars so hauntingly familiar to Locke evinced, zealous and dangerous. Accordingly, we wouldn't want *everyone* to decide what is best for himself. And Locke doesn't either. As already illustrated, he indicts entire categories of men in scholars and statesmen as stubbornly vain. Indeed, a significant problem in the state of nature for Locke is the presence of men who either ignore the laws of nature or interpret them badly. Therefore, Locke himself would hardly seem likely to believe that *all* men are naturally free and equal in their capacities for political judgments. By grandly asserting that all men are naturally "free" and "equal" to decide their political fate for themselves, Locke wants to prevent a judge from publicly presupposing what is best for them or from publicly treating them as evident inferiors who may be subject to arbitrary or absolute power.

In the next section, I will explore the institutional means by which Locke attempts to ensure that judges will remain impartial. His explanation reflects the view that judges may very well be motivated by considerations of partiality in their apparent impartiality.

III. INSTITUTIONAL MEANS

In explaining Locke's arguments about how to establish judicial impartiality, I can revisit the tension between impartiality and partiality with which I began. Partiality per se, I've suggested, is not for Locke the only or the most heuristically useful antithesis of impartiality. Another antithesis is the exercise of absolute or arbitrary power. And thus, to realize governmental impartiality, the people must have the right to resist what they perceive as absolute or arbitrary power, and not partiality in some categorical sense. When we recognize that political leaders are potentially prompted to be impartial under Locke's account because they fear for their office, we realize too that their outward impartiality is motivated by reasons that are not themselves impartial. Ironically, then, what is potentially animating the impartiality is a most self-interested partiality; the governmental officials are responsive to the people because the latter are also responsive to their own professional and institutional interests. And therefore what passes for impartiality is potentially underwritten by partiality. In this sense, whereas impartiality cannot exist with absolute or

arbitrary power, it potentially depends on a certain form of partiality.⁷⁶

We may then define Locke's view of impartiality as follows: Impartiality is the outward responsiveness by governmental officials to the concerns of the people and is expected to be motivated ultimately by the officials' partiality in wanting not to be ousted from their offices. This is not to say that judges aren't or can't be prompted by principle or professionalism, but rather to suggest that neither alone is sufficient to erect and maintain a system of impartial judges.

Locke's institutional proposals for civil government evince a desire to reinforce governmental impartiality by impeding public officials' indulgence of those forms of partiality that lead to arbitrary or absolute power and by rewarding the forms of partiality by public officials that are responsive to the people's wishes out of concern for the officials' own professional interests. Consider Locke's most important institutional proposals which attempt to ensure that officials are bound by the rule of law. Locke is guided by the belief that "*Where-ever Law ends, Tyranny begins*, if the Law be transgressed to another's harm."⁷⁷ Law as the institutional embodiment of impartiality is therefore incompatible with the partiality that is insensitive to others' welfare, not partiality as a whole. To restrain those forms of partiality hostile to the rule of law, Locke argues that governmental officials must "govern by *promulgated establish'd Laws*, not to be varied in particular Cases, but to have one Rule for Rich and Poor, for the Favourite at Court, and the Country Man at Plough."⁷⁸ Furthermore, the legislature is "placed in collective Bodies of Men," such that "every single person became subject, equally with other the meanest Men, to those Laws, which he himself, as part of the Legislative had established."⁷⁹ The same legislators are also expected to hold limited terms so as to prevent them from exempting themselves from their own laws:

[T]he *Legislative Power* is put into the hands of divers Persons who duly Assembled, have . . . a Power to make Laws, which when they have done, being separated again, they are themselves subject to the Laws, they have made; which is a new and near tie upon them, to take care, that they make them for the publick good.⁸⁰

76. I would thus be inclined to modify Ruth Grant's observation that for Locke "there is no place for private interest in political judgment." GRANT, *supra* note 46, at 188.

77. TWO TREATISES, *supra* note 31, at 400.

78. *Id.* at 363.

79. *Id.* at 329–30.

80. *Id.* at 364.

Not even the king's order can exempt anyone from the law's reach, "[f]or the King's Authority being given him only by the Law, he cannot empower any one to act against the Law, or justifie him, by his Commission in so doing."⁸¹ The logic of these institutional restraints assumes that governmental officials will be impartial not because they sincerely want to be, but because they are pressured to do so.

IV. REVISITING THE ABA CODE

I can now revisit the objections related to the ABA Code that I posed earlier. I'll address the objections in the reverse order in which I presented them, as that structure leads to a more coherent explication. There was the objection from purity of motive. The ABA Code, I argued, overestimates the judge's potential for impartiality, understood as "not allow[ing] family, social, political or other relationships to influence the judge's judicial conduct or judgment."⁸² The prohibition, interpreted straightforwardly, is impossible to follow for it is theoretically incomprehensible. By contrast, Locke doesn't forbid one from consulting those sources which I've identified as partial in particularity and affective desire, perhaps an implicit recognition that to be utterly devoid of such partiality is to be devoid of what makes us human. What preoccupies Locke isn't a purity of motive but the creation and maintenance of a judicial impartiality which underwrites civil society and distinguishes it from a state of war marked by arbitrary and absolute powers. His view of judicial impartiality thus isn't principally an exploration of ontology but a proposal for politics. The motives on the part of judges which animate this form of impartiality may themselves be rooted in interests and passions that are exquisitely self-serving, but for Locke, their moral character remains of subordinate concern for the enterprise of civil society. Indeed, Locke seems to urge judges to repress any bias or prejudice they may have about particular individuals or the people generally as incompetent and undeserving, for the political imperatives of civil society require that judges treat all men as presumptively equal.

That point leads us to the second objection. I stated that the ABA Code lacks a larger political justification for judicial impartiality. Perhaps this omission is unavoidable given the Code's formal task, but it would be useful to have a sustained answer. Locke's arguments provide one. Judicial impartiality for Locke is central to the creation of civil society and

81. *Id.* at 403.

82. ABA CODE, *supra* note 3, Canon 2B.

all its corollary benefits in peace and the stable protection of property. We value impartiality not simply because, as the ABA Code proclaims, “Our legal system is based on the principle that an independent, fair and competent judiciary will interpret and apply the laws that govern us” or because, “The role of the judiciary is central to American concepts of justice and the rule of law” or because, “The judge is an arbiter of facts and law for the resolution of disputes and a highly visible symbol of government under the rule of law.”⁸³ It is rather because without impartial judges, we face the awful prospect of being at the mercy of a tyrant who can gleefully exploit, torment and ultimately murder us in the exercise of arbitrary and absolute powers.

Bearing this in mind, the response gleaned from Locke’s theory to a third objection to the ABA Code shouldn’t be a surprise. I argued that the ABA Code contains a troubling ambivalence: sometimes it requires judges to be sincerely impartial and sometimes it requires them simply to act impartially. Which is more important and why? Given the decidedly political uses to which Locke employs judicial impartiality, it appears that judges needn’t be sincerely impartial (whatever that simplistic formulation might mean) but may be prompted by motives rooted in partiality. Indeed, Locke doesn’t want judges to ruminate primarily over the purity of their motives but to be sensitive to the people’s perceptions of their conduct as assessed in terms of the law of nature. This is why he empowers the people with the right of resistance. It is to make sure that the judges are responsive, however much they dread, to the people’s understanding of the law of nature.

To illustrate Locke’s views in idiom more accessible to our contemporary sensibilities, let me reexamine the play on *Lochner* with which I began. I depicted a hypothetical in which Justice Peckham sincerely regarded his widely criticized opinion as impartial while Justice Holmes insincerely delivered an opinion that is extolled as the paradigm of impartiality. The ABA Code provides no perspicuous answers for how to come to terms with these two, but Locke’s account of judicial impartiality does. Justice Holmes’s dissent shouldn’t be applauded as impartial for meeting criteria that is cleansed of any trace of partiality. It should be regarded as impartial because it resonates with our contemporary cultural preferences for a certain degree of legislative autonomy and a degree of skepticism regarding the equality of bargaining powers between employees and employers. Like the authority of Locke’s impartial judge, Justice Holmes’s authority derives from being sufficiently responsive to what the

83. *Id.* Pmb1.

people believe to be fair in political terms. By contrast, Justice Peckham's majority opinion is derided as being biased and prejudiced because it seems to grate against the cultural preferences which vindicate Justice Holmes's dissent.

The same cultural dynamic seems to be applicable in explaining popular reactions that have greeted other landmark cases like *Plessy v. Ferguson*⁸⁴ and *Brown v. Board of Education*.⁸⁵ We all condemn *Plessy*, where Justice Brown for the Supreme Court interpreted the Fourteenth Amendment's Equal Protection Clause as permitting the doctrine of state-sponsored racial segregation.⁸⁶ We chastise it as an appalling demonstration of racial bias and prejudice. Yet we enthusiastically celebrate Chief Justice Warren's unanimous opinion in *Brown* which formally overturned some of Justice Brown's opinion and informally foreshadowed its entire demise by declaring that separate but equal racial schools violated the Fourteenth Amendment's Equal Protection Clause.⁸⁷ In counterpoint to Justice Brown, Chief Justice Warren, according to contemporary cultural accounts, admirably shunned any racial animus towards Black Americans and hence was more impartial. But it's not that Justice Brown missed the mark on some inherently impartial understanding of the Constitution awaiting him at some Archimedean point and that Chief Justice Warren got it right. It's instead that the latter's view of race, and not the former's, was more responsive to a strand of cultural ethos in America present at the time of *Brown* and far less influential at the time of *Plessy*.

Given this understanding of judicial impartiality, we can say that the requirement to be impartial needn't entail for judges a corresponding requirement to be sincere. It makes more sense to argue that judges who insist on the stark moral project of being sincerely impartial at all costs are politically dangerous because they needn't logically be responsive to the people's view of impartiality. Supreme Court justices themselves at certain moments appear to recognize this unmistakably political understanding of impartiality. The joint-plurality opinion authored by Justices O'Connor, Kennedy, and Souter in *Planned Parenthood v. Casey*⁸⁸ provides a revealing look. They write: "The Court's power lies . . . in its legitimacy, a product of substance and perception that shows itself in the people's acceptance of the Judiciary as fit to determine what the Nation's law means

84. *Plessy v. Ferguson*, 163 U.S. 537 (1896).

85. *Brown v. Board of Education*, 347 U.S. 483 (1954).

86. *Plessy*, 163 U.S. at 551-52.

87. *Brown*, 347 U.S. at 495.

88. *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

and to declare what it demands.”⁸⁹ At one point, the joint-plurality opinion makes reference to the conventional dichotomy between principle and politics but even then people’s perceptions remain significant:

The Court must take care to speak and act in ways *that allow people* to accept its decisions . . . as grounded truly in principle, not as compromises with social and political pressures Thus, the Court’s legitimacy depends on making legally principled decisions under circumstances in which their principled character is sufficiently plausible to be accepted by the Nation.

The need for principled action to be perceived as such is implicated to some degree whenever this, or any other appellate court, overrules a prior case.⁹⁰

In addition, the opinion contains language that uncannily echoes Locke’s observation that while judges are bound to make some decisions that upset the people, the right of resistance should only be exercised if the legal abuses are sufficiently serious and prolonged:

People understand that some of the Constitution’s language is hard to fathom and that the Court’s Justices are sometimes able to perceive significant facts or to understand principles of law that eluded their predecessors [T]he country can accept some correction of error without necessarily questioning the legitimacy of the Court.⁹¹

This statement implies that from the judge’s perspective, impartiality isn’t a sacrosanct subject that is somehow immutable. Rather, it is contingent and changing, and ideally, responsive to the people.

CONCLUSION

What I’ve argued in this essay is that the attempt to define judicial impartiality as an ontological subject is needlessly difficult for the enterprise of civil society. It is better, I’ve suggested, for judicial impartiality to be understood principally as a political project whereby the judge responds, in a meaningful way, to what the people regard as

89. *Id.* at 865.

90. *Id.* at 865–66 (emphasis added).

91. *Id.* at 866.

sufficiently impartial behavior and refrains from arbitrary or absolute power.