

Module 5 Study Guide: The Hierarchy of Law, Due Process, and the Law of the Land

The Structural Physics of Government, Authority Tested by Reason

Lesson Summary

This module examines the "Structural Physics of Government," exploring the foundational principles that support and restrain state power. Using the analogy of a "cage" (the Constitution) and the "creature" (government power), the lesson establishes that the Constitution is not a provider of rights but a container designed to restrain authority. For this container to function, it must rest upon a foundation of "granite", pre-constitutional law, often referred to as the Law of Nature or the rule of right. Without this prior, immutable foundation, the Constitution becomes elastic and incapable of providing genuine restraint against the intrinsic voracity of power.

The lesson further delineates the hierarchy of law, tracing authority from the Law of Nature down through fundamental maxims, the Constitution, and finally to specific enactments and judicial applications. By distinguishing between "enforcement" (lawful force aligned with delegation and reason) and "violence" (force lacking structural authority), the module provides a framework for testing the legitimacy of any governmental act. Key historical figures like Sir Edward Coke and William Blackstone are referenced to illustrate that law precedes rulers and that any act contradicting the fundamental rule of right is structurally void from its inception (*void ab initio*).

Key Maxims

The following maxims serve as the "bones of reason" and structural constraints within the architecture of law:

- **No man may be judge in his own cause:** This forbids self-judging and ensures impartiality, preventing courts from becoming instruments of personal power.
- **Hear the other side:** No person should be condemned or deprived of rights without a hearing and an opportunity to answer.
- **Delegated power cannot be redelegated:** Authority granted in trust to a specific body cannot be transferred to another without breaking the chain of legitimacy.
- **Derivative power cannot exceed its source:** An agent cannot possess more authority than the principal who delegated it; the stream cannot rise higher than the spring.
- **Fraud vitiates everything:** Deception destroys the validity of an act or process from the very beginning, rendering the resulting structure poisoned and defective.

The Rule of Law: Power, Authority and Accountability

Quiz: Structural Principles and Hierarchy

1. How does the module describe the relationship between the Constitution and government power?
2. What is the "delegation paradox" as described in the text?
3. According to Sir Edward Coke, what is the relationship between a ruler (the King) and the law?
4. How does the module distinguish between "Enforcement" and "Violence"?
5. What are the two "instruments" Coke provided to test the exercise of power?
6. According to William Blackstone, what is the validity of human laws that contradict the Law of Nature?
7. What is the structural significance of the phrase "in pursuance thereof" in Article VI of the Constitution?
8. How does the module define "Due Process" in a structural context?
9. What does the legal term *void ab initio* mean regarding unconstitutional acts?
10. What is the historical origin and meaning of the phrase "Law of the Land"?

Answer Key

1. The Constitution is described as a "cage" or container designed to restrain the "creature" of government power. It is not a grant of rights or a provider of freedom, but a structural tool meant to confine authority so it does not devour liberty and property.
2. The delegation paradox posits that since delegation presupposes ownership, the People must have possessed lawful authority prior to the Constitution in order to delegate it. Therefore, the source of authority must exist before the written instrument that establishes the government.
3. Coke declared that the King is "under God and the law," not above it. This reframed the architecture of authority by asserting that law exists prior to the throne and that power does not create law, but is instead restrained by it.
4. Enforcement is force that is aligned with delegated authority, reason, and the rule of right, tracing its pedigree back through the People. Violence is force that lacks proper delegation or violates the rule of right, regardless of whether it is carried out by officials in uniform.
5. The two instruments are "authority" and "reason." Authority asks for the warrant or chain of title from the People, while reason asks if the act conforms to the rule of right and the fundamental maxims of law.
6. Blackstone asserted that the Law of Nature is superior to any other and that no human laws are of any validity if they are contrary to it. Human enactments only derive force if they align, mediately or immediately, with this original natural law.
7. This phrase acts as a structural filter, indicating that only laws made in conformity with the Constitution's delegated powers share in supremacy. If a statute exceeds its delegation or contradicts constitutional limits, it is not "in pursuance" of the Constitution and is not supreme.

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8. Due process is defined as a "condition precedent," or a prerequisite that must occur before lawful action can be taken. It is the operational mechanism that ensures both authority and reason are present before the government may restrain liberty or seize property.
9. *Void ab initio* means "void from the beginning." It implies that an unconstitutional act never possessed lawful authority, confers no rights, and is, in legal contemplation, as inoperative as if it had never been passed.
10. The phrase originates from the Magna Carta (1215) and refers to settled, pre-existing common law operating under established principles of justice. It is a term of limitation that prevents the legislature from redefining rights at will through mere enactment.

Essay Questions

1. **The Foundation of Granite:** Analyze the structural necessity of a pre-constitutional foundation for the law. Why is a "floating cage" unable to restrain government power effectively?
2. **The Hierarchy of Law:** Explain the vertical nature of the hierarchy of law. How do authority and reason flow and test upward and downward through the different "rungs" of the system?
3. **The Role of Maxims:** Discuss why legal maxims are referred to as the "bones of reason" and "axioms of jurisprudence." How do these self-evident truths prevent interpretation from becoming invention?
4. **Jurisdictional Gates:** Explore the relationship between jurisdiction, the Fifth Amendment, and the use of force. Why must jurisdiction attach before force can be considered lawful enforcement?
5. **Structural Testing:** Evaluate the "Four Structural Tests" mentioned in the module. How does the failure of a single test impact the legal validity of a governmental act?

Glossary of Key Terms

Term	Definition
Axiom	A self-evident truth or irreducible principle accepted as a foundational starting point for reasoning.
Condition Precedent	A prerequisite or requirement that must occur before a lawful action or deprivation of rights can take place.
Delegation	The act of a principal (the People) granting limited authority to an agent (government) through a written instrument.
Due Process	The operational mechanism and gate that ensures authority and reason are present before force is applied.
Fundamental Law	The level of hierarchy consisting of maxims and settled common-law principles that translate natural law into structural constraints.
In Pursuance Thereof	A qualifying phrase in Article VI meaning "in accordance with" or "in conformity to" the Constitution.

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Jurisdiction	The lawful authority of a body to act, which arises only through compliance with the hierarchy of law and due process.
Law of Nature	The rule of right discoverable by reason; an immovable, transcendent standard by which all human acts are measured.
Law of the Land	An inherited term of art synonymous with due process, referring to pre-existing law grounded in fundamental principles.
Maxim	A precise articulation of the Law of Nature in operation; a foundational principle of the greatest authority in jurisprudence.
Principal	The original owner of authority (the People) who establishes a trust and delegates power to agents.
Void ab initio	A legal status meaning an act was null and lacked any structural authority from its very inception.

Homework Assignment: Audit Authority

Objective: To move from theoretical understanding to practical application by performing a structural audit of a specific governmental act.

1. **Select an Act:** Identify a single statute, regulation, court order, or local ordinance to audit.
2. **Trace the Delegation:** Locate the specific constitutional grant of authority that allows for this act. If no textual delegation can be found, note where the chain breaks.
3. **Test the Scope:** Determine if the act stays within its delegated boundaries. Apply the maxim: "Derivative power cannot exceed its source." An agent cannot possess more authority than the principal who delegated it; the stream cannot rise higher than the spring.
4. **Test the Maxims:** Analyze whether the act violates fundamental axioms of reason. For example, does it allow for self-judging or deny the right to a hearing?
5. **Verify Due Process:** Assess if jurisdiction was properly established before force or deprivation occurred. Did authority and reason precede the application of power?
6. **Final Determination:** Based on your findings, decide if the act qualifies as the "Law of the Land" or if it is structurally void. Prepare a summary focusing strictly on the structural integrity of the act, setting aside personal or political preferences.

Foundational Maxims That Restrain Power

(Module 5 Companion Handout)

I. Law Precedes Power

Focus: Law as a rule of right existing prior to the state.

- **Law is a rule of right.** (Bouv. 136; *Jus est norma recti*)
- **Law is from everlasting.** (Jenk. Cent. p. 34; *Lex est ab æterno*)
- **The laws of nature are unchangeable.** (Cycl. Dict. 566; *Jura naturæ sunt immutabilia*)
- **Law is made to prevent the stronger from having the power to do everything.** (Dav. Ir. K.B. 36)
- **Law favors truth, faith, and certainty.** (Wing. Max. 154)
- **The law always intends what is agreeable to reason.** (Co. Litt. 78b)
- **Law is the dictate of reason, which commands what is right, useful and necessary, and forbids the contrary.** (Co. Litt. 319b)
- **Reason and authority are the two brightest lights of the world.** (Weisman 11u; *Ratio et auctoritas, duo clarissima mundi lumina*)
- **Reason is the soul of law; and when the reason of any law ceases, the law ceases also.** (Co. Litt. 70b; *Cessante ratione legis, cessat et ipsa lex*)
- **Nothing that is against reason is lawful.** (Co. Litt. 97b)
- **Where the law is uncertain, there is no law.** (Weisman 15e; *Ubi jus incertum, ibi jus nullum*)
- **An act of legislature to have force of law must be intelligibly expressed and when too vague is a nullity.** (Weisman 15g)
- **The law compels no one to do anything which is useless or impossible.** (Co. Litt. 231b; *Lex neminem cogit ad vana seu impossibilia*)
- **No one is bound to an impossibility.** (Jenk. Cent. 7; *Nemo tenetur ad impossibile*)
- **Natural law has its foundation in the will of God.** (1 Bl. Comm. 39; *Jus naturale*)
- **The male sex always includes the female.** (Dig. 32, 62; *Masculinum genus omne, masculum et foeminum continet*)

II. Rights Are Not Granted

Focus: Defining rights as exclusive boundaries and distinguishing them from privileges.

- **Individual liberties are antecedent to all government.** (C.L.M.)
- **Freedom (liberty) does not admit of valuation.** (Peloubet p. 153; *Libertas est res inestimabilis*)
- **Every man's house is his castle.** (5 Coke, 91)
- **What is mine cannot be taken away without my consent.** (Weisman p. 19; *Id quod nostrum est, sine facto nostro ad alium transferri non potest*)
- **What costs others is not a right.** (Derived from Weisman p. 86; *Nemo punitur sine injuria*)

- **No one can transfer to another a greater right than he himself has.** (Co. Litt. 309; *Nemo plus juris ad alium transferre potest, quam ipse habet*)
- **A privilege is a personal benefit, and dies with the person.** (Peloubet p. 237; *Privilegium est beneficium personale, et extinguitur cum persona*)
- **The right of blood and kindred cannot be destroyed by any civil law.** (Dig. 50, 17, 9; *Jura sanguinis nullo jure civili dirimi possunt*)
- **Natural right is that which has the same force among all men.** (7 Coke, 12)
- **Rights never die.** (Bouv. 156)

III. Delegation and Authority

Focus: The "Stream and Source" principle; agents cannot exceed their grant.

- **A delegated power cannot be again delegated.** (2 Inst. 597; *Potestas delegata non potest delegari*)
- **The derivative power cannot be greater than the original from which it is derived.** (Noy, Max.; *Derivativa potestas non potest esse major primitiva*)
- **Power can never be delegated which the authority said to delegate never possessed itself.** (47 U.S. 344)
- **A power is strictly interpreted.** (Jenk. Cent. p. 17; *Potestas stricte interpretatur*)
- **The legality of power must be estimated not by what it will do, but by what it can do.** (256 U.S. 135)
- **Where there is no authority for establishing a rule, there is no necessity of obeying it.** (Black's 2d 1181; *Ubi non est condendi auctoritas, ibi non est obediendi necessitas*)
- **Nothing is so becoming to authority as to live in accordance with the laws.** (Fleta, lib. 1; *Nihil tam proprium est imperii quam legibus vivere*)
- **In the presence of the superior power, the inferior power ceases.** (Jenk. Cent. 214; *In praesentia majoris, cessat potentia minoris*)
- **If a man grant that which is not his, the grant is void.** (Watk. Conv. 191)

IV. The Constitution as a Trust Instrument

Focus: Fiduciary duty and the fixed nature of the "Cage."

- **From the words of the law there must be no departure.** (5 Coke, 119; *A verbis legis non est recedendum*)
- **When in the words there is no ambiguity, then no exposition contrary to the words is to be made.** (Weisman 22hh; *Quoties in verbis nulla est ambiguitas, ibi nulla expositio contra verba fienda est*)
- **That is a cursed interpretation which corrupts the text.** (Weisman 22s; *Maledicta est expositio quae corrumpit textum*)
- **The best interpreter of a statute is the statute itself.** (Weisman 22bb; *Optima statuti interpretatrix est ipsum statutum*)
- **Contemporaneous exposition is the best and strongest in the law.** (Weisman 22z; *Contemporanea expositio est optima et fortissima in lege*)
- **Things derogatory to the common law are to be strictly interpreted.** (Jenk. Cent. 29)

- **An unconstitutional Act is not a law... it is as inoperative as though it had never been passed.** (*Norton v. Shelby County*)

V. Jurisdiction and Judgment

Focus: The structural boundary of judicial action.

- **An equal has no power over an equal.** (Jenk. Cent. 174; *Par in parem imperium non habet*)
- **In the greatest power there is the least freedom.** (Hob. 159; *In maxima potentia minima licentia*)
- **A judgment given by one who is not the proper judge is of no force.** (10 Coke, 70; *Sententia a non iudice lata nemini debet esse perniciosa*)
- **A judge who exceeds his office or jurisdiction is not to be obeyed.** (Weisman p. 55; *Extra territories jus dicenti non paretur impune*)
- **Fraud vitiates everything.** (Weisman p. 41; *Fraus omnia vitiat*)
- **What is invalid from the beginning cannot be made valid by subsequent act.** (Dig. 50, 17, 29; *Quod ab initio non valet, in tractu temporis non convalescit*)

VI. Force and Consent

Focus: Distinguishing lawful enforcement from private violence.

- **Nothing is so contrary to consent as force and fear.** (Weisman 21i; *Nihil consensui tam contrarium est quam vis atque metus*)
- **Consent makes the law.** (Weisman 21b; *Consensus facit legem*)
- **He who can will has a right to refuse to will.** (Weisman 21d; *Ejus est nolle, qui potest velle*)
- **A benefit is not conferred on one who is unwilling to receive it.** (Weisman 12b; *Invito beneficium non datur*)
- **Where there is no act, there can be no force.** (Weisman 2i)
- **Remove the cause and the effect will cease.** (Weisman 14i; *Sublata causa, tollitur effectus*)
- **That which is null produces no effect.** (Weisman 14q; *Quod nullum est, nullum producit effectum*)

The Granite Principle Beneath the Constitution

Taken together, these maxims establish the structural hierarchy:

1. **Law** (Rule of Right)
2. **People** (Possessors of Right / Settlers)
3. **Delegation** (Limited Grant of Power)
4. **Constitution** (The Written Instrument / The Cage)
5. **Officers** (Agents / Trustees Bound by Oath)

**Power that exceeds its delegation is void. Force without lawful cause is violence.
Interpretation that enlarges power destroys structure.**