**Rule of Law**

**CWCV 2010-001**

**Professor Zywicki**

**Fall 2023**

**(*Updated August 31, 2023)***

**COURSE OVERVIEW/DESCRIPTION:**

The Rule of Law provides the fundamental foundation of freedom, capitalism, and the Constitution. Yet today in the United States it faces unprecedented threats. This class will examine the rule of law as a historical development, philosophical concept, and institutional reality, as well as contemporary threats to the rule of law. Among other topics, the class will discussion the intellectual sources of the rule of, the unique institutional foundations in the Western world that led to its emergence in the Middle Ages, and its practical value in terms of the preservation of freedom and capitalism. The course will then address threats to the rule of law, including “Woke” ideology, the rise of anti-capitalist attitudes, crony capitalism, and intellectual attacks on concepts such as freedom of speech, due process, and other formal and informal institutional norms.

**COURSE MATERIALS:**

This course has no required textbook. All readings are either freely available or I will hand them out in class.

**Recommended Texts:**

Nadia E. Nedzel and Nicholas Capaldi, *The Anglo-American Conception of the Rule of Law* (2019) (hereinafter “Nedzel and Capaldi”).

*The Cambridge Companion to the Rule of Law* (Jens Meierhenrich and Martin Loughlin, eds., 2021) (hereinafter “*Cambridge*”(.

**CONTACT INFORMATION:** [tozy2171@colorado.edu](mailto:tozy2171@colorado.edu)

**CLASS MEETINGS:** Class will meet every Monday and Wednesday from 3:35-4:50. We will also have several distinguished speakers during the semester and in some instances in lieu of class students will be required to either attend those lectures live or if that is not possible to watch a recorded version of their talk.

From time to time it will be necessary for me to cancel class because of other professional commitments. In lieu of class meeting I might assign an alternative assignment for those weeks. If meeting is not feasible due to weather or illness, I might instead plan to meet by Zoom and will send a link at a later date if necessary.

**OFFICE HOURS:** Office hours will be before class on Monday and Wednesday from 2:15-3:30 and by appointment. I sometimes have travel or other professional commitments that may interfere with my ability to hold office hours at the stated time on any week; therefore, if you intend to come to office hours please try to let me know in advance via email so I can confirm I will be available. I am also happy to meet via Zoom.

**LEARNING OUTCOMES AND COURSE GOALS:** By the end of the course students should have acquired/be able to:

* Define the concept of the “rule of law”
* Identify the historical roots of the rule of law
* Critically discuss the institutional foundations necessary to support the rule of law
* Describe the sources of the rule of law
* Critically examine contemporary threats to the rule of law

**GRADING**

This is a small, discussion-oriented seminar-style class. For class meetings to be productive, it is essential that students prepare in advance by reading assigned material and actively participate in class discussion. In order to facilitate class discussion, at least once each week students submit several “Reaction Essays” during the course of the semester that consist of a short essay (approximately 1-2 pages in length) that summarizes a reading, reacts to an idea or argument in the readings for that week’s class sessions. Reactions may consist of challenges, questions for clarifications, something you agree or disagree with, connections with other works assigned in this class and other thinkers with whom students might be familiar, or extensions and applications to contemporary or historical questions and issues. *Even if you do not submit a reaction essay for a given class, students will be expected to come to each class with at least one thing they want to say about one of the readings*. If you choose to submit a reaction essay, reaction essays will be due at 1:00 pm. on each day we have class.

In addition, there will be a term paper of 3-5 pages that will ask you to discuss some element of the topics regarding the rule of law covered during the semester.

There will also be a comprehensive final exam that will cover all the material addressed during the semester.

You can also gain extra credit of up to 2 points for attending or viewing online the presentations by the 4 Benson Center invited lecture series.

* 15 Reaction Essays (2 points each) 30%
* Class Participation 20%
* Term Paper 25%
* Final Exam 25%
* Visiting Lectures (EC) 8%

**INSTRUCTOR EXPECTATIONS**

* Students are expected to be prepared for class each day.
* Expected reading assignments for each class are provided below but are subject to revision as the semester proceeds. Efforts will be made to remain consistent with this expected schedule but will be adapted to the needs of the class. Reading assignments for each subsequent class will be announced at the conclusion of each class.

**COURSE RULES/STRUCTURE:**

* As mentioned, this is a discussion-oriented course. I will generally lead a discussion. If discussion is not forthcoming, I reserve the right to “cold call” students to contribute their thoughts to the discussion.

**EMAIL COMMUNICATION*:*** If you have a question about course logistics or procedures it is best to communicate via email a the above-indicated email address.

**ATTENDANCE:** Regular and punctual attendance are required to earn academic credit. Should circumstances occur where you anticipate the possibility of missing a substantial number of class sessions (e.g. a serious illness), you should immediately contact the appropriate university officials as well as me.

**CLASS RECORDINGS PROHIBITED:** No portion of a class session or an examination may be preserved by means of a recording device such as an audio recording device or camera. Any exceptions to this policy must be expressly permitted in writing by me.

**ACADEMIC INTEGRITY AND CLASSROOM DECORUM:**It is expected that students adhere to the University of Colorado Student Honor Code, which is here: <https://www.colorado.edu/sccr/honor-code>. Students may not use AI text generators for any written assignment, including the midterm or final exam.

Class sessions will be conducted according to the principles established by the United States Constitution, the University of Colorado Regents Laws and Policies governing free speech and expression, which is available here: <https://www.colorado.edu/free-expression#faqs>. In addition, class meetings shall also be governed by the Statement of Faculty Principles on Classroom Dialogue and Debate adopted by Antonin Scalia law school, which is available here: <https://www.law.gmu.edu/about/commitment_to_open_dialogue/>. Enrollment in this class shall constitute voluntary consent to be governed by those rules.

**Reading Assignments**

**PART I: INTRODUCTION**

**Class 1: August 28 What is the Rule of Law?**

<https://worldjusticeproject.org/about-us/overview/what-rule-law>

<https://www.uscourts.gov/educational-resources/educational-activities/overview-rule-law>

<https://www.americanbar.org/groups/public_education/resources/rule-of-law/>

<https://www.un.org/ruleoflaw/what-is-the-rule-of-law/>

<https://unglobalcompact.org/what-is-gc/our-work/governance/rule-law>

<https://plato.stanford.edu/entries/rule-of-law/#OneIdeaAmonOthe> (Section 1, “One Ideal Among Others”)

Todd J. Zywicki, “The Rule of Law, Freedom, and Prosperity” 10 *Supreme Court Economic Review* 1 (2003).

Optional

“Constitutional Principles: The Rule of Law,” available <https://www.youtube.com/watch?v=q0MTEm2a7PA>.

**Class 2: August 30 “Thin” versus “Thick” views of the Rule of Law**

<https://plato.stanford.edu/entries/rule-of-law/#OneIdeaAmonOthe> (Section 2, “The Contestedness of the Rule of Law”)

Robert A. Stein, “What Exactly is the Rule of Law?” 57 *Houston L. Rev.* 185 (2019).

**Sept 4**

**No Class—Labor Day**

**PART II: FUNDAMENTAL CONCEPTS IN THE RULE OF LAW**

**Class 3: Sept 6 Vernon Smith Pre-Lecture by Johanna Jaehrig**

Douglas A. Irwin, “Adam Smith’s ‘Tolerable Administration of Justice’ and the Wealth of Nations,” Working Paper 20636, <http://www.nber.org/papers/w20636> (Oct. 2014).

Optional

Vernon Smith, “Adam Smith’s Emergent Rules of Justice,” Law and Liberty, <https://lawliberty.org/forum/adam-smiths-emergent-rules-of-justice/> (June 1, 2023).

**September 6 Vernon Smith Lecture (Extra Credit)**

**Sept 11 Introduction Continued and The Greeks**

Ron Cass, *The Rule of Law in America* at 1-20, available <https://books.google.com/books?id=_1UmQalPtqsC&printsec=frontcover#v=onepage&q&f=false>

<https://plato.stanford.edu/entries/rule-of-law/#OneIdeaAmonOthe> (§3,1, “History of the Rule of Law: Aristotle”).

Optional

<https://www.crf-usa.org/bill-of-rights-in-action/bria-26-1-plato-and-aristotle-on-tyranny-and-the-rule-of-law.html>

Steve Wexler and Andrew Irvine, “Aristotle on the Rule of Law,” 23(1) *Polis* 1 (2006).

Benjamin Constant, “The Liberty of the Ancients Compared with that of the Moderns” (1819), edited at <http://faculty.umb.edu/steven.levine/Courses/Action/Constant.pdf>.

**Sept 13 A.V. Dicey**

Albert Venn Dicey, *Introduction to the Study of the Law of the Constitution* pp. 107-123 (1915), available <https://oll.libertyfund.org/title/michener-introduction-to-the-study-of-the-law-of-the-constitution-lf-ed>

<https://plato.stanford.edu/entries/rule-of-law/#OneIdeaAmonOthe> §3.4 “Dicey”

Optional

Mark D. Walters, “The Spirit of Legality: A.V. Dicey and the Rule of Law,” in *Cambridge* at 153-171.

**Sept 18 F.A. Hayek and the Rule of Law**

F.A. Hayek, *The Road to Serfdom* Ch. 6 (“Planning and the Rule of Law”)

<https://plato.stanford.edu/entries/rule-of-law/#OneIdeaAmonOthe> (§3.5 Hayek).

Optional

“Essential Hayek: The Rule of Law,” available <https://www.youtube.com/watch?v=mBhwwudLRT0>.

**Sept 20 Hayek and the Rise of the Rule of Law**

F.A. Hayek, *The Constitution of Liberty* chs 11 & 12

**Sept 25** **F.A. Hayek and the Meaning of the Rule of Law**

F.A. Hayek, *The Constitution of Liberty* Ch 14

**Sept 27** **F.A. Hayek, the Common Law, and the Rule of Law**

F.A. Hayek, *Law, Legislation, and Liberty: Rules and Order* Vol. 1, ch 5

**Oct 2 F.A. Hayek on Legislation, Administrative Law, and the Rule of Law**

F.A. Hayek, *Constitution of Liberty* ch 13.

F.A. Hayek *Law, Legislation, and Liberty: Rules and Order* Vol. 1, ch 6

**Oct 4 Michael Oakeshott**

Michael Oakeshott, “The Rule of Law”

Timothy Fuller, “Michael Oakeshott on the Rule of Law and the Liberal Order,”

<https://lawliberty.org/forum/michael-oakeshott-on-the-rule-of-law-and-the-liberal-order/>.

**October 4 Kim Strassel Lecture**

**Oct 9 Legal Positivism and Formalism**

H.L.A. Hart, *The Concept of Law* ch. 2 (“Laws, Commands, and Orders”)

Jospeh Raz, “The Rule of Law and Its Virtue”

**Oct 11 Internal Morality of Law**

Lon Fuller, *The Morality of Law* Ch II (pp. 33-94).

<https://plato.stanford.edu/entries/rule-of-law/#:~:text=The%20most%20important%20demand%20of,their%20own%20preferences%20or%20ideology> (§3.6 “Fuller”).

**PART III: SOURCES OF THE RULE OF LAW**

**Oct 16** **Natural Law: John Locke**

John Locke, *Second Treatise of Government* Ch. XVIII (“Of Tyranny,” §§199-210).

Declaration of Independence

**Oct 18 Common Law**

Edward S. Corwin, “The ‘Higher Law’ Background of American Constitutional Law: Part I,” 42(2) *Harvard Law Review* 149, 169-185 (1928).

Edward S. Corwin, “The ‘Higher Law’ Background of American Constitutional Law: Part II,” 42(3) *Harvard Law Review* 365, 365-80 (1928).

**October 18 Jennifer Sey Lecture**

**Oct 23 Tradition and the Rule of Law**

Russell Kirk, “Burke, Hume, Blackstone and Constitution of the United States”

Edmund Burke, “Speech On Conciliation with the Colonies”

David Hume, “On the Origins of Government”

**Oct 25 The Rule of Law As Struggle**

Stefan Voigt, “Breaking with the Notion of Social Contract: Constitutions as Based on Spontaneously Arisen Institutions,” 10 *Constitutional Political Economy* 283-300 (1999).

Barry R. Weingast, “The Political Foundations of Democracy and the Rule of Law,” 91(2) *The American Political Science Review* 245-263 (1997)

Magna Charta (1215)

**Oct 30**

**No Class**

**Nov 1**

**No Class**

**Nov 6 Contractarianism**

Geoffrey Brennan and James M. Buchanan, *The Reason of Rules*, ch 2 (pp. 23-37)

**Nov 8 Contractarianism Applied**

Robert H. Bork, *The Tempting of America: The Political Seduction of the Law* 133-161 (1991)

*Marbury v. Madison* (1803)

**Nov 13 The Rule of Law as a Law of Rules**

Antonin Scalia, “The Rule of Law as a Law of Rules,” 56(4) *University of Chicago Law Review* 1175 (1989)

**IV. INSTITUTIONAL FOUNDATIONS OF THE RULE OF LAW**

**Nov 15 Institutional Predicates for the Rule of Law: Separation of Powers**

Berman, *Law and Revolution* Introduction

Federalist No. 51

**November 15 Scott Atlas Lecture**

**Nov 20 No Class—Fall Break**

**Nov 22 No Class—Fall Break**

**Nov 27 Institutional Predicates for the Rule of Law: Federalism**

Nathan Rosenberg and L.E. Birdzell, *How the West Grew Rich: The Economic Transformation of the Industrial World* Introduction (pp. 3-37), ch 4 (pp. 113-143) (1988).

**Nov 29 Economic Effects of the Rule of Law**

Sanjai Baghat and Glenn Hubbard, The Rule of Law

The Rule of Law and Economic Growth

**V. THREATS TO THE RULE OF LAW**

**Dec 4 “Woke” Law**

Herbert Marcuse, “Repressive Tolerance”

Morton J. Horwitz, “The Rule of Law: An Unqualified Human Good?” 86 *Yale L. J.*562 (1977)

Emily Ekins, “What Americans Think about Poverty, Wealth, and Work,” Cato Institute (2019)

**Dec 6 The Regulatory State**

Todd Zywicki, “Restoring the Rule of Law in Finance,” Heritage Foundation

**Dec 11 Crises**

Eric A. Posner and Adrian Vermeule, *The Executive Unbound: After the Madisonian Republic* Introduction (pp. 3-17) (2011)

Todd J. Zywicki, “The Rule of Law During Times of Economic Crisis,” in *Economic and Political Change After Crisis: Prospects for Government, Liberty and the Rule of Law* (Stephen H. Balch and Ben Powell, eds., 2016).

**Dec 13 Interest Groups and Constitutional Change**

A.C. Pritchard and Todd J. Zywicki, “Finding the Constitution: An Economic Analysis of Tradition’s Role in Constitutional Decision-Making,” 77 N.C. L. Rev. 409 (1999)

Todd Zywicki, Rent-Seeking, Crony Capitalism, and the Crony Constitution, 23 *Supreme Court Economic Review* 77 (2016).

**Exam:**