

Module 6 Study Guide: The Judiciary - Jurisdiction, Judgment, and Nullity

Foundational Structure of the American Judiciary

Lesson Summary

This module examines the internal machinery of the American judiciary, shifting the focus from courtroom drama and legal outcomes to the underlying structural design established by the Constitution. It posits that the judiciary possesses "neither force nor will, but merely judgment," acting as a surveyor rather than an architect. In this capacity, the court does not create law or social policy but measures the acts of the legislature against the "deed" of the Constitution, which represents the sovereign will of the people. By adhering to this hierarchy of law, the judiciary serves as a critical checkpoint, ensuring that government agents do not exceed the strictly delegated authority granted to them.

The module further explores the essential prerequisites for lawful judicial action, specifically the doctrine of jurisdiction and the requirements of due process. Jurisdiction, comprising subject-matter, personal, and a lawful cause of action, is presented as the non-negotiable anchor of judicial power that cannot be created by consent or silence. When a court acts without this foundational authority, its actions are governed by the doctrine of nullity and are considered void ab initio, or void from the beginning. Furthermore, the module emphasizes that due process is a "condition precedent" to the exercise of force, requiring a specific sequence of injury, accusation, hearing, evidence, and judgment to occur before the state may lawfully deprive an individual of life, liberty, or property.

Key Maxims

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

- **Higher law governs lower law** (*Lex superior derogat legi inferiori*); Higher law governs lower law ; a structural principle where any law that conflicts with a higher law is invalid, ensuring the Constitution remains supreme over lower enactments.
- **A void act has no legal effect** (*Quod nullum est nullum producit effectum*); the doctrine that an act done without lawful authority is void ab initio and is as inoperative as though it had never been passed.
- **Delegated powers must be strictly limited** (*Potestas stricte interpretatur*); a rule of construction asserting that government may exercise only the authority actually delegated, as the law serves as the definition and limitation of power.
- **Delegated power cannot be further delegated** (*Delegata potestas non potest delegari*) ; a vital principle for the integrity of government stating that authority entrusted to an agent must be exercised by that agent and cannot be transferred to another.

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- **Natural rights are immutable** (*Jura naturalia sunt immutabilia*); the recognition that fundamental rights exist prior to government and are beyond the control or absolute disposition of the state.
- **Rights require a remedy** (*Ubi jus ibi remedium*); an indisputable rule that if a legal right is invaded, the law must provide a remedy by suit or action, or the system ceases to be a government of laws.
- **Fraud destroys legality** (*Fraus omnia vitiata*); a general doctrine established by the courts that fraud vitiates and invalidates the most solemn contracts, documents, and even judicial judgments.
- **No one should be judge in their own case** (*Nemo debet esse judex in propria causa*); a fundamental requirement for a fair trial that ensures an absence of actual bias by disqualifying any officer with a personal interest in the controversy.
- **Both sides must be heard** (*Audi alteram partem*); a core requirement of due process that prevents arbitrary deprivation by ensuring a fair trial according to established modes of procedure.
- **Guilt requires a guilty mind** (*Actus non facit reum nisi mens sit rea*); a persistent principle in mature legal systems stating that criminal liability generally requires the concurrence of an evil-meaning mind with an evil-doing hand.
- **No crime or punishment without law** (*Nullum crimen sine lege / Nulla poena sine lege*); a due process requirement that prohibits retroactive punishment and requires that a statute first define an act as a crime before a person can be deprived of liberty.
- **Laws must be interpreted according to their original meaning** (*Contemporanea expositio est optima et fortissima in lege*); a principle binding the interpretation of the Constitution to the law and ordinary meaning as it existed at the time it was adopted.

Study Quiz: Short Answer

1. **According to Alexander Hamilton in Federalist No. 78, what is the primary nature of judicial power?** Hamilton argued that the judiciary possesses neither force nor will, but merely judgment. This means the courts do not have independent sovereign will to create policy; instead, they exist to apply the law to specific cases by measuring government acts against the Constitution.
2. **Describe the "Surveyor" analogy as it relates to the role of a judge.** A judge acts like a surveyor who does not invent property boundaries but merely identifies where they already exist in a deed. In this framework, the Constitution is the deed, and the judge uses the law to determine if government actions fall within the established boundaries of delegated power.
3. **What is the fundamental difference between the American and British legal hierarchies?** In the British system, Parliament is sovereign and its declared will is the final law, which courts cannot invalidate. In the American system, the people are sovereign and the Constitution is the supreme law, meaning the judiciary must invalidate any legislative act that conflicts with the Constitution.

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4. **What does it mean for judicial power to be "vested" under Article III?** To vest power means to place it in a specific office with defined responsibilities and constitutional safeguards, such as due process and trial by jury. This ensures that judicial power is exercised through lawful judgment within a structured court system rather than through arbitrary or scattered administrative bodies.
 5. **How does the module define the phrase "during good Behaviour" for judicial office?** While often equated with life tenure, the phrase historically implies that judicial office is conditional upon the faithful execution of the constitutional trust. It protects judges from political retaliation while reminding them that their authority exists only so long as they operate within the limits established by the Constitution.
 6. **Why is the claim of "inherent authority" potentially dangerous to constitutional structure?** Inherent authority suggests a court possesses undefined power simply because it exists, rather than power specifically delegated by the Constitution or statute. This can lead to a shift where the judiciary becomes a source of law itself, expanding its own boundaries rather than measuring the ones set by the people.
 7. **How does "summary contempt" violate the fundamental geometry of justice?** Summary contempt collapses the separate roles of accuser, witness, and judge into a single individual, allowing a judge to punish conduct they personally witnessed. This violates the maxim that no one should be a judge in his own cause and removes the structural checks that protect the integrity of the legal process.
 8. **What are the three essential elements required for a court to have jurisdiction?** A court must possess subject-matter jurisdiction (authority over the type of case), personal jurisdiction (authority over the specific parties), and a lawful cause of action (a real dispute involving an actual injury). All three elements must be present for a court to exercise lawful power.
 9. **Explain the doctrine of "nullity" in the context of judicial acts.** The doctrine of nullity holds that if a government act is performed without lawful authority or jurisdiction, it has no legal force and does not become valid simply because it occurred. Such an act cannot create rights, impose duties, or afford protection because its legitimacy must exist before the act is performed.
 10. **What is the significance of the phrase *void ab initio*?** Meaning "void from the beginning," this concept describes an act that never possessed legal force because the required authority was missing at the moment of the action. According to the court in *Norton v. Shelby County*, an unconstitutional act is as inoperative as though it had never been passed.
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Answer Key

1. Judiciary possesses neither force nor will, but merely judgment; it applies law rather than creating policy.
2. Judge as surveyor; Constitution as the deed; task is to measure boundaries of power, not redesign them.
3. UK: Parliament is sovereign. US: The Constitution is sovereign and the people are the source of authority.
4. Power is placed in specific offices with defined responsibilities; prevents arbitrary exercise of power outside constitutional safeguards.
5. Conditional independence; protects judges from politics but requires adherence to the constitutional trust.
6. It allows courts to assert power not found in the Constitution, turning the interpreter into a source of law.
7. It merges roles of accuser and judge; removes impartial checks; violates *nemo iudex in causa sua*.
8. Subject-matter jurisdiction, personal jurisdiction, and a lawful cause of action.
9. Acts without authority are invalid from the start; procedure and enforcement cannot create legitimacy where authority is absent.
10. "Void from the beginning"; unauthorized or unconstitutional acts have no legal existence or effect regardless of enforcement.

Essay Questions (Self-Guided)

1. **The Surveyor vs. The Architect:** Compare the outcomes of a judicial system where judges see themselves as surveyors of a fixed constitutional boundary versus one where they see themselves as architects of social progress.
2. **The Hierarchy of Law:** Analyze Thomas Cooley's assertion that the will of the legislature is only law when it is in harmony with the Constitution. What are the systemic consequences when this hierarchy is ignored?
3. **The Sequence of Due Process:** Discuss the importance of due process as a "condition precedent." What happens to individual liberty when the state reverses this order, applying force before establishing judgment?
4. **Jurisdiction as a Safeguard:** Examine why jurisdiction cannot be created by the consent of the parties. How does this principle prevent the unauthorized expansion of government power?
5. **The Role of the Jury:** Based on the module's introduction to the jury, explain how its placement "after evidence and before judgment" serves as a final structural check on the state.

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Comprehensive Glossary

Term	Definition
Cause of Action	A concrete controversy involving a real injury or violation of law that justifies judicial intervention.
Condition Precedent	A legal requirement or sequence that must be satisfied before a subsequent action (such as the exercise of force) becomes valid.
Due Process	The defined legal sequence (notice, hearing, evidence, judgment) that the government must follow before depriving a person of life, liberty, or property.
Inherent Authority	Power claimed by a court as necessary to its existence, which is a structural impossibility as “all political power is inherent in the people.”
Jurisdiction	The legal foundation and authority of a court to hear a case and render a binding judgment.
Maxims of Law	Fundamental rules of legal reasoning and ancient principles of justice that underlie the common law and constitutional structure.
Nullity	The legal status of an act performed without authority; such acts are invalid and carry no legal weight.
Personal Jurisdiction	A court's authority over the specific individuals or entities involved in a legal dispute.
Subject-Matter Jurisdiction	A court's authority to hear cases of a specific category or type (e.g., bankruptcy, criminal, maritime).
Summary Contempt	A doctrine allowing a judge to immediately punish an individual for conduct the judge deems contemptuous, often merging the roles of accuser and decider.
Void Ab Initio	A Latin term meaning "void from the beginning"; referring to an act that lacked legal force from its inception.

Homework Assignment: Judicial Structural Audit

Objective: Apply the analytical framework of Module 6 to a modern court case to evaluate its "chain of custody of authority."

1. **Case Selection:** Choose a modern criminal, civil, or constitutional ruling (state or federal).
2. **The Audit Process:**
 - **Source of Law:** Did the court measure the statute/rule against higher law (The Constitution/Maxims)?
 - **Jurisdiction Check:** Did the court establish subject-matter jurisdiction, personal jurisdiction, and a real cause of action on the record?
 - **Due Process Review:** Was there a neutral tribunal, a sworn accusation, and a proper presentation of evidence before judgment?

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- **Role Determination:** Did the judge act as a "surveyor" (declaring what the law is) or an "architect" (creating law based on policy)?
- 3. **Written Submission:** Summarize the case and explain your findings. Identify any structural defects, such as assumed jurisdiction or the reversal of force and judgment. Focus strictly on the structural integrity of the proceeding rather than the political popularity of the outcome.

Case Example

A clear, modern example of the U.S. Supreme Court adhering to **strict construction** and the **original meaning** of a text, rather than inventing a "policy-based" exception, is *United States v. Jones*, 565 U.S. 400 (2012).

In this case, the government argued that it did not need a warrant to attach a GPS tracker to a vehicle because there is "no reasonable expectation of privacy" on a public street. However, the Court looked past modern policy and went back to the **original intent** and the "**deed**" of the Fourth Amendment.

Judicial Structural Audit: *United States v. Jones*

- **Source of Law:** The Court measured the government's action against the **original understanding** of the Fourth Amendment as it existed in 1791. They applied **Maxim XII** (*Contemporanea expositio...*), holding that the Constitution must be understood according to the understanding at the time it was adopted.
- **Jurisdiction Check:** The Court found that when the government physically touched the defendant's property (the car) to install the tracker, they committed a **trespass**. Under strict construction, the government has no delegated authority to trespass on private property without a warrant.
- **Due Process Review:** By requiring a warrant before the tracking occurred, the Court upheld **Maxim XI** (*Nulla poena sine lege*), ensuring that the government cannot bypass established modes of proceeding.
- **Role Determination:** Justice Scalia acted as a **surveyor**. He did not "architect" a new right to privacy; he simply surveyed the historical boundaries of property rights and declared that a physical intrusion on a "house, paper, or effect" is a search, regardless of modern technology.

How this Adheres to the Maxims

- **Lex superior derogat legi inferiori:** The Court ruled that the government's "reasonable" arguments for efficiency cannot override the **superior law** of the Fourth Amendment.

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- **Potestas stricte interpretatur:** The Court strictly interpreted the government's power, refusing to expand it just because a new technology (GPS) made surveillance easier.
- **Jura naturalia sunt immutabilia:** The decision recognized that the right to be secure in one's property is an **immutable right** that exists prior to government and cannot be discarded for administrative convenience.

This case is a "win" for beginners because it proves that **maxims are not debateable**; they are the fixed "bones of reason" that prevent the government from redefining its own limits.

THE JUDICIAL STRUCTURAL AUDIT

Measuring Jurisdiction, Judgment, and Nullity

SECTION I — FOUNDATIONAL AUTHORITY TEST

(Hierarchy of Law Compliance)

1. Identify the Source of Law Applied

- Natural law principle invoked — Example: Immutable rights existing prior to government.
- Fundamental maxim identified — Example: Lex superior derogat legi inferiori.
- Constitutional provision cited
- Statutory enactment cited

Question: Was the statute tested against higher law?

- Yes
- No

Note: If No, hierarchy inversion is present.

2. Natural Law Consistency Check Does the ruling:

- Protect life, liberty, property
- Recognize inherent rights as pre-political
- Avoid retroactive punishment — Nullum crimen sine lege.
- Avoid arbitrary targeting

If it violates any of these, flag: Structural conflict with natural law.

3. Fundamental Maxims Test Did the proceeding comply with:

- Nemo iudex in causa sua (No one judge in own cause)
- Audi alteram partem (Hear the other side)
- Burden of proof on accuser — Actori incumbit probatio.
- No punishment without injury — Ubi injuria, ibi remedium.
- Delegated power cannot be redelegated

If any maxim is structurally violated: Judgment rests on broken geometry.

SECTION II — JURISDICTIONAL TEST

(Authority Before Action) Jurisdiction must be proven, not presumed.

A. Subject Matter Jurisdiction

- Is this dispute within constitutional grant of judicial power?
- Is the court constitutionally created?
- Is the cause of action lawful under constitutional delegation?

If statutory-only jurisdiction without constitutional grounding: Jurisdictional vulnerability.

B. Personal Jurisdiction

- Was lawful service achieved?
- Was defendant properly brought before court?
- Was appearance voluntary or compelled under lawful authority?

C. Standing

- Is there a real injured party? — *Lujan v. Defenders of Wildlife*.
- Is injury concrete and particularized?
- Is remedy within court's authority?

If no injured party: No case or controversy.

D. Jurisdictional Timing

- Was jurisdiction established before any coercive action?
- Were assets seized before judgment?
- Was punishment imposed before trial?

If force precedes jurisdiction: Due process violation.

SECTION III — DUE PROCESS STRUCTURAL TEST

(Condition Precedent to Lawful Force)

1. Notice

- Was notice specific?
- Was the charge clearly defined?
- Was notice given before action?

2. Neutral Tribunal

- Is the judge independent?
- Is the tribunal separate from prosecuting authority?
- Does the court benefit from outcome? — *Tumey v. Ohio*.

If institutional interest exists: Nemo iudex issue.

3. Hearing

- Public proceeding? — *In re Oliver*.

- Oath-bound testimony? — Indivisible oath.
- Opportunity to confront evidence?
- Right to present defense?

4. Burden and Standard of Proof

- Accuser bears burden? — In re Winship.
- Standard clearly defined?
- Applied consistently?

5. Judgment Before Enforcement

- Was a written judgment issued?
- Was reasoning articulated?
- Did enforcement follow, not precede, judgment?

SECTION IV — DECLARATION VS CREATION TEST

Judicial power is declaratory.

Ask:

- Did the court apply fixed constitutional text?
- Did it rely on enumerated authority?
- Did it defer to constitutional limits?

OR

- Did it invoke evolving standards?
- Did it justify outcome by policy?
- Did it expand authority beyond text?

If policy reasoning replaces textual reasoning: Judicial will substituted for judgment.

SECTION V — PRECEDENT TEST

- Does precedent align with natural law?
- Does precedent align with constitutional text?
- Is precedent being used to override hierarchy?

If precedent contradicts hierarchy: Precedent cannot control.

SECTION VI — NULLITY DETERMINATION

If any of the following are true:

- No jurisdiction
- Violation of fundamental maxim

- No due process
- Statute unconstitutional under hierarchy
- Court acted outside delegated authority

Then: The act is void ab initio. Not voidable. Void. *Per Norton v. Shelby County*:

- Confers no rights
- Imposes no duties
- Affords no protection

SECTION VII — LAWFUL FORCE ANALYSIS

Force is not inherently evil. Was force exercised:

- A. With Delegation?
- B. Through Due Process?
- C. Under Jurisdiction?
- D. According to Reason?

If yes → Lawful enforcement. If no → Structural violence.

SECTION VIII — STRUCTURAL DEVIATION INDEX

Score 0–2 (0=compliant, 1=questionable, 2=defect):

1. Hierarchy adherence
2. Jurisdiction integrity
3. Due process integrity
4. Maxim compliance
5. Declaration vs creation
6. Enforcement sequence

Total Score:

- 0–3 → Structurally sound
- 4–7 → Vulnerable
- 8–12 → Severe deviation
- 13+ → Jurisdictional collapse

SECTION IX — REAL COURT VS ADMIN TRIBUNAL CHECK

- Is tribunal constitutionally created?
- Are judges Article III / state constitutional judges?

Is separation of powers preserved?

Is prosecuting entity separate?

Is tribunal financially neutral?

If executive branch adjudicates its own enforcement: Structural concentration of power.

SECTION X — FINAL QUESTION

If the same structure were applied to the government itself: Would it survive its own test? If not:
Authority has migrated from law to institution

The Twelve Foundational Maxims of Law

(Module 6: Judiciary - Framework for Constitutional and Legal Reasoning)

The "Twelve Foundational Maxims of Law" constitute the structural bedrock of constitutional jurisprudence, serving as the essential legal DNA of a free society. This document functions as a critical bridge between the timeless wisdom of ancient Latin legal principles and modern judicial enforcement, ensuring that our social contract remains a "government of laws and not of men." By synthesizing these maxims with the evolving body of case law, we demonstrate a profound continuity of legal logic that spans from antiquity to the landmark decisions of the United States Supreme Court.

The purpose of this analysis is to demonstrate how these maxims operate not merely as historical artifacts, but as active jurisprudential filters that preserve the integrity of the judicial process. Understanding these principles is of paramount strategic importance for preserving individual liberty; they represent the primary defense against the encroachment of arbitrary caprice by establishing immutable boundaries for government action. Ultimately, the legitimacy of any legal system is predicated upon the hierarchy of its laws and the strict adherence to the reason of the law, the *ratio legis*.

I. Higher Law Governs Lower Law

Lex superior derogat legi inferiori

Principle:

A law that conflicts with a higher law is invalid.

Supporting maxims

- *Lex iniusta non est lex* — An unjust law is not law
- *Salus populi suprema lex* — The welfare of the people is the supreme law
- *Quod contra rationem juris receptum est non est producendum ad consequentias* — That which is against reason is not to be extended

Confirming cases

- ✦ **Marbury v. Madison, 5 U.S. 137, 180 (1803).** This case established the principle of judicial review, specifically stating that a law repugnant to the Constitution is void. *“Thus, the particular phraseology of the constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the constitution is void; and that courts, as well as other departments, are bound by that instrument.”*
- ✦ **Norton v. Shelby County, 118 U.S. 425, 426 (1886).** The Court famously held that *“An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no*

protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed.”

- ✳ **Cooper v. Aaron, 358 U.S. 1, 3 (1958).** Confirms that no state officer can "war against the Constitution" without violating their oath. *“No state legislator or executive or judicial officer can war against the Constitution without violating his solemn oath to support it.”*

II. A Void Act Has No Legal Effect

Quod nullum est nullum producit effectum

Principle:

An act done without lawful authority is void.

Supporting maxims

- *Ex nihilo nihil fit* — Nothing comes from nothing
- *Quod ab initio non valet in tractu temporis non conualescit* — What is void from the beginning cannot become valid
- *Ex turpi causa non oritur actio* — No right arises from a wrongful act

Confirming cases

- ✳ **Norton v. Shelby County, 118 U.S. 425, 426 (1886):** *“An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed.”*
- ✳ **Ex parte Siebold, 100 U.S. 371, 376 (1879).** The Court ruled that an unconstitutional law is "void, and is as no law," and that a conviction under such a law is illegal. *“An unconstitutional law is void, and is as no law. An offence created by it is not a crime. A conviction under it is not merely erroneous, but is illegal and void, and cannot be a legal cause of imprisonment.”*

III. Delegated Powers Must Be Strictly Limited

Potestas stricte interpretatur

Principle:

Government may exercise only the authority actually delegated.

Supporting maxims

- *Expressio unius est exclusio alterius* — The expression of one excludes others
- *Generalia specialibus non derogant* — General provisions do not override specific limits
- *Potestas publica non potest exerceri sine lege* — Public power cannot be exercised without law

Confirming cases

- ✦ **Yick Wo v. Hopkins, 118 U.S. 356, 369-70 (1886).** Confirms that sovereignty remains with the people and government power is a "definition and limitation of power". *"When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power. Sovereignty itself is, of course, not subject to law, for it is the author and source of law; but in our system, while sovereign powers are delegated to the agencies of government, sovereignty itself remains with the people, by whom and for whom all government exists and acts. And the law is the definition and limitation of power. It is, indeed, quite true, that there must always be lodged somewhere, and in some person or body, the authority of final decision; and in many cases of mere administration the responsibility is purely political, no appeal lying except to the ultimate tribunal of the public judgment, exercised either in the pressure of opinion or by means of the suffrage. But the fundamental rights to life, liberty, and the pursuit of happiness, considered as individual possessions, are secured by those maxims of constitutional law which are the monuments showing the victorious progress of the race in securing to men the blessings of civilization under the reign of just and equal laws, so that, in the famous language of the Massachusetts Bill of Rights, the government of the commonwealth "may be a government of laws and not of men." For, the very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself."*
- ✦ **Fletcher v. Peck, 10 U.S. 87 (1810).** This was the first time the Court struck down a state law, asserting that even a legislature has limits to its power. *"A grant, in its own nature, amounts to an extinguishment of the right of the grantor, and implies a contract not to reassert that right". The Court further noted, "When, then, a law is in its nature a contract, when absolute rights have vested under that contract, a repeal of the law cannot divest those rights".*

IV. Delegated Power Cannot Be Further Delegated

Delegata potestas non potest delegari

Principle:

Authority entrusted to an agent must be exercised by that agent.

Supporting maxims

- *Delegatus non potest delegare* — A delegate cannot re-delegate
- *Qui facit per alium facit per se* — He who acts through another acts himself
- *Fiduciarius non potest sibi ipsi lucrari* — A trustee cannot profit from the trust

Confirming cases

- ✳ **Field v. Clark, 143 U.S. 649 (1892).** This was the first time the Court struck down a state law, asserting that even a legislature has limits to its power. *"That Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution."*
- ✳ **A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).** Struck down the NIRA as an unconstitutional delegation of legislative authority without sufficient standards. *"Congress cannot delegate legislative power to the president to exercise an unfettered discretion to make whatever laws he thinks may be needed or advisable..."*

V. Natural Rights Are Immutable

Jura naturalia sunt immutabilia

Principle:

Fundamental rights exist prior to government.

Supporting maxims

- *Libertas est naturalis facultas* — Liberty is a natural faculty
- *Quod ad jus naturale attinet omnes homines aequales sunt* — All persons are equal under natural law
- *Sic utere tuo ut alienum non laedas* — Use your rights so as not to harm others

Confirming cases

- ✳ **Yick Wo v. Hopkins, 118 U.S. 356, 369-70 (1886).** *"When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power. Sovereignty itself is, of course, not subject to law, for it is the author and source of law; but in our system, while sovereign powers are delegated to the agencies of government, sovereignty itself remains with the people, by whom and for whom all government exists and acts. And the law is the definition and limitation of power. It is, indeed, quite true, that there must always be lodged somewhere, and in some person or body, the authority of final decision; and in many cases of mere administration the responsibility is purely political, no appeal lying except to the ultimate tribunal of the public judgment, exercised either in the pressure of opinion or by means of the suffrage. **But the fundamental rights to life, liberty, and the pursuit of happiness, considered as individual possessions, are secured by those maxims of constitutional law which are the monuments showing the victorious progress of the race in securing to men the blessings of civilization under the reign of just and equal laws, so that, in the famous language of the Massachusetts Bill of Rights, the government of the commonwealth***

"may be a government of laws and not of men." For, the very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself."

- ★ **Hurtado v. California, 110 U.S. 516, 536-37 (1884).** Affirmed that there are rights in every free government that exist beyond the control of the state. *"It must be conceded that there are such rights in every free government beyond the control of the State. A government which recognized no such rights, which held the lives, the liberty, and the property of its citizens subject at all times to the absolute disposition and unlimited control of even the most democratic depository of power, is after all but a despotism."*

VI. Rights Require a Remedy

Ubi jus ibi remedium

Principle:

If a right is violated, the law must provide a remedy.

Supporting maxims

- *Remedium est jus* — The remedy is part of the right
- *Nullus recedat a curia sine remedio* — No one should leave court without a remedy

Confirming cases

- ★ **Marbury v. Madison, 5 U.S. 137, 163 (1803).** Affirmed the principle that a violation of a vested legal right demands a remedy, stating: *"The Government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation if the laws furnish no remedy for the violation of a vested legal right."* This underscores the duty of courts to provide relief, aligning with the maxim that where there is a right, there is a remedy. *"In all other cases, it is a general and indisputable rule that where there is a legal right, there is also a legal remedy by suit or action at law whenever that right is invaded."*
- ★ **Bell v. Hood, 327 U.S. 678 (1946).** Confirms the "general doctrine that fraud vitiates the most solemn contracts, documents, and even judgments". *"where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief."*

VII. Fraud Destroys Legality

Fraus omnia vitiat

Principle:

Fraud invalidates acts and judgments.

Supporting maxims

- *Fraus et dolus nemini patrocinari debent* — Fraud should aid no one
- *Dolus circuitu non purgatur* — Fraud is not cured by technicalities
- *Ex dolo malo non oritur actio* — No right arises from fraud

Confirming cases

- ✳ **United States v. Throckmorton, 98 U.S. 61 (1878)** "There is no question of the general doctrine that fraud vitiates the most solemn contracts, documents, and even judgments." (98 U.S. at 64). The Court distinguished intrinsic vs. extrinsic fraud but affirmed the maxim that fraud invalidates proceedings (though relief may be limited by timing/res judicata).
- ✳ **Marshall v. Holmes, 141 U.S. 589 (1891)**. Upheld the power of equity courts to annul state judgments obtained through fraud. *"The case made by the petition is one where, without negligence, laches, or other fault upon the part of the petitioner, Mayer has fraudulently obtained judgments which he seeks, against conscience, to enforce by execution."* Quoting from prior precedent (*Marine Insurance Co. v. Hodgson, 1813*): *"Any fact which clearly proves it to be against conscience to execute a judgment, and of which the injured party could not have availed himself in a Court of law; or of which he might have availed himself at law, but was prevented by fraud or accident unmixed with any fault or negligence in himself or his agents, will justify an application to a Court of Chancery."* ... *"A circuit court of the United States, in the exercise of its equity powers, and where diverse citizenship gives jurisdiction over the parties, may deprive a party of the benefit of a judgment fraudulently obtained by him in a state court, if the circumstances are such as would authorize relief by a federal court if the judgment had been rendered by it and not by a state court."*

VIII. No One Should Be Judge in Their Own Case

Nemo debet esse judex in propria causa

Principle:

Courts must be impartial.

Supporting maxims

- *Judex debet esse impar* — A judge must be impartial
- *Nemo potest esse simul actor et judex* — No one may be both accuser and judge

Confirming cases

- ★ **Tumey v. Ohio, 273 U.S. 510 (1927)**. Voided convictions where the judge had a personal financial stake in the outcome. *"That officers acting in a judicial or quasi-judicial capacity are disqualified by their interest in the controversy to be decided is, of course, the general rule."*
- ★ **In re Murchison 349 U.S. at 136-137, 139**. Stated that "fairness of course requires an absence of actual bias" and prevents even the "probability of unfairness". *"A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness."*

IX. Both Sides Must Be Heard

Audi alteram partem

Principle:

Due process requires a fair hearing.

Supporting maxims

- *Audiat et altera pars* — Let the other side be heard
- *Qui aliquid statuerit parte inaudita altera aequum licet dixerit haud aequum fecerit* — Deciding without hearing the other side is unjust

Confirming cases

- ★ **Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. 272 (1856)**. Defined *"due process of law"* as conveying the same meaning as *"by the law of the land"* in Magna Carta, to be tested by the settled usages and modes of proceeding existing in the common and statute law of England before the emigration of our ancestors, and by the laws of many of the States at the time of the adoption of this amendment. *"The constitution contains no description of those processes which it was intended to allow or forbid. It does not even declare what principles are to be applied to ascertain whether it be due process... Tested by [those historical standards], the proceedings... cannot be denied to be due process of law."*
- ★ **Davidson v. New Orleans, 96 U.S. 97 (1877)**. Reaffirmed that due process is satisfied by a fair trial according to established modes of procedure applicable to the case, without arbitrary deprivation. *"It is not possible to hold that a party has, without due process of*

law, been deprived of his property, when, as regards the issues affecting it, he has, by the laws of the State, a fair trial in a court of justice, according to the modes of proceeding applicable to such a case."

X. Guilt Requires a Guilty Mind

Actus non facit reum nisi mens sit rea

Principle:

Criminal liability requires intent.

Supporting maxims

- *Voluntas reputabitur pro facto* — Intent is treated as the act
- *Ignorantia facti excusat* — Mistake of fact excuses
- *Actus me invito factus non est meus actus* — An act done against my will is not my act

Confirming cases

- ★ **Morissette v. United States, 342 U.S. 246 (1952)**. Clarified that criminal intent (*mens rea*) is a persistent requirement in mature systems of law, even if not explicitly written in a statute. "*The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is universal and persistent in mature systems of law, as is shown by English criminal jurisprudence from earliest times.*" ... "*Crime, as a compound concept, generally constituted only from concurrence of an evil-meaning mind with an evil-doing hand, was congenial to an intense individualism and took deep and early root in American soil.*" ... "*[The] familiar rule, that a thing may be done 'willfully' and yet not be criminal unless done with a bad purpose, is deeply engrained in our jurisprudence.*" ... "*The mere omission from § 641 of any mention of intent will not be construed as eliminating that element from the crimes denounced.*" ... "*Where intent of the accused is an ingredient of the crime charged, its existence is a question of fact which must be submitted to the jury for determination in the light of all relevant evidence; and the trial court may not withdraw or prejudge the issue by instructing the jury that the law raises a presumption of intent from a single act.*"

XI. No Crime or Punishment Without Law

Nullum crimen sine lege / Nulla poena sine lege

Principle:

Individuals cannot be punished unless the conduct was defined as criminal beforehand.

Supporting maxims

- *Lex prospicit non respicit* — Law looks forward, not backward
- *Poena non irrogatur nisi lege* — No punishment without law

Confirming cases

- ★ **Bouie v. City of Columbia, 378 U.S. 347 (1964)**. Ruled that due process prohibits the retroactive application of a judicial construction of a criminal statute. *"The basic principle that a criminal statute must give fair warning of the conduct that it makes a crime has been recognized as a 'fundamental' in our law."... "An act which was innocent when done cannot be made criminal by subsequent judicial construction."... "When a statute on its face is narrow and precise, but has been given a new broader meaning by the courts, the due process requirement of fair notice may be violated if the statute is applied retroactively to conduct which the statute did not previously reach."... "It is intolerable that a State should employ an unfair procedure to deprive a person of life, liberty, or property... The Due Process Clause... bars courts from achieving precisely the same result by judicial construction."*
- ★ **United States v. Hudson and Goodwin, 11 U.S. (7 Cranch) 32 (1812)**. Established that federal courts do not have jurisdiction over common-law crimes; a statute must first define the act as a crime. *"The legislative authority of the Union must first make an act a crime, affix a punishment to it, and declare the Court that shall have jurisdiction of the offence."... "All exercise of criminal jurisdiction in common law cases we are of opinion is not within their implied powers."... "The powers of the general Government are made up of concessions from the several states, whatever is not expressly given to the former, the latter expressly reserve."*

XII. Laws Must Be Interpreted According to Their Original Meaning

Contemporanea expositio est optima et fortissima in lege

Principle:

The meaning of a law must be understood according to the understanding at the time it was adopted.

Supporting maxims

- *Ratio legis est anima legis* — The reason of the law is its soul
- *Ut res magis valeat quam pereat* — Interpret the law so it has effect
- *Optima est lex quae minimum relinquit arbitrio iudicis* — The best law leaves little to judicial discretion

Confirming cases

- ✦ **Mattox v. United States, 156 U.S. 237, 243 (1895).** Bound the interpretation of the Constitution to the "law as it existed at the time it was adopted". *"We are bound to interpret the Constitution in the light of the law as it existed at the time it was adopted, not as reaching out for new guaranties of the rights of the citizen, but as securing to every individual such as he already possessed as a British subject, such as his ancestors had inherited and defended since the days of Magna Charta."*
- ✦ **District of Columbia v. Heller, 554 U.S. 570 (2008).** Reaffirmed that the Constitution's words should be understood in their "normal and ordinary as distinguished from technical meaning" as understood by the founding generation. *"In interpreting this text, we are guided by the principle that '[t]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning.'" (citing United States v. Sprague, 282 U.S. 716, 731 (1931); Gibbons v. Ogden, 9 Wheat. 1, 188 (1824)) ... "Normal meaning may of course include an idiomatic meaning, but it excludes secret or technical meanings that would not have been known to ordinary citizens in the founding generation."*

The Twelve Foundational Maxims Sanctioning Due Process

(Module 6: Judiciary - Framework for Constitutional Due Process and Legal Reasoning)

Due process of law is not a modern procedural invention. It is the application of settled maxims of law that have governed courts for centuries. These maxims establish the conditions that must exist before government may lawfully deprive a person of life, liberty, or property.

Due process is a condition precedent which means it must come before any deprivation of rights it is the gate that protects the people in their ordinary exercise of liberty. Due process of law in each particular case means such an exertion of the powers of government as the settled maxims of law permit and sanction, and under such safeguards for the protection of individual rights as those maxims prescribe for the class of cases to which the one in question belongs (Cooley, *Const. Lim.*, citing *Wynehamer v. People*, 13 N.Y. 378, 432; *Kalloch v. Superior Court*, 56 Cal. 229; *Baltimore v. Scharf*, 54 Md. 499). The "Twelve Foundational Maxims Sanctioning Due Process" constitute the structural bedrock of fair judicial process, serving as the essential legal DNA of due process in a free society. This document functions as a critical bridge between the timeless wisdom of ancient Latin legal principles and modern judicial enforcement, ensuring that due process remains the safeguard against arbitrary power. By synthesizing these maxims with the evolving body of case law and additional supporting maxims from collections such as Weisman's and Peloubet's, we demonstrate a profound continuity of legal logic that spans from antiquity to the landmark decisions of the United States Supreme Court.

The purpose of this analysis is to demonstrate how these maxims operate not merely as historical artifacts, but as active jurisprudential filters that preserve the integrity of due process. Understanding these principles is of paramount strategic importance for preserving individual liberty; they represent the primary defense against the encroachment of arbitrary caprice by establishing immutable boundaries for government action in judicial proceedings. Ultimately, the legitimacy of any legal system is predicated upon adherence to due process, the ratio legis of fair judgment.

The analysis draws from the traditional structural flow of legal process as outlined in due process documentation, where each step must exist before the next becomes lawful: injury or violation, sworn accusation, review by neutral magistrate, lawful charge upon sufficient cause, public hearing before a lawful tribunal, burden of proof on the accuser, judgment according to law, and lawful enforcement. This sequence ensures force follows lawful judgment and never precedes it, embodying the essence of due process in both civil and criminal contexts.

I. Injury or Violation Required for Process

Ubi injuria, ibi remedium

Principle: Legal process must begin with an actual injury, harm or violation of a legal right. No action arises without damage. An injury is the infringement of a legally protected right for which the law provides a remedy. *Black's Law Dictionary* defines injury as “any wrong or damage done to another in his person, rights, reputation, or property.” Blackstone likewise explains that civil injuries are “a privation of right... an infringement or deprivation of the private or civil rights belonging to individuals.”

These rights are natural, life, liberty, property, and parental authority, not creations of the state. In the parent–child context, Blackstone describes injury as actual harm resulting from parental omission, such as a child perishing for lack of maintenance, being left defenseless against danger, or growing “like a mere beast” without education or protection. Poverty, speculation about “risk,” or vague allegations of “neglect” do not constitute injury; the law requires demonstrable harm or imminent danger producing real damage.

Absent proven injury, there is no predicate for deprivation and no lawful basis for state intervention into the sovereign family circle. Due process therefore operates as a **condition precedent**: sworn accusation, neutral review, and a lawful hearing must occur before any deprivation of rights. If these steps are bypassed, the act is void, *quod nullum est nullum producit effectum*.

Controlling Maxims

- Law is a rule of right; and whatever is contrary to the rule of right is an injury" (Jus est norma recti; et quicquid est contra normam recti est injuria – 3 Bulst. 313; Weisman p. 52; Peloubet p. 57)
- An action is not given to one who is not injured — Jenk. Cent. 69
- No injury is done by things not in existence — Dig. 50, 17, 169, 1 Injury, damage, harm — Jenk. Cent. 52 (from maxims on injury)

Confirming Cases

- ★ **Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992).** Established that standing requires concrete and particularized injury; hypothetical harms do not suffice for judicial process. *"The irreducible constitutional minimum of standing contains three elements. First, the plaintiff must have suffered an 'injury in fact', an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical."*
- ★ **Ashwander v. Tennessee Valley Authority, 297 U.S. 288 (1936).** Reinforced that courts do not entertain cases without actual controversy or injury. *"The judicial power does not extend to the determination of abstract questions."*

II. Sworn Accusation or Complaint

Juramentum est indivisibile et non est admittendum in parte verum et in parte falsum

Principle: Legal process must begin with a sworn accusation grounded in fact. The oath serves as the first safeguard against arbitrary power by binding the accuser to the truth of the allegation. A complaint or accusation must therefore be made under oath or affirmation and must set forth sufficient facts establishing probable cause. Without a sworn foundation, the accusation lacks legal legitimacy and cannot initiate lawful proceedings.

An oath is indivisible: it cannot be partly true and partly false. The law treats the oath as a solemn affirmation of truth before God and the community, intended to prevent reckless or malicious accusations. As early authorities explain, “an oath is indivisible; it cannot be admitted in part true and in part false” (4 Inst. 279). The oath therefore transforms an allegation into a legally accountable statement, exposing the accuser to penalties for perjury should the claim prove knowingly false.

This requirement reflects the broader principle that **he who affirms must prove**. The burden rests on the party making the accusation to present evidence sufficient to justify invoking the coercive machinery of the state. Mere suspicion, rumor, or unsworn complaint cannot satisfy this standard. Without the sworn assertion of facts demonstrating probable cause, the state lacks authority to intrude upon the liberty or property of the accused.

In constitutional practice, this principle appears explicitly in the Fourth Amendment requirement that warrants issue only upon “probable cause, supported by oath or affirmation.” The oath requirement ensures that government action begins with verified facts rather than speculation or administrative convenience. It places the responsibility for the accusation squarely upon the accuser, subject to judicial scrutiny by a neutral magistrate.

Thus, the sworn accusation functions as a **condition precedent** to lawful process. Only after a verified complaint is presented may a magistrate evaluate whether probable cause exists. Without such sworn cause, any subsequent process, arrest, seizure, or prosecution, rests on an unlawful foundation and is therefore void. The requirement of oath protects the individual from arbitrary accusation and preserves the integrity of the judicial process by ensuring that legal proceedings begin with truth rather than conjecture.

Controlling Maxims

- An oath is indivisible; it cannot be in part true and in part false — 4 Inst. 279
- Truth by whomsoever pronounced is from God — 4 Inst. 153
- He who affirms must prove — *Porter v. Stevens*, 9 Cush. (Mass.) 535

Confirming Cases

- ★ ***Aguilar v. Texas*, 378 U.S. 108 (1964)**. Required sworn affidavits for warrants, emphasizing oath's role in due process. *"Although an affidavit may be based on hearsay*

information and need not reflect the direct personal observations of the affiant, the magistrate must be informed of some of the underlying circumstances... The tip, however, has a fundamental weakness: it is not supported by oath or affirmation."

- ★ **Whiteley v. Warden, 401 U.S. 560 (1971).** Held that unsworn or insufficiently verified accusations violate due process. *"An arrest without a warrant bypasses the safeguards provided by an objective predetermination of probable cause, and substitutes instead the far less reliable procedure of an ex post facto judicial determination."*

III. Review by Neutral Magistrate

Nemo debet esse iudex in propria causa

Principle: A sworn accusation must be reviewed by a neutral and detached magistrate before the coercive power of the state may be invoked. The law does not permit the accuser, investigator, or executive authority to determine the sufficiency of their own accusation. Instead, the determination of probable cause must be made by an impartial judicial officer who stands independent of the prosecuting authority.

This requirement arises from the foundational maxim *nemo iudex in causa sua*, no person should be judge in his own cause. Justice requires that decisions affecting life, liberty, or property be made by a tribunal free from personal interest or institutional bias. The magistrate's role is therefore to interpose a neutral judgment between the citizen and the power of the state, ensuring that accusations are supported by lawful cause before process may issue.

The neutral magistrate functions as a constitutional checkpoint. After receiving a sworn complaint, the magistrate must independently examine the facts presented and determine whether they establish probable cause to proceed. This evaluation cannot be delegated to law enforcement officers or administrative officials who are themselves participants in the accusation. Without such independent review, the process collapses into self-authorization, allowing the state to accuse and adjudicate simultaneously.

The constitutional structure reflects this safeguard. The Fourth Amendment requires that warrants issue only upon probable cause supported by oath or affirmation and evaluated by a neutral and detached magistrate. This requirement ensures that governmental power does not operate solely on the discretion of the executive branch, but must pass through judicial scrutiny grounded in law.

Thus, review by a neutral magistrate is a **condition precedent** to lawful process. Only after an impartial officer determines that the sworn accusation establishes sufficient cause may the machinery of the state move forward. When this safeguard is bypassed, when the accuser becomes the judge, the process loses its legitimacy. Any action taken without neutral judicial review rests upon a defective foundation and cannot satisfy the requirements of due process.

Controlling Maxims

- No one should be a judge in his own cause — Broom, Max. 113
- A judge must be impartial — *Judex debet esse impar*
- The condition of the defendant must be favored — Dig. 50, 17, 125

Confirming Cases

- ★ **Coolidge v. New Hampshire, 403 U.S. 443 (1971)**. Required neutral magistrate for warrants. "The warrant requirement... is the point we have considered basic: the notion of an objective predetermination of probable cause by a neutral and detached magistrate."
- ★ **Shadwick v. City of Tampa, 407 U.S. 345 (1972)**. Affirmed that magistrates must be neutral. "Whatever else neutrality and detachment might entail, it is clear that they require severance and disengagement from activities of law enforcement."

IV. Sufficient Cause for Charge

Probatio debet esse evidentiior quam res probanda

Principle: No person may be subjected to legal process unless the accusation is supported by sufficient cause grounded in evidence. The law requires more than suspicion, conjecture, or unverified belief; it demands facts capable of establishing a reasonable basis for the charge. The maxim *probatio debet esse evidentiior quam res probanda* reflects the long-standing rule that proof must be clear enough to justify the allegation it seeks to support.

The requirement of sufficient cause functions as a safeguard against arbitrary prosecution. A sworn accusation alone does not authorize state action; the facts underlying the accusation must demonstrate probable cause that a violation of law has occurred. This evidentiary threshold protects individuals from being subjected to the coercive power of the state based on rumor, speculation, or administrative preference.

Historically, courts have insisted that proofs be evident and intelligible. As the common law explains, "proofs ought to be evident, clear and easily understood." The burden rests upon the party asserting the allegation to establish facts sufficient to justify the charge. That which is plainly apparent need not be proved, but where the facts are uncertain or speculative, the law forbids proceeding further.

In constitutional practice, the concept of probable cause embodies this requirement. Probable cause exists when the facts and circumstances known to the accuser are sufficient to warrant a reasonable belief that an offense has been committed. This standard ensures that the state may not invoke its prosecutorial power unless objective evidence establishes a lawful basis for doing so.

Thus, sufficient cause is a **condition precedent** to the issuance of charges. A magistrate must determine that the sworn accusation is supported by adequate evidence before authorizing legal process. Where such cause is absent, the charge cannot lawfully issue, and any subsequent

proceedings are fundamentally defective. By requiring evidentiary justification before accusation becomes prosecution, the law preserves the essential barrier between suspicion and lawful judicial action.

Controlling Maxims

- Proofs ought to be evident, to-wit, clear and easily understood — Co. Litt. 283
- The burden of proof lies on him who asserts the fact — 39n from maxims
- That which is clearly apparent need not be proved — 10 Mod. 150

Confirming Cases

- ★ **Brinegar v. United States, 338 U.S. 160 (1949).** Defined probable cause as sufficient facts for charge. "Probable cause exists where the facts and circumstances within their knowledge and of which they had reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed."
- ★ **Aguilar v. Texas, 378 U.S. 108 (1964).** Required sufficient cause in sworn form. "The magistrate must be informed of some of the underlying circumstances from which the informant concluded that the narcotics were where he claimed they were."

V. Lawful Charge Issued Upon Cause

Accusare nemo se debet nisi coram Deo

Principle: A formal charge must arise from lawful authority grounded in established law, not from arbitrary accusation or the exercise of force. The law requires that charges be issued only after sufficient cause has been established and recognized through proper legal process. A charge is therefore not merely an allegation but a formal legal act that invokes the authority of the law and places the accused under the jurisdiction of the court.

Law, in this context, is not the mere command of authority nor the exercise of coercive power. Law is a rule of right governing conduct, established through legitimate authority and applied through judicial process. As the classical maxim states, *jus est norma recti*, law is the rule of right. Violence or arbitrary command does not become law simply because it is exercised by those in power. A lawful charge must therefore rest upon the rule of law rather than the will of the accuser.

Under the principles of due process, the issuance of a charge requires the prior establishment of sufficient cause and the authorization of lawful process. The charge must identify the specific violation of law alleged and must be grounded in facts that support the accusation. Summonses or citations may not issue until the legal basis for the accusation is clearly stated, ensuring that the accused understands the nature of the charge and the authority under which it is brought.

The maxim *accusare nemo se debet nisi coram Deo* further reflects the principle that no person is bound to accuse himself and that accusations must proceed through lawful forms rather than

coercion. The law demands that accusations be made openly, formally, and under procedures designed to protect the rights of the accused.

Thus, the lawful charge marks the transition from accusation to formal legal proceeding. It represents the moment at which the authority of law, rather than the discretion of the accuser, governs the process. Only after a lawful charge has been issued upon sufficient cause may the court proceed to adjudication. If this step is bypassed, if force, detention, or prosecution occurs without a lawful charge, the process ceases to be governed by law and becomes merely an exercise of power. Such acts lack legal foundation and cannot satisfy the requirements of due process.

Controlling Maxims

- No one is bound to accuse himself — Wing. Max. 486
- An action is a plaint or complaint — Co. Litt. 292a
- Summonses or citations should not be granted before it is expressed on what ground — 12 Coke, 47

Confirming Cases

- ★ **Giordenello v. United States, 357 U.S. 480 (1958).** Held that charges must be based on lawful process. "*Criminal prosecutions must be initiated by information or indictment as the circumstances require, but arrests can be made without warrant in limited situations.*"
- ★ **Beck v. Ohio, 379 U.S. 89 (1964).** Invalidated charges without sufficient cause. "*Whether that arrest was constitutionally valid depends in turn upon whether, at the moment the arrest was made, the officers had probable cause to make it.*"

VI. Public Hearing Before Tribunal

Audi alteram partem

Principle: No person may be condemned or deprived of rights without the opportunity to be heard in a public proceeding before a lawful tribunal. The maxim *audi alteram partem*, “hear the other side”, expresses the fundamental rule that both parties must be allowed to present their case before judgment is rendered. A determination made without hearing the accused is not an act of law but an act of arbitrary authority.

The hearing must occur before a **court of record**, a tribunal established by law, exercising judicial power according to established procedures, and maintaining a permanent record of its proceedings. Courts of record possess the authority to administer oaths, compel the attendance of witnesses, receive evidence, and render judgments according to law. The record itself serves as the official memorial of the proceedings, ensuring transparency, accountability, and the ability of higher courts to review the legality of the judgment.

Historically, the requirement of a court of record ensured that disputes affecting life, liberty, or property were decided according to the settled forms of law rather than by administrative discretion or executive command. Proceedings conducted outside a court of record lack the procedural safeguards necessary to guarantee fairness, including the preservation of evidence, the examination of witnesses under oath, and the creation of a record subject to appellate review.

The public character of the hearing further protects the integrity of the judicial process. Open proceedings allow the community to observe the administration of justice and guard against secret judgments or abuses of authority. As the common law recognized, no person should be condemned unheard, and justice must be administered openly and according to the law of the land.

Thus, a hearing before a lawful tribunal, specifically a **court of record exercising judicial authority under law, is a condition precedent to lawful judgment**. Only after both parties have been heard, the evidence examined, and the proceedings recorded according to law may the tribunal render judgment. When this safeguard is absent, the process loses its legal foundation and cannot satisfy the requirements of due process.

Controlling Maxims

- Let the other side be heard — Audiatur et altera pars
- No man should be condemned unheard — Broom, Max. 113
- The practice of the court is the law of the court — 3 Bulst. 53

Confirming Cases

- ★ **In re Oliver, 333 U.S. 257 (1948)**. Affirmed right to public trial. *"Whatever other benefits the guarantee to an accused that his trial be conducted in public may confer upon our society, the guarantee has always been recognized as a safeguard against any attempt to employ our courts as instruments of persecution."*
- ★ **Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980)**. Extended public hearing to due process. *"The right of access to places traditionally open to the public, as criminal trials have long been, may be seen as assured by the amalgam of the First Amendment guarantees of speech and press."*

VII. Impartial Tribunal and Jury

Judex debet esse impar

Principle: Judgment must be rendered by an impartial tribunal free from bias, interest, or participation in the accusation. The maxim *judex debet esse impar*, "a judge must be impartial", expresses the foundational rule that justice cannot exist where the decision-maker has a personal stake in the outcome or participates in the prosecution of the case. The tribunal must stand neutral between the parties and decide the matter according to law and the evidence presented.

The requirement of impartial adjudication prevents the consolidation of prosecutorial and judicial power in the same authority. When the accuser, investigator, and judge are the same entity, the safeguards of due process collapse, and the proceeding becomes an exercise of unilateral power rather than lawful adjudication. For this reason, the common law has long insisted that no person may act simultaneously as accuser and judge, *nemo potest esse simul actor et iudex*.

In criminal cases, the law provides an additional safeguard through the institution of the jury. The jury serves as a body of impartial citizens drawn from the community, tasked with determining the facts of the case and ensuring that judgment does not rest solely upon the authority of the state. Trial by jury has historically been regarded as a fundamental protection of liberty, interposing the judgment of the people between the accused and the power of government.

The impartial tribunal must also operate within a court of record exercising lawful jurisdiction. The judge presides over the proceedings to ensure that the rules of law and evidence are observed, while the jury, where required, determines the facts upon which judgment rests. This division of roles preserves the balance necessary for fair adjudication and guards against arbitrary or politically motivated judgments.

Thus, an impartial tribunal, and where applicable an impartial jury, constitutes a **condition precedent to lawful judgment**. Only when the decision-makers are neutral, detached, and bound by the rule of law can the proceeding satisfy the requirements of due process. Where bias, interest, or institutional conflict is present, the legitimacy of the tribunal is compromised and the resulting judgment cannot stand as an act of law.

Controlling Maxims

- A judge must be impartial — *Judex debet esse impar*
- The trial should always be had where the jurors can be best informed — 7 Coke, 1b
- No one may be both accuser and judge — *Nemo potest esse simul actor et iudex*

Confirming Cases

- ★ **Duncan v. Louisiana, 391 U.S. 145 (1968)**. Held jury trial essential to due process. "*Trial by jury in criminal cases is fundamental to the American scheme of justice.*"
- ★ **Hurtado v. California, 110 U.S. 516 (1884)**. Discussed grand jury but held not required for states, yet affirmed impartial tribunal. "*Due process of law in the latter refers to that law of the land which derives its authority from the legislative powers conferred upon Congress by the Constitution of the United States.*"

VIII. Burden of Proof on Accuser

Actori incumbit probatio

Principle: The burden of proof rests upon the party who makes the accusation. The maxim *actori incumbit probatio*, “the burden of proof lies upon the plaintiff”, expresses the rule that the accuser must establish the facts necessary to sustain the charge. The law does not presume guilt or liability; it requires the party asserting wrongdoing to prove it with sufficient evidence.

This rule protects individuals from being compelled to disprove accusations that have not first been substantiated by the accuser. The presumption of innocence flows from this principle: until the accuser meets the burden of proof, the accused stands free of liability under the law. Requiring the accused to prove innocence would invert the structure of justice and expose individuals to punishment based upon mere allegation.

The burden of proof also serves as a restraint on the exercise of governmental power. When the state initiates a prosecution, it must demonstrate the existence of every element of the alleged offense through competent evidence. The law does not allow the state to rely on suspicion, conjecture, or administrative convenience; it must prove its case according to the standards required by law.

In criminal proceedings, this burden is particularly strict. Because the consequences may involve deprivation of liberty or property, the prosecution must establish guilt beyond a reasonable doubt. This standard reflects the fundamental principle that it is better for the guilty to escape punishment than for the innocent to be wrongfully condemned.

Thus, the burden of proof resting on the accuser is a **condition precedent to lawful judgment**. Unless the party bringing the accusation proves the facts necessary to sustain the charge, the tribunal cannot lawfully impose judgment. When the burden of proof is shifted onto the accused or diluted by presumption, the proceeding ceases to operate under the rule of law and fails to satisfy the requirements of due process.

Controlling Maxims

- The burden of proof lies on him who asserts the fact — Steph. Pl. 84
- He who affirms must prove — Porter v. Stevens, 9 Cush. (Mass.) 535
- Proofs ought to be evident — Co. Litt. 283

Confirming Cases

- ★ **In re Winship, 397 U.S. 358 (1970).** Held burden on state in criminal cases. *"The Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."*

- ✳ **Speiser v. Randall, 357 U.S. 513 (1958).** Shifted burden violates due process. *"Where the transcendent value of speech is involved, due process certainly requires... that the State bear the burden of persuasion to show that the appellants engaged in criminal speech."*

IX. Judgment According to Law

Judicium semper pro veritate accipitur

Principle: Judgment must be rendered according to established law and the facts proved in the proceeding. The maxim *judicium semper pro veritate accipitur*, “a judgment is accepted as truth”—reflects the principle that a lawful judgment derives its authority from the application of law to the facts established through due process. A court does not create law through its will; it declares and applies the rule of law governing the case before it.

The authority of judgment therefore depends upon the integrity of the process that precedes it. Only when the steps of due process, sworn accusation, neutral review, sufficient cause, lawful charge, public hearing, impartial tribunal, and proof by the accuser, have been satisfied may the tribunal proceed to judgment. If any of these conditions are absent, the judgment rests on a defective foundation and cannot properly be regarded as the act of law.

Judgment according to law requires that the tribunal decide the case based on the legal rules governing the dispute rather than personal preference, administrative policy, or external pressure. The judicial function is not to create new rules but to determine what law already governs the controversy. As recognized in **State v. Post**, the duty of the court is to examine the existing sources of law, natural law, fundamental principles, and the settled law of the community, and declare which rule properly applies to the case. Courts therefore do not legislate from the bench; they declare whether the conduct in question aligns with the law of God, the fundamental law, and the constitutional order of society.

The law itself defines and limits the power of the tribunal. When judgment is rendered according to these governing principles and grounded in the facts proved in the record, it carries the authority of law. When judgment departs from these foundations, substituting discretion, policy preference, or arbitrary will, it ceases to be judicial in character.

Thus, judgment according to law represents the culmination of due process: the point at which the tribunal formally declares the legal consequence of the facts proven before it. When the court faithfully declares the law and applies it to the case, the judgment stands as an act of justice. When it does not, when the court abandons the rule of law and substitutes its own will, the judgment loses its legitimacy and fails the requirements of due process.

Controlling Maxims

- Judgment is to be given according to what is proved — Lofft. 42
- The law is the definition and limitation of power — *Yick Wo v. Hopkins*, 118 U.S. 356
- Judgment without due process is void — *Norton v. Shelby County*, 118 U.S. 425

- A court can only declare what the law is, and whether consistent with the law of God, and the fundamental or constitutional law of society. *The State v. Post*, 20 N.J.L. 368, 370 (1845).

Confirming Cases

- ✳ **Hurtado v. California, 110 U.S. 516 (1884).** Judgment must follow law of the land. "*Due process of law... refers to that law of the land in each State which derives its authority from the inherent and reserved powers of the State.*"
- ✳ **Davidson v. New Orleans, 96 U.S. 97 (1877).** "*It is not possible to hold that a party has, without due process of law, been deprived of his property, when... he has... a fair trial in a court of justice, according to the modes of proceeding applicable to such a case.*"

X. No Punishment Without Lawful Judgment

Nulla poena sine iudicio

Principle: No person may be punished, deprived of liberty, or stripped of property except through lawful judgment rendered after due process of law. The maxim *nulla poena sine iudicio*, “no punishment without judgment”, expresses the rule that coercive force may only follow a lawful adjudication. Government authority does not begin with punishment; it begins with process.

This principle protects individuals from arbitrary deprivation by requiring that the state first establish its claim through lawful procedure. A person may not be detained, fined, or otherwise penalized merely upon accusation or administrative determination. The law requires that the accusation be tested through the steps of due process, sworn complaint, neutral review, sufficient cause, lawful charge, public hearing, impartial tribunal, and proof of the accusation, before any penalty may be imposed.

The rule also reflects the broader principle that **law precedes force**. The function of the court is to determine whether the law has been violated and to declare the legal consequence of that violation. Only after this determination has been made may enforcement follow. When punishment precedes judgment, the process is reversed: force replaces law, and the protections of due process collapse.

This safeguard is closely related to the principles that there can be **no crime without law** (*nullum crimen sine lege*) and **no punishment without law** (*nulla poena sine lege*). Together these maxims ensure that punishment occurs only when three conditions are satisfied: a law defining the offense exists, the accusation has been proven through lawful process, and a competent tribunal has rendered judgment according to law.

Thus, lawful judgment stands as a **condition precedent to punishment**. Enforcement without judgment, whether through detention, seizure, or other coercive action, lacks legal foundation and cannot be regarded as the operation of law. When force precedes judgment, the proceeding

ceases to be governed by law and becomes an exercise of arbitrary power, contrary to the fundamental requirements of due process.

Controlling Maxims

- An act of the court shall prejudice no man — Jenk. Cent. 118

Confirming Cases

- ★ **Pennoyer v. Neff, 95 U.S. 714 (1877).** Enforcement requires due process. "*Due process of law means a course of legal proceedings according to those rules and principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights.*"
- ★ **Griffin v. Griffin, 327 U.S. 220 (1946).** Enforcement without notice violates due process. "*Due process requires that one charged with contempt of court be advised of the charges against him, have a reasonable opportunity to meet them by way of defense or explanation.*"

XI. Safeguards in Criminal Cases

Nulla poena sine lege

Principle: In criminal proceedings, additional safeguards must exist before punishment may occur. Because criminal prosecution threatens liberty and reputation, the law imposes stricter procedural protections to ensure that punishment follows only after lawful process and proof. These safeguards include the requirement that crimes be defined by law, that accusations be tested before impartial tribunals, and that guilt be determined by a jury of peers.

The maxim *nulla poena sine lege*, “no punishment without law”, reflects the fundamental rule that punishment may occur only where the law has previously defined the offense and prescribed the penalty. The state cannot punish conduct that has not been clearly established as unlawful. Criminal liability must therefore arise from law enacted beforehand, not from retrospective judgment or discretionary enforcement.

Because of the severity of criminal sanctions, the law further requires that the accusation be examined through institutional safeguards designed to protect the innocent. Historically these protections include the grand jury, which determines whether sufficient cause exists to proceed with prosecution, and the petit jury, which determines guilt based on the evidence presented at trial. These institutions place the judgment of the community between the accused and the power of the state.

The burden of proof rests entirely upon the prosecution. The accused is presumed innocent unless the state proves every element of the offense beyond a reasonable doubt. This requirement reflects the longstanding principle that it is preferable for the guilty to escape punishment than for the innocent to be wrongfully condemned.

Thus, criminal punishment may occur only when three conditions are satisfied: the conduct has been defined as criminal by law, the accusation has been proven through lawful process, and the judgment has been rendered by a competent tribunal according to the rules governing criminal trials.

Controlling Maxims

- No punishment without law — *Poena non irrogatur nisi lege*
- The burden of proof rests on the accuser — *Actori incumbit probatio*
- Trial by jury as safeguard of liberty — fundamental principle of common law
- Juries are the judges of fact and law in American jurisprudence. *State of Georgia v. Brailsford*, 3 Dall. 1, 4; *U.S. v. Dougherty*, 473 F.2d 1132-33.
- The decision of twelve good and upright men is thought by the common law to be the dictate of truth. *Halk. Max.* 73.
- There can be no valid trial jury of less than 12 men, and a consent even by the defendant to a trial by a less number is absolutely void. *Hunt v. State*, 61 Miss. 577, 580, 581.

Confirming Cases

- ★ **United States v. Hudson and Goodwin, 11 U.S. 32 (1812).** No crime without law. "*The legislative authority of the Union must first make an act a crime, affix a punishment to it.*"
- ★ **Apprendi v. New Jersey, 530 U.S. 466 (2000).** Jury must find facts for punishment. "*Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt.*"

XII. Due Process as the Barrier Against Arbitrary Power

Salus populi suprema lex esto

Principle:

Due process functions as the structural barrier preventing arbitrary power. By requiring sworn accusation, neutral review, lawful charge, hearing before an impartial tribunal, proof of the accusation, and judgment according to law, due process ensures that governmental authority operates according to established legal principles rather than personal will. The rule of law thus replaces the rule of men.

The maxim *salus populi suprema lex esto*, "let the welfare of the people be the supreme law", reflects the foundational principle that the purpose of government is to secure the rights and safety of the people. This objective cannot be achieved through arbitrary exercise of power. Instead, the protection of the people requires adherence to the rule of law and the safeguards that prevent unjust deprivation of life, liberty, or property.

The Constitution embodies this principle by placing limits upon governmental authority and by requiring that all exercises of power conform to the law of the land. Public officials do not possess inherent authority to act outside these limits. Their power derives from the law and must remain subordinate to it.

When these safeguards are respected, government functions as a system of laws applied through lawful process. When they are ignored, the system ceases to operate under law and becomes an instrument of arbitrary authority. Due process therefore stands as the essential barrier preserving the constitutional order and protecting individual liberty.

Controlling Maxims

- The welfare of the people is the supreme law — *Salus populi suprema lex*
- A law repugnant to the constitution is void — *Marbury v. Madison* reference
- Justice is to give each his due — Aristotle via maxims

Confirming Cases

- ★ **Cooper v. Aaron, 358 U.S. 1 (1958).** No officer can war against due process. *"No state legislator or executive or judicial officer can war against the Constitution without violating his undertaking to support it."*
- ★ **Yick Wo v. Hopkins, 118 U.S. 356 (1886).** Due process protects against arbitrary action. *"Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand... the denial of equal justice is still within the prohibition of the Constitution."*