The Rule of Law

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For many decades of our history Americans have been accustomed to say that we live, in this country, under the Rule of Law. Presumably this is contrasted to rule by a particular strong leader, or rule by a privileged group of class. That is what we threw off when our ancestors revolted against King George and his ministers back in 1976.

We have accepted the notion that our behavior should be governed by rules adopted in a process that has our consent rather than pronouncements of a dictator or king. This does not mean that we have been uniformly faithful to the Rule of Law as we have understood it. Sad to say, we are quite aware of the saying in Animal Farm that some of us are "more equal than others" by reason of economic, educational, and political advantages. But the basic assumption is that our government is one of "laws not men."

The problem is that while we glibly refer to the Rule of Law as a fundamental pillar of our social order, how much do we really know about

what those three words really mean? And now, in this day and age, when we anxiously ask whether the Rule of Law is in danger and how it can be saved, what are we really talking about? The purpose of this paper is to delve into these issues to the extent that the essayist's understanding and the audience's patience permits.

History of the Rule of Law

Although the Rule of Law as a fundamental principle of human governance is thought to be of relatively recent origin, the use of law to rule has ancient roots. From the time that human beings coalesced into social groups it has been necessary to use generalized abstract rules or precepts to organize their activities and maintain a viable social and economic structure. Rulers of the Medes and the Persians issued laws to govern their people. There was the Code of Hammurabi among the Babylonians. The Hebrews were governed by generalized commandments issued directly by their god, Yahweh.

It is worth noting that these early forms of law were not voluntarily adopted by the governed populations but were edicts of arbitrary rulers, and also, that there was no requirement of human equality in either the precepts or the application of the rules – there could be different laws for

different groups, men v. women, nobles v. commoners, freemen vs. slaves. The key is that law has been and can be used by persons in power to rule their fellow human beings in ways that do not comply with the Rule of Law as we have known it. History's worse tyrants have generalized their directives as law in the interest of efficiency and to generate widespread compliance. Imperial Rome, Nazi Germany and Stalinist Russia maintained totalitarian systems through what were called laws.

The notion of the Rule of Law, as opposed to Rule by Law appeared to ripen in Europe in the Age of Enlightenment, roughly 1650-1800 AD. Thinkers such as Jean Jacques Rousseau and James Harrington posited a system by which the rules by which they were governed would emanate from the population of the governed, or some trusted subset of them and that these rules would be supreme, subject to change only with the consent of the governed, and that they would apply equally to everyone. These thinkers grounded their speculations on ancient notions of "natural law" or a kind of order inherent in nature, and on the growing realization that all persons are, at some levels at least, equal.

Without going into detail of this development in intellectual and cultural history, by the end of the 18th Century, the notion of an "Empire of laws, not men" was well known to the leaders of England's breakaway

colonies along the eastern seaboard of the North American continent. Foremost among them was John Adams, perhaps the single most influential architect of the American Constitution and our form of government. The phrase “a government of laws not of men” first appeared in his 1780 Constitution of the Commonwealth of Massachusetts, on which the United States Constitution of 1787 was largely based. This concept, which Adams and his fellow Drafters embodied in the new U. S. Constitution was based on two fundamental theories, 1) that precepts governing the behavior of human beings should be issued in abstract rules governing all and 2) that under these abstract rules all persons are to be treated equally. This did not and does not mean that all persons must be treated the same. There were of course different rules for different occupations, different activities, different kinds of property and so on. But there was to be no difference between persons, as such.

As an aside, Adams and his colleagues were far from faithful to the idea of fundamental equality on which the structure that they created was founded. In many important respects the essential equality of all human beings was not recognized in the early Republic or even in its governing documents. Slavery was a gaping hole in the theoretical foundation of our Republic. The Constitution implicitly acknowledged this by not mentioning

it. Among various other tolerated inequalities, the disparate treatment of women also stands out.

This tolerated inequality does not mean that the Rule of Law as it was embodied in our Constitution was a sham. Political institutions are not precise structures. They can bear many imperfections and still render satisfactory service at least for a time.

The other essential ingredient of the Rule of Law, not of Men as conceived by Adams is a political structure that enables men to rule themselves without enabling some of them to acquire illegitimate power over the others, some to become "more equal than others." The key to this structure was a government that embodied three branches, an elected legislative body to adopt the rules, an elected executive branch to implement the rules and make sure that they were followed, and a more or less independent judiciary to decide cases concerning the meaning of the legislative enactments or whether legislation or executive action is authorized by the Constitution.

The role of the judiciary as a fundamental safeguard of the rule of law was relatively new in Adams' time. Traditionally courts were regarded largely as arms of the sovereign, tasked with enforcing his rules and punishing his enemies. That courts would be considered a co-equal part of

the government itself in order to guide and restrain both executive and legislative based on a written compact was something new. Here is what Adams wrote in 1776, the early days of the Revolution:

> The dignity and stability of government in all its branches, the morals of the people, and every blessing of society depend so much upon an upright and skillful administration of justice, that the judicial power ought to be distinct from both the legislative and executive, and independent upon both, that so it may be a check upon both, as both should be checks upon that. The judges, therefore, should be always men of learning and experience in the laws, of exemplary morals, great patience, calmness, coolness, and attention. Their minds should not be distracted with jarring interests; they should not be dependent upon any man, or body of men. To these ends, they should hold estates for life in their offices; or, in other words, their commissions should be during good behavior, and their salaries ascertained and established by law.[1]

In these dark days, it must be remembered that the Rule of Law, as embodied in the U. S. Constitution, has long stood as an outstanding model for the entire World, despite a Civil War and many lesser compromises and setbacks along the way. Germany, in rebuilding as a Rechtstaat out of the rubble of World War II adopted a constitution based largely on the U.S. model. Many other countries, for various reasons, have done the same.

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[1] John Adams, *Thoughts on Government Applicable to the Present State of the American Colonies* (1776).

We cannot let its imperfections blind us to its successes over more than two centuries.

Ingredients of the Rule of Law

Now let's drill down on the essential ingredients of the Rule of Law as intended by the Founders and as generally practiced to date in our Republic.

The Constitution conceived of governing power residing largely in the legislative branch that would craft and enact the rules by which the conduct of the populace would be prescribed and restrained. The legislators would be chosen in a way that reflects the wishes of the governed and would remain free of corrupting outside influence that would cause then to act other than in the interest of those who had chosen them.

Here, of course, perfection has been hard to attain. Early on federal legislators were chosen by electorates composed of a handful of the citizens. They had their own interests, often as landed gentry, that influenced the votes they lodged in behalf of their constituents. Over the years various kinds of partisan irregularities have marred the fidelity of their representation of the bulk of their fellow citizens. Gerrymandering is a practice that dates back to 1812 when Massachusetts Governor Elbridge

Gerry created a partisan district in Boston that resembled a salamander on the map. Political institutions and actors can fall far short of perfection in their design and performance and still maintain a reasonable version of the Rule of Law.

The key to the role of the legislature is that it remains active to preserve its own role and reassure its constituents that their wishes are being implemented and their concerns are being addressed. The fate of the Roman Senate in the centuries of the Caesars furnishes a monitory example of what happens when the legislature abdicates its function and sinks into irrelevance.

Perception that the legislature is being significantly influenced by elements other than the favor of the represented also significantly affect its role in maintaining the rule of law. Again, incorruptibility need not be perfect. All legislators are more sensitive to the priorities of some constituents than others for a variety of reasons, some merely human and others illegitimate. However, when the constituents sense that their representative is corrupted by bribery or intimidated by another political figure, their faith in the Rule of Law is threatened. Fundamental to the continued vitality of the rule of law is the faith of the governed in the mechanism by which it takes place. Campaign financing, for instance, has

greatly increased the potential for outside interests to gain great influence with legislators all to the detriment of general faith in the rule of law.

The executive is a problematical branch in a legal order that maintains the rule of law. The drafters of the Constitution were determined not to create a king-like figure who would exercise power beyond that which would be authorized or granted by the Congress. On the other hand, they knew that it is not practical for a leader to have to check with a legislative body at every turn. The Law does not execute itself in most cases. People have to live by and effectuate the commands of the legal rules. How specific must Congress' guidance be to authorize some act? And who determines whether the existing conditions are those that a legal rule describes in authorizing executive action of one kind or another to deal with them.

Who decides, for instance, whether the country is in economic crisis so as to authorize the executive to impose economic restrictions, even tariffs? Congress can describe what it has in mind in general, but who ultimately decides whether this is it?

Once again, the rule of law is not airtight. There is indeed play in the joints for close cases as well as a modicum of miscommunication, as long as the executive follows Congress's directives most of the time. The

safeguard is that if the executive exercises power that Congress does not believe he should, Congress can step in and enact legislation that makes the boundaries on the executive's power more clear. An example of this interplay is the 1973 "War Powers Resolution" which requires the President to notify Congress within 48 hours of introducing troops into hostilities. This was passed during the Vietnam war and was designed to limit the President's ability to commit the U.S. to foreign conflict without congressional authorization.

It is the third branch, the judicial branch that the popular imagination tends to associate most with the Rule of Law. Political thinkers such as John Adams and his associates had considered that a third judicial branch would adjudicate conflicts between the other branches and tend to keep them operating within the realm of law.

Before the adoption of the American constitution and the development of the role of the U. S. Supreme Court starting with *Marbury v, Madison*, the role of courts, as a restraint on the sovereign was very limited. To be sure, in England the Great Writs provided citizens a means to obtain review of certain royal actions, particularly those that resulted in confinement or punishment. But the idea that the courts would exercise a

comprehensive responsibility to insure that the legislature and executive are following law and the constitution? That was something new.

People point to *Marbury v. Madison*, in which Chief Justice Marshall asserted the role of the judiciary to decide whether congressional enactments or executive actions are in conformity with the terms of the U. S Constitution as the birth of a robust role for the Third Branch. Over the centuries since, this role has been enlarged and refined. It is now generally accepted that the courts, and especially the U. S. Supreme Court, have the last word on legal conflicts between the other branches and the U. S. Constitution.

The problem is, as was observed as recently as last month at a Public Forum her in Portland, of the three branches, the Courts are weakest. The Supreme Court has no funds and cannot raise any directly. It must rely on Congress to keep it in business. The Courts have no ability to enforce their decisions by the use of force. Hence the apocryphal story of President Jackson's reaction to the Supreme Court's 1832 decision in *Worcester v. Georgia*, that invalidated Georgia law redistributing Cherokee lands to white settlers, "Marshall has spoken, but where are his troops?" As the Court exercises its role as balance wheel between the other branches of government, it must always be alert to the possibility that its

precepts may be ignored, which could be the beginning of the end of its role as a third branch of government. Sometimes survival requires a politic avoidance of dogma or defiance.

It is interesting that judicial review by an independent judiciary is a feature of a modern democratic government that has had perhaps the most success in other lands that have ungraded their constitutions or adopted new ones. For instance, the German Constitutional Court was authorized and created by a postwar “Basic Law” that was greatly influenced by American concepts of constitutional law and the role of the U. S. Supreme Court. For many years it has been regarded as the most trusted element of the modern German government.

Once again, perfection in the creation and maintenance of an independent and highly capable judicial branch is not required. It is enough if the judiciary has a degree of independence and orientation to the requirements of legal rules in lieu of political loyalty or personal gain. For instance, our own judiciary, the prototype for many other systems, is significantly flawed. The fact that a majority of state court judges are chosen in partisan elections and receive political contributions is a serious compromise with the ideal of impartiality and independence. Even those judges who are not elected in popular elections are appointed by political

figures who have motivations to choose jurists oriented to their parties or ways of thinking. The power of the judiciary lies in the respect in which it is held. If the populace does not respect the judges, woe be the rule of law.

Another ingredient in a society that lives by the rule of law is a relative abundance of more or less independent legal practitioners who can invoke and argue the precepts of law and how it should apply to situations in the real world. This includes a means of educating and training the lawyers as well as a culture that protects them in their representation of clients in cases and otherwise participating in the creation and enforcement of legal rules. In particular, lawyers must be able to represent unpopular clients an clients who oppose vested interests or the government itself without fear of social stigma or legal retribution. If a lawyer fears that her representation of a client may bring retaliation or even opprobrium down on her head, it is likely that the representation would be neither spirited or effective.

The Rule of Law does not depend on written law alone. In any culture there are many unwritten rules of conduct that are almost as effective as positive law in regulating behavior. At the top of the list is a basic respect for the law, for judges and for other institutions of the legal order. This flows over into construing and applying the law in ways that make sense and resonate positively with the values of the society. There

are a certain number of things that are not done simply because they are not done. Too much of this kind of unwritten law can lead to the ossification of society. Too little is like “bone on bone” in a knee joint – interactions on the fringes are likely to be painful and confrontive.

Every legal regime needs a system by which public servants or even private parties bring legal proceedings to hold citizens and entities which transgress the law accountable. The processes by which the law is invoked to deal with misconduct can be burdensome and costly both to accuser and to accused. Just to be publicly charged with a legal transgression can impose tremendous financial, psychological and reputational cost to the person accused. How can the law regulate the process by which it is invoked against a citizen?

Interestingly enough, the Anglo-American legal system knows no formal mechanism by which unwarranted or vindictive prosecutions can be prevented. Our mantra is “prosecutorial discretion” the prosecutor, as a public servant, determines which matters to prosecute. Her decision to prosecute or not to prosecute a particular case is not generally subject to review.

This is an example of the role of the unwritten law, of legal tradition, in our system. Prosecutors refrain from unwarranted prosecutions because

that is not the way a prosecutor should behave. By the same token, prosecutors initiate needed prosecutions because that it their job.

This state of affairs does leave open the possibility that initiation as well as suppression of criminal prosecutions may be influenced by extraneous political considerations even to the point of weaponizing the rule of law against political opponents or unpopular figures and groups. We have seen this happening recently in spades. Many persons who are being criminally investigated or prosecuted by the current Administration, (as well as some by the previous administration) are raising the cry that the prosecutions are selective or politically inspired – a weaponization of criminal justice. While these cries may be heard politically, our justice system can respond to them only in the most extreme cases.

It may be worth noting that some modern legal regimes provide legal restraints against irresponsible exercise of the power to initiate or withhold criminal prosecutions. For instance, in Germany, a citizen who believes that he is being prosecuted selectively or for political ends can appeal the initiation of the prosecution to the Regional District Attorney who has the power to abate it if unjustified.

Apart from the political judicial and legal institutions that deal directly with legal rules, their creation and application, there are various elements

of culture that play an important role in maintaining the rule of law within a political entity. First of all is the desire of the populace for the rule of law rather than rule by man, whether a single tyrant or an oligarchy.

The rule of law is not always easy. It involves a lot of process to create law and make it work. Campaigns, elections, rules, and the administrative processes of government are time consuming and expensive. Isn't it just easier to accept rule by a "beneficent sovereign" a "benign dictator" than to go through the process of generating rules of law and then making sure that persons given power abide by these rules? A part of the human character longs for a leader, a Fuhrer, who will lead the people on. Leaders such as Stalin and Hitler in the past and Zih in the present maintain power partly because many of their subjects prefer it that way. At the present time, it seems as if there is a significant number of Americans who are more comfortable with what they regard as a benign dictatorship than the hurly-burly and give and take of democratic politics.

Another fundamental building block for the rule of law is the ability of the society to agree on the facts of their surrounding reality. To be sure, sometimes it is necessary to resolve differences of fact in legal disputes by trial. This is not what we are talking about. We need our surrounding factual reality to be understood pretty much in the same way by everyone.

The acceptability of legal rules depends on the facts to which they are applied. If there is not general agreement as to what those facts are, it will be impossible for the law to be perceived as consistent, predictable and reliable.

A frustrating reality in present-day America is the existence of "alternative facts" based on a person's political orientation. For example, in this country are we overwhelmed with a flood of defective, disease-carrying, criminals who threaten our daily security and economic prosperity? Or are the people who are entering our country, often illegally, more like the rest of us, ordinary people seeking a better way of life for themselves and their families? It is impossible to debate political or legal issues without a common basis in fact. The kind of laws that we will enact and enforce depend on the facts as they are known to the legislators as well as the general populace.

The Rule of law thus depends, to a remarkable degree, on the existence of active and responsible news media that capture information about the real world and distribute it to people who do not experience it first-hand. To the extent that there is not reliable information about the facts, there is not reliable law. To the extent that the media accentuates disagreements as to the operative facts, that media burdens and sidelines

any meaningful dialogue or debate about legal solutions to practical problems.

The Rule of Law under Pressure

A large number of our countrypeople fear and believe that the rule of law, that has obtained in this country is under assault that threatens to push it aside in favor of a regime that rules by edict enforced by marching soldiers. Indeed, it does appear that many attributes, features and elements of the rule of law as we have known it are under some kind of threat.

How is the “Rule of Law” being undermined in our fair land? After all, the police are still arresting malefactors. One’s money is still safe in the bank. Elections are being held and the winners are taking office. But slowly, perhaps surely, the feeling is growing that the law as we have known it is no longer effective to restrain and govern how our country is being run. Here are some concrete examples:

1. Our armed forces are sinking boats of suspected drug dealers on the high seas without giving the victims any kind of due process before their execution.

2. Tariffs are being dealt out like cards by the executive under the pretext that there is some kind of national economic crisis to justify such action.
3. Criminal investigations and prosecutions are being selectively and arbitrarily initiated against persons who have opposed the current President or his policies in the past.
4. Pardons are being extended willy nilly to convicted criminals allied with the president or whose families have supported the President often financially.
5. Executive actions are being taken by the President that are by law reserved to Congress.
6. Universities are being harassed under pretexts and required to yield their academic independence.
7. Immigrants are being imprisoned and deported without hearings or other due process of law.

The list can go on and on. Many of the actions listed are taken under cover of legal pretext. The problem is that legal pretext is not the law.

Many of us sense the analogy of “boiling the frog”. Elements of our democracy and rule of law are being infringed and sidelined and contravened in a succession of major and minor actions by actors within

the current Administration. But it is a relatively gradual process. Those first impacted are the poor and marginalized, who are scarcely in a position to render effective resistance. The rich and the upper middle class are comfortable – for the time being. We are feeling no pain as our rights and power are being eroded. When we finally wake up, it will be too late. Nineteen Eight-Four will be here.

Take for example the process of creation of law and guiding the executive by the Legislative Branch. Our tri-partite system of government contemplates that if the Executive takes action that infringes on the prerogatives of the Legislative Branch, Congress will enact legislation clarifying its powers and restricting those of the executive. Currently, however, Congress remains passive and silent as the President exercises powers that in the past have belonged to Congress.

The reason for this passivity is not hard to discern. Ordinarily members of the national legislature are accountable to the voters of the district or state that they represent. If they do not reasonably satisfy the wishes of the constituents, the latter can vote them out. Now, however, an increasing number of Republican senators and representatives are accountable not to their constituents but to one person, the President. Our current President has taken advantage of his popularity among the radical

fringe of his party to be able to threaten any representative from a more or less “safe” district with being confronted in the party primary by a competitor who has his blessing and support. The is that the Legislative Branch is reluctant to insist on its constitutional prerogatives I opposition to the President. For most of the legislators in the majority party, personal employment security as a senator or congressman is better served by letting the President do the governing.

Many of us are relying on the federal judiciary to confine the activities in the current administration to the terms of the Constitution and to block the implementation of the worst excesses. Here, it can be said, “the jury is out…” While judges of the lower courts have not been afraid to call out unconstitutional or unauthorized action by the Administration, their decisions are being appealed to the U. S. Supreme Court, the pinnacle of the Judicial Branch. Every effort has been made to reinforce the independence of the Judicial Branch from domination or excessive influence from either of the other Branches. No organ of government has authority to contradict a decision of the Supreme Court.

On the other hand, judges of the Supreme Court are nominated by the President and confirmed by the Senate. For some time now, American Presidents have tended to choose judges who shared their political

persuasions. By the luck of the draw, in recent years more appointments have been made by Republicans than Democrats. And in partial contravention of one of those unwritten laws mentioned above, the current Administration has appointed relatively extreme partisans to SCOTUS judgeships.

Early returns suggest that these jurists might be more responsive to the President who appointed them than behooves a fully independent Third Branch. If the judges depart too far from the mainstream of American constitutional doctrine in order to accommodate the accretions of power now being sought by the Executive, the Rule of Law will take a major hit.

The population has no right to insist on decisions that it likes, either in reasoning or outcome. Some decisions are politically unpopular but are defensible as a matter of law and legal reasoning. In critiquing the Court, we have to differentiate between these decisions and decisions that are not defensible as a matter of rational explication of legal rules and application to reality-based fact scenarios.

Finally, there is the awful possibility that the executive may not obey the decisions of the Courts. As noted above, President Jackson felt free to ignore an inconvenient decision of the Supreme Court in his time. The current President seems to do all he can to skirt court decisions he does

not like, even to the point of threatening to ignore decisions of lower courts in the Federal hierarchy. It has been suggested that the perceived reluctance of the Supreme Court to contravene the President is partly based on a desire to avoid a direct collision that would precipitate actual disobedience.

Unless Congress "wakes up" and asserts its prerogatives as the most democratically chosen of our three branches, unless the Court "holds the line" in the interpretation of our Constitution and statute law, there is a good chance that the Rule of Law will be severely damaged if not swept away in our fair land. This does not mean that the United States will suddenly become a lawless wasteland or a totalitarian nightmare. Even in Nazi Germany there were some laws that were respected and enforced. No, the Rule of Law in the United States will die of a thousand cuts – of the kind we are see right now all around us.

The turning point will come when it is clear to a large part of the populace that when push gets to shove the law will not determine the outcome in important questions – when public faith in the law will be lost. At that point everyone will scurry for his or her own cover.

Can We Put Humpty Dumpty Together Again?

There are those who say that once the Rule of Law has crumbled, it is impossible to revive it within the context of ordinary political activity. They maintain that cynicism, corruption, and power-brokering are just too powerful. By definition, the people will have lost their ability to keep the public interest paramount.

This view maintains that the only way for the Rule of Law to return is via a cataclysm that destroys all and there is a new start with fresh institutions. This was, for instance, the fate of Germany under Hitler. It took World War II and the total devastation of the country to create the conditions under the Rule of Law could re-emerge as the backbone of the new Germany. Italy and Japan have followed similar paths. Indeed, the American democracy of which we speak had its late 18th century origins not in an orderly reform of British colonial policies, but in a violent revolution in which all was at stake.

This school of thought is reinforced by how difficult is seems to be for authoritarian countries to enact political reforms that reduce corruption and strengthen the rule of law. Russia had a brief flirtation with democracy before returning to harsh authoritarianism. Many countries in Africa, the Middle East and South America have successively thrown off dictators only to fall under the sway of new dictators or dictatorial parties.

When we finally “wake up,” will we need a violent revolution to upset a corrupt authoritarian regime and re-establish the Rule of Law with all its trappings? Will we be able to hold the line somewhere near where we currently are and peacefully reclaim our Rule of Law?

There are examples of countries that fell into authoritarianism but then pulled themselves out without a violent revolution or collapse. One of them is Chile, which emerged peacefully from the Pinochet dictatorship to re-establish the rule of law and a working democracy. Brazil and the Philippines are struggling to do the same. Interestingly, in the first half of the 19th century, England was on the threshold of a crisis of democratic legitimacy and saved itself by enlightened legislation. This included the Reform Bill of 1832 that enlarged the electoral franchise to include a meaningful portion of the population. It may not be too much for us to hope that we can do the same.

The key to re-establishment of the rule of law is to do all we can to prevent further erosion. Certainly, wholesale resort to the courts is vital. But for the reasons suggested above, we cannot count on the courts to maintain the rule of law unaided. What can we, as citizens, to do maintain and enhance the rule of law in the face of the current assaults on it?

One answer to this question was articulated by Harvard professor Noah Feldman at a Public Forum here in Portland on October 14. “Talk and vote!”, he said. We must talk with each other and with whomever will listen about what is going on, about why it should not be tolerated, and about what we can do to fight it. We must speak out.

Mark Wolf, who resigned a federal judgeship so that he could speak out against what is now going on and defend the rule of law quotes Senator Robert F. Kennedy speaking in in 1966 about ending apartheid in South Africa: “Each time a man stands up for an ideal, or acts to improve the lot of others, or strikes out against injustice, he sends forth a tiny ripple of hope.”

The rule of law dies in the sullen silence of the citizenry. If we talk to each other, encourage each other, reach out when we can to debate those who believe differently, it is much more likely that things will get better than if we tolerate the current state of affairs by saying nothing against it.

“Talk” means more than dinner-table conversation or chats among the like-minded. It means all sorts of means to bring the issue to the attention of the populace, to persuade, convince, even to intimidate. It means various kinds of assemblies, marches, and protests to express the views of the citizenry and demand respect of those views by our representatives in

the government. Protests such as “no kings” days are something. Protests that are less jovial and more focused on particular grievances might be more effective. If we do not talk loudly and often, we will not be heard.

One of the last institutions of democracy that falls to authoritarianism is the vote. Even in dictatorships, some forms of votes are tolerated, even if they are not effective to govern leadership. As long as votes are honest and aboveboard, they offer us the best chance to turn this ship into a more positive direction. A strong popular vote can bring an authoritarian wannabe up short and can herald the end of an existing authoritarian streak.

Once we come to believe that our votes do not count or will not be counted then the frog is truly boiled. So as we talk, we must also get out and vote, and get our neighbors out to vote, and organize to get people registered and voting, and, and, and. . . . In the end, this is our best hope of being able to reclaim our rule of law short of a violent catastrophe or revolution.

It is too early to know whether we will be able to reclaim and restore the Rule of Law as we have known it. It is a race against time. Will we be able to arrest the increasing tide of authoritarian thought and action, will we be able to stem the growth of cynicism and corruption before the basic faith

of the people in legal rules adopted by a democratic process has been lost beyond redemption?

There may be some early signs. The continued courage of lawyers and judges in bringing and deciding litigation to restrain illegal and unconstitutional executive actions is a good sign. The successes of the opposition party in the election earlier this month give reason for hope. A sense of diminishing popular support for the excesses of the current Administration may mean something. Two more federal elections could lead to replacement of the current authoritarian leader and revival of the relevance of the Congress, both indispensable steps in the return to the Rule of Law.

And we must not forget the states, 50 of them, vested with a kind of sovereignty and capacity to make and enforce laws that govern a great deal of our lived experience. Several of the states, including our own, have made clear that the Rule of Law is alive in their respective jurisdictions even though it may be wounded in Washington. “See you in Court,” saith our Governor to the President. The vitality of the law in the States may be a model of how it can be restored in our Federal government.

While rebuilding of the government, balancing of the judiciary, and restoration of vital legislation and administrative regulations would take

more time, one can conceive that these things might happen if Americans decide in favor of the Rule of Law and vote accordingly. If the frog realizes how hot the water is becoming, it is conceivable that he might jump out of the pan and prevent further damage to the Rule of Law at this time. We might be able to die with the Rule of Law in force in our land.

But reclaiming the Rule of Law within the framework of our current legal and political institutions is not enough. It will not be enough for us to elect a majority in the Congress and an executive who will more faithfully play their roles in the Rule of Law as it has developed in this country over the last two and a half centuries. It is not enough for the Supreme Court to render a few key decisions invalidating the worst of current excesses. We must be prepared to reform the Rule of Law so as to make it less likely that it will falter or fall in the face of another authoritarian attack.

Most, if not all countries, which have experienced a serious erosion or collapse of the Rule of Law, have started more or the less from the bottom in rebuilding their legal and political institutions. The most prominent example is Nazi Germany, which created a new Constitution and legal and political order from the rubble of a lost war. South Africa underwent a more or less peaceful, but scarcely less fundamental legal metamorphosis with the end of apartheid and the black takeover of power in that land. Indeed,

those countries which “cured” their rule of law ailments merely through a change in the ruling political party without fundamental legal and political reform have all too often seen rule-of-law backsliding and weaknesses that have continued to plague them going forward.

Assuming that we can somehow prevent the worst erosion of the Rule of Law as we are currently faced with it, how can we, in this country, better enshrine and protect the Rule of Law going forward? The weaknesses of our current Constitution have been manifest for some time. Moreover, it is questionable if any Constitution can effectively protect the rights of the people in a society that is so economically unequal as ours. It has been observed repeatedly in the past that the rule of law flourishes best in an economy in which economic wellbeing is widespread in the population.

This is clearly the harder challenge. It will require people of the same level of public-spirited prescience as had that handful of men who fashioned our Constitution and legal institutions two hundred fifty years ago. Where we will find these people and how we will bring them forward and entrust to them this task are daunting questions. But unless we are able to reform our version of the rule of law in a pretty fundamental way, the path to another authoritarian leader will not be a long one. So as we work

toward saving the rule of law, let us not forget the more fundamental challenge, to modernize and reform it.