

## History 459



Spring 2022

Tu-Th 1:00-2:15

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Office hours: In person: Mondays 1-3 in Humanities 4101

Remote: by appointment

### The History of the Rule of Law

**Course Overview:** It is 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 and medieval worlds. 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 long history of law and institutions to which we are heirs. 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 for 75 minutes on Tuesdays and Thursdays. It is designed for majors in History and Legal Studies, but it is not restricted to students from those majors. Each class period will be a combination of lecture materials, typically related to some pre-assigned readings, as well as more far-ranging 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 Thursday, March 10th . The final will be given on the date specified by the college, which is May 8th. There are also required weekly responses to the assigned readings. On the canvas page you will answer three prompts each week with a few short sentences. The weekly reading responses are 30% of your grade. The midterm is 35% of your grade and the final is 35% of your grade. The course will be graded on the letter grade scale (A 100-93, AB 92.5-87.5, B 87.4-82, BC 81.4-78, C 77.4-70, D 69.5-60, F 59.4-0)

**Attendance:** Attendance for this class is strongly encouraged. However, we are still in a pandemic. Please refer to and follow all campus guidelines regarding Covid-19.

**Texts:**

All required readings will be posted on the Canvas page for this class.

**Course Objectives and Learning Outcomes:**

- To become familiar with the debates and issues that arise around the term “the rule of law.”
- To understand the historical developments undergirding modern law and modern legal institutions
- To understand how conceptions of “the rule of law” have been and continue to be mobilized to expand or restrict individual freedom and to exploit or preserve economic and natural resources.

## **Week 1 (January 25 and 27)**

Introduction to the course

Readings: Tamanaha, *On the Rule of Law*

## **Week 2 (February 1 and 3)**

### **Foundational Texts**

Institutional and Subjective Perspectives on the Rule of Law

Readings: *Magna Carta*  
*Crito*

Assignment: 1<sup>st</sup> reading response due Friday, February 4.

## **Week 3 (February 8 and 10)**

### **Roman Law and the Rule of Law**

Readings: Tamanaha, "Historical Background"  
Donahue, The Emperor, The Jurist, and the Horse.

Assignment: 2<sup>nd</sup> reading response due Friday, February 11.

## **Week 4 (February 15 and 17)**

### **Fourth Lateran Council and 1215 revisited**

Readings: Canons of the Fourth Lateran Council  
Assignment: 3<sup>rd</sup> Reading Response due Friday, February 18.

## **Week 5 (February 22 and 24)**

### **The Rule of Law and Divine Power**

Reading: Shoemaker, "*The Devil's Justice*"  
*Mascarón*  
Assignment: 4<sup>th</sup> Reading Response due Friday, February 25.

## **Week 6 (March 1 and 3)**

### **The Rule of Law and Judicial Power: Lord Coke and King James 1**

Readings: *Prohibitions del Roy*  
Assignment: 5<sup>th</sup> Reading Response due Friday, March 4.

## **Week 7 (March 8 and 10)**

### **The English Bill of Rights**

Readings: The English Bill of Rights  
Assignment: NO weekly Reading Response (Midterm this week)

### **Mid-term Exam – Thursday, March 10th**

## **Week 8 (March 22 and 24)**

### **The Rule of Law and the Common Law Jury**

Readings: *Bushell's Case*  
Assignment: 6<sup>th</sup> weekly Reading Response due March 25

## **Week 9 (March 29 and 31)**

### **The Federalists Papers and the Rule of Law**

Readings: Tamanaha, "*Locke, Montesquieu, and the Federalist Papers*"  
Assignment: 7<sup>th</sup> Weekly Reading Response due April 1

## **Weeks 10 (April 5 and 7)**

### **The US Constitution and the Rule of Law**

Readings: The US Constitution  
Assignment: 8<sup>th</sup> weekly Reading Response due April 8

## **Week 11 (April 12 and 14)**

### **Judicial Review and the Rule of Law**

Readings: *Marbury v. Madison* and *Cherokee Nation v. Georgia*

Assignment: 9<sup>th</sup> weekly Reading Response due April 15.

## **Week 12 (April 19 and 21)**

### **Slavery and the Rule of Law**

Readings: *Scott v. Sandford*

Assignment: 10<sup>th</sup> weekly Reading Response due April 22.

## **Week 13 (April 26 and 28)**

### **Lamenting the decline of the rule of law**

Reading: Tamanaha, "*Conservatives Warn*"

Assignment: 11<sup>th</sup> Weekly Reading Response due April 29.

## **Week 14 (May 3 and 5)**

### **The Rule of Law in the 20th Century**

Readings: Tamanaha, "*Formal Theories*" and

*Lochner v. New York* and *Brown v. Board of Education*

Assignment: 12<sup>th</sup> weekly Reading Response due May 6.