Aristotle, *The Federalist,* and Lincoln on Courts and the Rule of Law

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Recent controversies about judicial retention elections raise important questions about the respective powers of the people on the one hand and courts on the other when it comes to making and interpreting laws. As a professor of political philosophy, I regard such questions as an opportunity to explore the meaning and application of the core principles on which our government is founded and according to which it is meant to be governed.

The principle of popular sovereignty, for example, would seem to support the right of the people to correct what they believe to be misinterpretations of a law or abuses of a governmental power that ultimately belong to them. As the Declaration of Independence says,[1] governments derive "their just powers from the consent of the governed," and it is the people's right to institute, alter, or abolish governments "as to them shall seem most likely to effect their safety and happiness." If the people may go so far as to change governments when it seems best to them, then does it not follow that they can take lesser steps such as changing the membership of a part of their government, such as the judiciary, when they deem it necessary—especially if in doing so they follow regular legal procedure?

On the other hand, the Declaration reminds us of two points that cut in the other direction. First, it insists that the ends of government are determined by self-evident truths, independent of the people's will. Government exists to secure "certain unalienable rights," and the people are bound to institute, alter, or abolish government with these ends in mind. Though the people, right or wrong, may have ultimate say over things governmental, they should by no means be encouraged to use this power impulsively or without due regard for natural rights.

[1] *The American Republic: Primary Sources*, ed. Bruce Frohnen, Indianapolis, IN: Liberty Fund, 2002, pp. 189-191.

Second, and more particularly, the Declaration, in objecting to the dependence of judges on the will of the British king "for the tenure of their offices," strongly affirms the importance of an independent judiciary. Though in this context independence is from the whims of a king, there is no reason to believe that the whims of a people are necessarily less dangerous to the impartiality demanded of courts. In fact, as *Federalist* 78 affirms,[2] the independence of judges is requisite not only to protect the judiciary from the legislative and executive branches, but even from the "ill humors" of "the people themselves."

In our system of government, then, we are presented with a curious crossing of forces: the courts, as with all branches of government, are responsible to the people for the existence and proper use of their authority; yet the courts must be independent of all, including the people, if they are to use that authority well.

How can we understand this paradox? I will not propose an adequate solution, or even conduct an adequate analysis of the problem, in these brief remarks. Instead I will attempt to identify a framework for approaching this problem by turning to a concept that I believe underlies the principles that we see in conflict here—the principles of popular sovereignty and judicial independence. That concept is the rule of law. First I will give a sketch of this concept as treated by the ancient Greek political philosopher Aristotle. Next I will turn back to *The Federalist* and attempt to outline more precisely how the rule of law, through an independent judiciary, is meant to balance popular and judicial power in our political society. Third, I'll consider the application of those same principles to our own political system by one of our most revered attorney-statesmen: Abraham Lincoln. Finally, I will close with some thoughts about how these examples might inform contemporary controversies in judicial politics.

I

In the third book of his *Politics*,[3] Aristotle asks "whether it is more advantageous to be ruled by the best human beings or by the best laws." The question would

[2] *The Federalist*, Alexander Hamilton, John Jay, and James Madison, ed. George W. Carey and James McLellan, Indianapolis, IN: Liberty Fund, 2001.
[3] Aristotle, *Politics*, trans. Carnes Lord, Chicago: The University of Chicago Press, 1984.

seem to presuppose that we have a ready choice between one and the other. As we know, and as Aristotle's own analysis confirms, this is not simply the case. Nonetheless, the question—law, or human beings?—helps us to understand what we aim at in promoting the rule of law, and to some extent how we should aim at it.

Aristotle begins with what is wrong with the rule of law. Since "laws only speak of the universal and do not command with a view to circumstances, . . . to rule in accordance with written rules is foolish." In the fifth and sixth books of his *Nicomachean Ethics*,[4] Aristotle had spoken of the virtue of *epikeia* or equity, and of *gnome* or that part of the virtue of prudence that makes us capable of identifying the equitable thing—the thing that is more just under particular circumstances than rigid adherence to universal rules would be. Thus the distinction between law and equity, which comes to us through the heritage of our common law tradition.

The need for equity demonstrates that law is incapable of achieving justice without the intervention of thoughtful human beings, who are capable of seeing how the general rules apply to the circumstances of a particular case. Yet the most thoughtful human beings will know the universal principles contained in law as well as the best thing to do in particular circumstances. Therefore it would seem that the rule of the best human beings has all of the benefits and none of the defects of the rule of even the best laws, and that the former is to be preferred to the latter.

In this and other passages, however, Aristotle analyzes the difficulties with schemes to secure the rule of the best human beings. These difficulties can be traced to two major problems. First, no matter how thoughtful the rulers may be, humankind is not disposed to submit to the authority of persons unwilling to share that authority with others. Second, whatever the virtues of those human beings who seek to rule, as human beings they are susceptible to bias and error.

Thus we see that our two contenders for rule—the law and human beings—are both blind: the law is blind to particulars, and human beings are blinded by particulars. If Aristotle favors the rule of law, then, it would almost seem that he chooses it as the lesser of two evils.

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[4] Aristotle, *Nicomachean Ethics*, trans. Jose Sachs, Newburyport, MA: Focus Publishing, 2002.

Instead, I think it would be better to say that Aristotle sees this mixture of strengths and weaknesses in either ruling principle as an invitation to form a partnership between law and human beings, a partnership intended to bring out the best in both. (This, by the way, according to *The Federalist* 57, is also the best way to look at the "checks and balances" in our constitutional systems—as helping to "obtain for rulers, men who possess most wisdom to discern, and most virtue to pursue, the common good of society; and in the next place, to take the most effectual precautions for keeping them virtuous.") To return to Aristotle, in this partnership between law and human beings, law is to have a certain kind of primacy, for "laws must exist," and if they do, they must be presumed to be authoritative over both the human beings whom they govern, and those who govern by them.

Yet the authority of the laws remains dependent upon human beings in two ways. First, "the ruler must necessarily be a legislator," meaning that the goodness of good laws stems from the wisdom of those composing them in the first place. Badly made laws will not be nearly as helpful as well-made ones, and few if any laws in real political communities will be made flawlessly. Hence the wisdom of things like an amendment process for constitutions or an election cycle for legislators, so that deficiencies can be identified and corrected according to the best lights of the community.

Next, even the wisest laws "must not be authoritative insofar as they deviate from what is right" in particular cases, meaning that the application of the laws must be entrusted to human beings capable of judging how the written laws and precedents, interpreted in light of established principles and fundamental purposes of law, apply to the questions raised in given disputes. This need for scrutiny into the relationship between fact and law shows the wisdom of institutions like an independent judiciary, due process, and an adversarial system, without which rules of law would all too easily be ignored or applied haphazardly.

Far from being a lesser evil, this partnership between law and human beings aims high: for "one who asks law to rule . . . is held to be asking god and intellect alone to rule." What does this mean? To begin with, we are "asking" rather than allowing law to rule because the law itself is neither god, man, nor beast; possessing no rea-

soning capacity or will of its own, law can only rule through the mediation of human reason and will. Yet human reason and will are weak in themselves and also accompanied by passions, habits, and dispositions that tend all too frequently to turn them from their proper course. When we ask law to rule, then, we are asking human beings to rule—but not to rule simply as the particular (and limited) human beings they happen to be. Instead, by crafting a law which is to rule over human beings, we are identifying all that is best in human reason; and by entrusting this law to the care of certain authorities, we are asking those authorities to be "law-guardians and . . . servants of the law," and therefore to submit their own fallible judgments to the discipline of a law embodying a larger tradition of sound reasoning.

The discipline of the law is manifested in at least two ways. The first is education. "As regards those things which law is held not to be capable of determining," Aristotle remarks, "a human being could not decide them either. Rather, the law educates especially for this." In other words, though rulers may have to supplement law with their own judgment, their judgment is not merely their own if and when they strive to perfect it in light of the practical experience and established principles of a sound legal tradition. Even as they supply the defects of the law, by modifying it and adapting it as experience and circumstances demand, the law has supplied and continues to supply the limits of their personal judgment.

The second manifestation of legal discipline is evident in the manner in which human beings rule: since "it is no more just for equal persons to rule than to be ruled, . . . it is therefore just that they rule and be ruled by turns. But this is already law; for the arrangement of ruling and being ruled is law, . . . for there must necessarily exist certain offices by which persons rule," and by which they guard and implement the law. In other words, the very idea of human equality demands a constitutional order in which no person or group has unlimited power, and this limitation of power can only be achieved by requiring each person or group to share its authority with other persons or groups.

Thus the rule of law asks the human beings who rule to look beyond themselves in two ways: first, by forming their judgments in accordance with knowledge and experience beyond their own and embodied in a tradition that is larger, older, and

wiser than any of its guardians and servants; second, by exercising judgment in accordance with their office, and hence deferring to a certain degree and in certain conditions to the legal interpretations of their fellow citizens.

II

How do these philosophic remarks apply to our legal system? Turning again to *The Federalist*, this time number 49, we note that it affirms both "the fundamental principle of republican government, which admits the right of the people to alter or abolish the established constitution whenever they find it inconsistent with their happiness," and the principle that those who govern ought to fulfill the duties of their offices with a significant (though varying) degree of independence from the people. The reason for combining these seemingly opposed principles is strikingly Aristotelian.

Though "the people are the only legitimate fountain of power," says Publius, it is not good to "appeal to the people themselves" on a too-frequent basis. Among the reasons for this caution is "the danger of disturbing the public tranquility by interesting too strongly the public passions." Despite the principle of popular sovereignty, *The Federalist* insists that "it is the reason of the public alone"—and not its passions—"that ought to control and regulate the government. The passions ought to be controlled and regulated by the government."

This general argument applies, perhaps with its greatest force, to the discussion of the federal judiciary in *The Federalist* 78. Here Publius insists that "the interpretation of the laws is the proper and peculiar province of the courts," and emphasizes the rare skills and virtues needed to understand and defend "the rights of the constitution and of individuals." It is therefore appropriate that modes of action against sitting judges are restricted to extraordinary procedures such as impeachment, constitutional amendment, or (as history has shown) court-packing. Notably, retention elections are not part of the federal checks and balances.

Yet *The Federalist* still affirms the responsibility of courts to the people. It would be wrong, Publius readily concedes, for the courts "to substitute their own pleasure to the constitutional intentions" of others, or to "exercise will instead of judgment."

In declaring a law unconstitutional, the court is not wielding its own power, but yielding to its "superior obligation" to prefer "the intention of the people"—expressed in the Constitution—"to the intention of their agents"—expressed, for example, in a piece of legislation. That the passions of the people should not easily override the court's judgment is clear; that the people's "solemn and authoritative act" is capable of doing so remains unquestionable. In fact, as *The Federalist* 71 argues, leaders in a democratic republic are called upon to resist the "sudden [breezes] of passion," the "transient impulse[s]," and "prejudices" of the people; but those same leaders must ultimately bow to "the deliberate sense of the community," given after "cool and sedate reflection."

And so U.S. Constitutional law asks reason to rule by balancing the independence of courts with the sovereignty of the people.

III

How did Abraham Lincoln understand the dynamics of this delicate balance between courts and people? I'd like to consider two applications he made at different points in his career.

First, in his Lyceum speech of 1838,[5] the young Lincoln boldly confronts an increasing incidence of "mob law" in America. His response is firm and clear: if the people, who in our democratic form of government have the right to make the laws, also reserve the right to break them, our political institutions cannot long survive. Even the most guilty parties must have a fair trial, and not only for their own sakes: for Lincoln argues that if the rule of sober reason embodied in law and legal procedure is replaced by the rule of blind passion, innocent citizens will be caught in the fury of the "mobocratic spirit," even the best citizens will become alienated from government, and freedom and liberty—divorced from law—will soon disappear.

[5] *The American Republic*, "Address to the Young Men's Lyceum of Springfield, Illinois," pp. 518-522.

The second application can be seen in Lincoln's response to the infamous *Dred Scott* decision of 1858,[6] in which the USSC interpreted the US Constitution to bar citizenship to certain persons based solely on race, and to require Congress to permit slavery in all federal territories. In reply, Lincoln conceded that, as the highest court in the land, the SC had the right to render a final decision in all cases before it, as well as to establish precedents in constitutional law. At the same time, he defended the right of citizens to regard a SC decision as erroneous, to act within the scope of their respective offices on principles contrary to those articulated in the opinion of the court, and to make every effort to have the SC's decision duly overruled. To treat the opinion of a divided court, based on unsound reasoning, as the final word on what the law is, would constitute not the rule of law but rather an abdication of the very principle of self-government upon which our law is founded.

In brief, Lincoln holds, with Aristotle, that when we ask law to rule, we are asking reason to rule; but not the limited reason of any one human being or group of human beings, whether it be an electorate, a legislature, a jury, or a court. The rule of law is the rule of reason, which does indeed work through the mediation of all these parties, yet nonetheless transcends them all.

Conclusion

How might these thoughts apply to contemporary controversies regarding judicial retention elections? I would like to make a few brief suggestions. To begin with, the office of the judge has to be seen as existing within a framework of law ultimately determined by the people, who themselves are morally obligated to follow their reason and not their passions in crafting this framework, and who also may be constrained to follow the judgment of others—including judges—during the normal operations of that legal system.

In other words, neither the people nor the courts possess absolute power, and it would be erroneous to hold either that the people must defer to the judges, or that the judges must defer to the people, without qualification. It would be true to say, on the one hand, that neither the people nor the judges need defer to the whim of

[6] *The American Nation: Primary Sources*, ed. Bruce Frohnen, Indianapolis, IN: Liberty Fund, 2008, "First Inaugural Address," pp. 34-38.

the other, and also that both the people and the judges must defer to the judgment of the other, under conditions specified by that legal system.

Without going into the details of our current controversy, it is necessary to note that the opposition to certain judges witnessed recently is only one part of a larger critique of contemporary trends in jurisprudence, based on the view that certain decisions of various courts in recent decades represent a flagrant abuse of judicial power. This alleged abuse is characterized in part by a perceived disregard for both popular sovereignty and the larger tradition of law undergirding both judicial and popular authority. Although it is reasonable to raise and to stress the importance of judicial independence, then, it is neither reasonable nor adequate to characterize opposition to judges as necessarily resting only on uninformed public opinion regarding one or more isolated decisions. Nor is it adequate to dismiss such opposition as flowing from ignorance of the proper limits of popular sovereignty—namely, the notion that the passions of the people must be controlled by the government.

Instead, I would propose that, since the rule of law embodied in our constitutional systems is designed to promote the rule of reason, we will best fulfill our obligation to sustain this noble framework of liberty and justice for all if we take the current controversies about judicial politics as an opportunity to enter into a more profound public dialogue regarding the relevant substantive content of the legal tradition whose guardians both judges and the people are called to be.