

Prof. Karl Shoemaker  
Fall 2010  
T-Th 2:30-3:45  
[kbshoemaker@wisc.edu](mailto:kbshoemaker@wisc.edu)  
Office hours: TBA

## The History of the Rule of Law

**Course Overview:** Few phrases occur more often in discussion of democracy and western political values than “rule of law.” Yet, one would find it difficult to attach a precise meaning to the phrase. For some, the “rule of law” signifies a legal order “in which the human spirit can develop in freedom and diversity.” For others, the “rule of law” is more closely identified with the regulation of the material conditions deemed necessary for economic growth and development. For still others, the phrase “rule of law” is better understood as a legal maxim, representing the aspiration that “no man is above the law” or the claim that a particular political community is “ruled by law, not by men.” Not infrequently, the phrase “rule of law” is meant to signal a fundamental difference between political orders that are presumed to encourage individual freedom and autonomy, and regimes that are deemed despotic, arbitrary, oppressive, or otherwise in opposition to presumed core western political values.

Although the phrase “rule of law” has undoubted importance in the history and development of the legal and political order in the United States of America, its origins are readily traced to the ancient world. Indeed, there is a long and venerable tradition of investigating the relationship between law and politics. This ancient tradition of thought had a formative influence on the framers of the United States Constitution, but its influence has been much wider. It may be said that reflection on the “rule of law” is one of the bedrock features of the western legal tradition, a tradition that encompasses ancient, medieval, and early modern legal and political traditions and that distinguishes “western civilization” from other modes of human existence.

This course will examine the origins and development of the “rule of law” across the ancient, medieval and modern West. Among the questions we will have the opportunity to ask are: What is law? What is the relationship between law and the good? In what way can law be said to rule? What is the relationship between law and human freedom? What is the relationship between law and politics? In asking these questions, the course will also examine the claim that the rule of law signifies something distinctive to western civilization and its relationship to law.

**Course Format:** This is an upper level lecture course that meets twice a week in two 75 minute sessions. It is designed for majors in History and Legal Studies, but it is not restricted to students from those majors. There is no separate discussion section attached to this course. Each class period will be a combination of lecture materials, typically

related to some pre-assigned readings, and more open-ended discussions of themes addressed in lecture or readings.

**Course Examinations:** The course will have a midterm exam and a final exam. The midterm will be October 26<sup>rd</sup>. The final will be given on December 17<sup>th</sup> from 2:45-4:45. Each exam will account for 40% of your grade, with the remaining 20% determined by attendance and participation in class.

**Attendance:** It is not possible to pass this course if you have more than 5 absences.

**Texts:**

1) Brian Tamanaha, *On the Rule of Law: History, Politics, Theory* (Cambridge University Press, 2004). Available in the University Bookstore.

2) Roger Berkowitz, *The Gift of Science: Leibniz and the Modern Legal Tradition* (Fordham University Press, 2010)

3) Plato, *Crito* (available online at <http://classics.mit.edu/Plato/crito.html>)

**Week 1**

Introduction to the course

Readings:

Tamanaha, *On the Rule of Law*, pp. 7-14

Plato, *Crito* (available electronically)

**Week 2**

Medieval accounts of the rule of law and the good for man

Reading:

Tamanaha, pp. 15-31.

**Week 3**

Kingship and Law in the Middle Ages

Reading:

Bracton, *De laudibus* pp. 19-39 (available electronically)

#### **Week 4**

God's justice, the devil's justice and salvation in medieval Christendom

Reading:

Anonymous, *Processus Sathanae* (distributed electronically)

#### **Week 5**

Can the Sovereign do wrong?

Thomas Hobbes (reading to be distributed electronically)

#### **Week 6-7**

Leibniz and the project of codification

Reading:

Roger Berkowitz, *The Gift of Science: Leibniz and the Modern Legal Tradition* (Harvard, 2005; Fordham, 2010), pp. 1-70

\*\*\*\*\*

#### **Mid-term Exam – October 26th**

\*\*\*\*\*

#### **Week 8**

Legality and Security

Reading: Berkowitz, pp. 71-101

#### **Weeks 9-10**

Positive Law and Justice

Reading: Berkowitz, pp. 103-167

## **Week 11**

Locke, Montesquieu, and the Framers of the United States Constitution

Readings:

Tamanaha, *The Rule of Law*, chapter 4.

## **Week 12**

Lamenting the decline of the rule of law

Reading:

Tamanaha, *The Rule of Law*, chapter 5

E. Barker, "The 'Rule of Law,'" 1914 *Political Quarterly* 116.

H.W. Arndt, "The Origins of Dicey's Concept of the 'Rule of Law'" 31 *Australian Law Journal* 117 (1957) (in Course Reader).

## **Week 13**

A Revival

Readings:

Tamanaha, *The Rule of Law*, chapter 10

Joseph Raz, "The Rule of Law and It's Virtue", 93 *The Law Quarterly Review* (1977) (in Course Reader)

## **Week 14**

Examples at the level of constitutional law

Readings:

*Lochner v. New York*, 198 US 45 (1905)

*Brown v. Board of Education*, 347 US 483 (1954)

## **Week 15**

Judgment and the Rule of Law

Reading:

(To be distributed electronically)