

Module 20: The History and Drift of Law

From Law as a Rule of Right to Positive Enactment, Institutional Fiat, and Government by Procedure

Section 1: Module Summary & History

Core Overview

Module 20 analyzes the structural transition of Law from a "rule of right" that precedes and governs the state to a system of "government by procedure," where institutional acts provide their own justification. The module posits that Law is not merely whatever a government issues; rather, Law identifies rightful boundaries and protects interests (life, liberty, and property) that exist before the state is formed. The foundational sequence dictates that Law and Rights precede the Constitution, which then creates a government of delegated, fiduciary authority.

Structural friction arises when modern institutional practices invert this sequence, treating the exercise of power as proof of its own lawfulness. This leads to the central "Firewall Question": **Is the government acting under Law, or merely exercising institutional power under the appearance of Law?** When institutions substitute their own internal rules, regulations, and procedural hurdles for substantive Law, they shift the measure of authority from an external standard to the institution's own circular processes.

The Timeline of Drift (1776 to Present)

The historical movement of Law is characterized by a gradual abandonment of the 1776 procedural baseline, where authority must be traced to a specific delegation, in favor of institutional self-validation.

Phase Name	Historical/Analytical Era	Key Developments & Case Law References	Impact on Procedural Sequence
Law as a Rule of Right	1776 Foundational Baseline	Federalist No. 47 & 48; Thomas Paine's distinction of Trust vs. Usurpation.	Law precedes government; all authority must trace back through the People and Constitution.
Positive Enactment	Derivative Implementation	Statutes, judgments, and ordinances.	Acts are recognized as derivative; they prove an action occurred but do not prove the action was authorized.
Drift 1: Legislation as Law	Early Institutional Shift	Focus on the "Legislative Vote" rather than delegated authority.	The inquiry changes from "Is this within authority?" to "Did the legislature pass it?"
Drift 2: Judicial Doctrine	Rule of Precedent	Substitution of judicial interpretation for the controlling Law itself.	Judicial doctrine becomes self-validating; the referee's previous call replaces the rulebook.

The Rule of Law: Breakdown, Record and Exposure

Drift 3: Regulation	Administrative Expansion	Executive agencies supply governing rules, duties, and consequences.	The executive shifts from executing legislative rules to creating the rules it later enforces.
Drift 4: Procedure	Procedural Gatekeeping	Filing rules, deadlines, and exhaustion requirements.	Procedure controls access to Law; the "track" to the courthouse becomes a "barricade" to the right.
Drift 5: Institutional Practice	Authority by Repetition	Longevity of practice used as a substitute for delegated power.	Duration and acquiescence are treated as a cure for defective origins or missing grants.
Drift 6: Presumption	Modern Governance	The "Presumption of Regularity" in official conduct.	Reverses the burden: official acts are presumed valid unless the citizen can prove a defect.

Core Operational Concepts

- **The Burden Shift:** In the foundational model, the government must demonstrate the lawful authority supporting its intervention in a protected sphere. In the drifted model, the "Presumption of Regularity" moves the practical burden to the citizen, who must prove a defect in an act that is already presumed valid simply because an official performed it.
- **The Operational Mechanism:** Administration normalizes the drift through circular reasoning. The institution creates a rule, executes it, interprets it, and then judges any challenge to it. This accumulation of functions, warned against in *Federalist No. 47*, allows the institution to use its own internal processes as evidence of its lawfulness.

Glossary of Key Terms

- **Rule of Right:** The understanding of Law as a protector of boundaries that defines when those boundaries may be crossed and provides remedies for injury.
- **Fiduciary Authority:** Power held in trust by public officers for a defined purpose and limited by a specific commission (The Constitution).
- **Delegated Power:** Authority specifically granted by a lawful source; distinguished from "Assumed Power" or usurpation.
- **Positive Enactment:** A derivative act (statute, regulation, or judgment) that depends on superior authority for its validity.
- **Presumption of Regularity:** An evidentiary tool where official acts are assumed to be valid and properly performed until proven otherwise.
- **Quo Warranto:** A legal proceeding ("By what authority?") used to challenge the lawful title or right of a person or institution to exercise a specific power.
- **The Firewall Question:** The analytical test used to determine if an act is grounded in Law or merely the exercise of institutional power.

The Rule of Law: Breakdown, Record and Exposure

Section 2: Assessment and Review

Multiple-Choice Quiz

1. According to the foundational sequence, which of the following is the final step before a "Governmental Act" can claim lawful authority? A. The Constitution B. Rights C. Delegated Authority D. Positive Enactment
2. Thomas Paine defines "delegated power" as trust. What term does he use for "assumed power"? A. Legislation B. Usurpation C. Presumption D. Regulation
3. The "First Drift" occurs when which of the following happens? A. Procedure blocks access to the court. B. An agency creates its own rules. C. Legislation is treated as Law merely because it was enacted. D. A court follows a previous doctrine.
4. What is the primary function of "Procedure" in its original, non-drifted state? A. To determine if a right will be heard. B. To carry Law into judgment. C. To establish internal court rules. D. To provide a barricade against frivolous claims.
5. *Federalist No. 47* associates the accumulation of legislative, executive, and judicial powers in the same hands with: A. Constitutional efficiency. B. Proper institutional practice. C. Tyranny. D. Necessary checks and balances.
6. In the context of the "Florida Bar" exemplar, what was the primary source of the Court's jurisdiction? A. Rules Regulating The Florida Bar. B. The U.S. Constitution. C. Article V, Section 15 of the Florida Constitution. D. Institutional Practice.
7. How does the "Presumption of Regularity" structurally invert the Law? A. It requires the government to prove its authority first. B. It makes the institution the measure of its own lawfulness. C. It ensures the Constitution remains superior to the officer. D. It forces the legislature to adhere to judicial doctrine.
8. According to *Federalist No. 48*, what is required to prevent separation of powers from existing only "on paper"? A. Complete institutional isolation. B. Written boundaries alone. C. Lawful checks and balances. D. The removal of executive agencies.
9. The legal proceeding *Quo Warranto* literally asks what question? A. Is this act fair? B. By what authority? C. Is the official acting in good faith? D. What is the remedy?
10. Which drift describes "repeated governmental conduct" beginning to function as authority in itself? A. Law becomes Regulation. B. Law becomes Procedure. C. Law becomes Institutional Practice. D. Law becomes Positive Enactment.

Answer Key and Explanations Table

Question Answer		Explanation
1	C	Slide 3 defines the sequence: Law → Rights → People → Constitution → Government → Delegated Authority → Governmental Act.
2	B	Slide 7 explicitly cites Paine's distinction between delegated power (trust) and assumed power (usurpation).
3	C	Slide 12 notes the first drift is when the question changes from "Was this authorized?" to "Did the legislature pass it?"
4	B	Slide 15 states procedure exists to organize how a controversy is presented and carry Law into judgment.

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5	C	Slide 10 and 26 cite Madison in Federalist No. 47 regarding the accumulation of powers as the definition of tyranny.
6	C	Slide 19 identifies Article V, Section 15 as the constitutional source cited by The Florida Bar.
7	B	Slide 17 and 18 explain that presumption replaces proof of authority with the institution's own acts.
8	C	Slide 11 and 27 state that Federalist No. 48 requires constitutional means to resist encroachment.
9	B	Slide 29 defines Quo Warranto as a proceeding testing the claimed right to exercise power ("By what authority?").
10	C	Slide 16 describes the fifth drift as institutional practice where repetition becomes presumed authority.

Essay Format Questions

1. **The Inversion of Procedure:** Analyze how the "Fourth Drift" (Law becomes Procedure) fundamentally alters the relationship between a citizen's rights and the judicial forum. Explain the difference between procedure as a "track" and procedure as a "barricade."
2. **The Fiduciary Nature of Office:** Using the "House Sitter" or "Board of Directors" analogies from the text, synthesize the argument that public power must be delegated rather than assumed. Contrast this with the modern "Presumption of Regularity."
3. **The Interplay of Federalist Nos. 47 and 48:** Discuss why separation of powers cannot exist without checks and balances. How does institutional "insulation" (using separation as a shield) actually violate the intent of the constitutional structure?

Section 3: Exemplars Summary and Relevance

Exemplar	Summary	Relevance to Material
The Florida Bar Response	The Bar identified the State Constitution as the Court's source of power but relied on court-created rules to define its own institutional authority.	Illustrates the "Firewall Question" regarding whether a rule implements a constitutional grant or creates new, unauthorized powers.
Massachusetts Senate S.3104	The Senate cooperated with a performance audit on a limited basis while disputing the Auditor's constitutional authority to compel it.	Demonstrates "Cooperation without Concession" and the tension between institutional isolation and lawful checks.
Presumption of Regularity	A standard where official conduct is presumed valid, often shielding the accumulation of functions from inquiry.	Serves as the final stage of "Drift," where the institution's own conduct is treated as evidence of its validity, replacing the need for proof of authority.

Section 4: Expanded Homework Assignment and Practical Application Exercise

Case File / Background

A student is faced with an administrative reality where an agency or public officer is exercising a specific power (e.g., imposing a fine, denying a permit, or enforcing a rule) that does not appear to have a clear legislative or constitutional origin. The institution points to its own "standard operating procedure" or a "longstanding practice" as the basis for its action.

Procedural Review Assignment Apply the following step-by-step operational directive to the chosen office:

1. **Step One (Identify and Document):** Record the specific person or institution exercising power and the exact act being challenged.
2. **Step Two (Preserve Chronology):** Map the act against the foundational sequence (Law → Rights → People → Constitution → Government → Delegated Authority → Act). Identify where the chain breaks.
3. **Step Three (Test for Drift):** Determine if the authority is being claimed through one of the six drifts (e.g., is "practice" being used as a substitute for "delegation"?).
4. **Step Four (Identify the Presumption):** Document whether the institution is relying on the "Presumption of Regularity" to avoid showing its source of authority.

Required Document Preparation Draft a formal inquiry based on the **Quo Warranto** standard. The document must record and preserve the following:

- The specific **Office** or **Franchise** being exercised.
- The **Instrument** (Constitution or Statute) that created the office.
- The **Delegation** that defines the scope of the office's power.
- The **Specific Power** being questioned and the lack of a tracing to the original delegation.

Final Review Question Upon completion of the assignment, the student must answer: **By what lawful authority and warrant does this specific person or institution exercise this particular governmental power, independent of their own institutional claims or repeated practices?**

Paul Carnie - General Multiple Requests Records :: W016439 060226

From The Florida Bar Public Records <noreplyfloridabar@mycusthelp.net>

To paul.carnie@proton.me

Date Friday, June 26th, 2026 at 9:02 AM

--- Please respond above this line ---

The Florida Bar



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June 26, 2026

Paul Carnie

Public Records Request: W016439-060226 of 6/2/2026

Record Type: General/Multiple Requests Records

Request Description: Copies of records concerning the authority, jurisdiction, rulemaking structure, administrative framework, financial structure, and procedural governance relating to the licensing and regulation of the practice of law within the State of Florida.

Paul Carnie:

First, Art. V, section 15 of the Florida Constitution states that "The supreme court shall have exclusive jurisdiction to regulate the admission of persons to the practice of law and the discipline of persons admitted." This is further codified in the Introduction, Rules Regulating the Florida Bar: "The Supreme Court of Florida by these rules establishes the authority and responsibilities of The Florida Bar, an official arm of the court."

Second, relying on separation of powers principles, the courts have consistently held that the judiciary is not an "agency" for purposes of Ch. 119, F.S., commonly known as the Florida Public Records Law. See, e.g., *Times Publishing Company v. Ake*, 660 So. 2d 255 (Fla. 1995) (the judiciary, as a coequal branch of government, is not an "agency" subject to supervision or control by another coequal branch of government); and *Locke v. Hawkes*, 595 So. 2d 32 (Fla. 1992). Cf. s. 119.0714(1), F.S., stating that "[n]othing in this chapter shall be construed to exempt from [s. 119.07(1), F.S.] a public record that was made a part of a court file and that is not specifically closed by order of court . . ." (e.s.) And see *Tampa Television, Inc. v. Dugge*, 559 So. 2d 397 (Fla. 1st DCA 1990) (Legislature has recognized the

distinction between documents sealed under court order and those not so sealed, and has provided for disclosure of the latter only).

Access to records of the judicial branch is governed by Florida Rule of General Practice & Judicial Administration 2.420:

(a) Scope and Purpose. Subject to the rulemaking power of the Florida Supreme Court provided by article V, section 2, Florida Constitution, the following rule shall govern public access to and the protection of the records of the judicial branch of government. The public shall have access to all records of the judicial branch of government, except as provided below...

(b) Definitions.

(1) "Records of the judicial branch" are all records, regardless of physical form, characteristics, or means of transmission, made or received in connection with the transaction of official business by any judicial branch entity and consist of:

....

(B) "administrative records," which are all other records made or received pursuant to court rule, law, or ordinance, or in connection with the transaction of official business by any judicial branch entity.

*(2) "Judicial branch" means the judicial branch of government, which includes the state courts system, the clerk of court when acting as an arm of the court, **The Florida Bar**, the Florida Board of Bar Examiners, the Judicial Qualifications Commission, and all other entities established by or operating under the authority of the supreme court or the chief justice.*

In 1949 the Florida Supreme Court granted a petition to integrate the Florida Bar. To review your request or download any associated files; please login to the [Public Records System](#) using this email address.

If you have any further questions, please feel free to contact me at your earliest convenience.

Sincerely,

Rick Courtemanche
Deputy General Counsel

rcourtemanche@floridabar.org
850-561-5788

Please note: Florida has very broad public records laws. Many written communications to or from The Florida Bar regarding Bar business may be considered public records, which must be made available to anyone upon request. Your e-mail communications may therefore be subject to public disclosure.

SENATE No. 3104

The Commonwealth of Massachusetts

In the One Hundred and Ninety-Fourth General Court
(2025-2026)

RESOLUTIONS RESPONDING TO THE SUPREME JUDICIAL COURT’S ORDER OF
MAY 7, 2026, AND ENHANCING GOVERNMENT TRANSPARENCY.

1 WHEREAS, AS ELECTED MEMBERS OF THE MASSACHUSETTS GENERAL
2 COURT, SENATORS BEAR A RESPONSIBILITY TO UPHOLD THE CONSTITUTION
3 AND PRESERVE THE INDEPENDENCE OF THE GENERAL COURT AS A COEQUAL
4 BRANCH OF GOVERNMENT; AND

5 WHEREAS, THE SENATE RECOGNIZES THE IMPORTANCE OF MAINTAINING
6 PUBLIC CONFIDENCE IN THE INTEGRITY AND ACCOUNTABILITY OF STATE
7 GOVERNMENT; AND

8 WHEREAS, THE SENATE IS COMMITTED TO INFORMING THE PUBLIC AND
9 CONSTITUENTS OF THE WORK IT DOES ON THE PEOPLE’S BEHALF; AND

10 WHEREAS, SINCE MARCH 2023 AND CONTINUING THROUGH JANUARY 3,
11 2025, WHEN CHAPTER 250 OF THE ACTS OF 2024 CAME INTO EFFECT AFTER THE
12 VOTERS’ APPROVAL OF QUESTION 1, THE OFFICE OF THE STATE AUDITOR
13 ISSUED LETTERS, STATEMENTS AND COMMUNICATIONS EXPRESSING ITS

14 INTENTION TO CONDUCT A “PERFORMANCE AUDIT” OF THE GENERAL COURT;
15 AND

16 WHEREAS, ON JANUARY 6, 2025, THE OFFICE OF THE STATE AUDITOR SENT
17 THE SENATE REQUESTS FOR DOCUMENTS RELATED TO ITS PROPOSED
18 PERFORMANCE AUDIT; AND

19 WHEREAS, MEMBERS OF THE SENATE HAVE SOUGHT CLARIFYING
20 INFORMATION FROM THE OFFICE OF THE STATE AUDITOR CONCERNING THE
21 PROPOSED PERFORMANCE AUDIT AND DOCUMENT REQUESTS AND HAVE
22 CONVEYED THE SENATE’S CONCERNS REGARDING THE AUDIT’S
23 CONSTITUTIONALITY, SCOPE, ADHERENCE TO GENERALLY ACCEPTED
24 GOVERNMENT AUDITING STANDARDS AND THE AUDITOR’S APPARENT
25 CONFLICT OF INTEREST; AND

26 WHEREAS, ON FEBRUARY 10, 2026, THE STATE AUDITOR BROUGHT SUIT
27 WITHOUT THE ATTORNEY GENERAL’S AUTHORIZATION AGAINST THE
28 PRESIDENT OF THE SENATE, THE SPEAKER OF THE HOUSE OF REPRESENTATIVES
29 AND THE CLERKS OF BOTH LEGISLATIVE BODIES; AND

30 WHEREAS, AT ORAL ARGUMENT BEFORE THE SUPREME JUDICIAL COURT
31 ON MAY 6, 2026, COUNSEL FOR THE STATE AUDITOR AGREED THAT THE
32 AUDITOR’S LITIGATION RELATED ONLY TO THE LEGISLATURE’S ALLEGED
33 FAILURE TO PRODUCE DOCUMENTS RESPONSIVE TO THE 4 SPECIFIC REQUESTS
34 IN THE OFFICE OF THE STATE AUDITOR’S LETTER OF JANUARY 6, 2025; AND

WHEREAS, ON MAY 7, 2026, THE SUPREME JUDICIAL COURT ISSUED AN ORDER CONCLUDING THE AUDITOR’S LITIGATION IS “NOW LIMITED” TO THE 4 REQUESTS MADE ON JANUARY 6, 2025; AND

WHEREAS, THE SENATE, INFORMED BY THE RECENT CLARIFICATION OF SCOPE, SEEKS TO RESPOND RESPONSIBLY AND TRANSPARENTLY; NOW THEREFORE BE IT

RESOLVED, THAT THE SENATE IS GRATEFUL THAT THE MAY 7, 2026, ORDER BY THE SUPREME JUDICIAL COURT BROUGHT CLARITY TO THE STATE AUDITOR’S REQUESTS RELATED TO THE PROPOSED PERFORMANCE AUDIT; AND BE IT FURTHER

RESOLVED, THAT THE SENATE, SEEKING IN GOOD FAITH TO PROVIDE ADDITIONAL TRANSPARENCY, WILL PROVIDE PROMPTLY TO THE OFFICE OF THE STATE AUDITOR ALL RECORDS RESPONSIVE TO ITS LETTER OF JANUARY 6, 2025, AS CLARIFIED BY THE SUPREME JUDICIAL COURT’S ORDER OF MAY 7, 2026, WHICH SPECIFIES (A) “[T]HE OFFICIAL BUDGETS FOR THE SENATE FOR FISCAL YEARS 2021, 2022, 2023 AND 2024”, (B) “[C]OPIES OF OFFICIAL AUDITS OF THE SENATE FOR FISCAL YEARS 2021, 2022, 2023 AND 2024”, (C) “[A] LISTING OF ALL TRANSACTIONS RELATED TO THE SENATE’S BALANCE FORWARD LINE ITEM FOR FISCAL YEARS 2021, 2022, 2023 AND 2024” AND (D) “[A] LISTING OF ALL MONETARY SETTLEMENT AGREEMENTS ENTERED INTO BY THE SENATE WITH ANY CURRENT OR FORMER EMPLOYEES OR MEMBERS OF THE SENATE DURING FISCAL YEARS 2021, 2022, 2023 AND 2024”; AND BE IT FURTHER

57 RESOLVED, THAT THE SENATE, IN PROVIDING SAID RECORDS, DOES SO
58 VOLUNTARILY BUT DOES NOT CONCEDE THAT IT MAY BE AUDITED PURSUANT
59 TO SECTION 12 OF CHAPTER 11 OF THE GENERAL LAWS WITHOUT VIOLATING
60 THE CONSTITUTION OF THE COMMONWEALTH; AND BE IT FURTHER

61 RESOLVED, THAT THE SENATE RESERVES ALL ITS RIGHTS TO OBJECT TO
62 ANY SUCH AUDIT, PRESENT OR FUTURE, AND ON ANY GROUNDS, INCLUDING,
63 BUT NOT LIMITED TO, THAT CHAPTER 250 OF THE ACTS OF 2024 VIOLATES THE
64 SENATE'S CONSTITUTIONAL RULEMAKING AUTHORITY, SEPARATION OF
65 POWERS, LEGISLATIVE IMMUNITY AND PRIVILEGE AND THE LEGAL
66 PRESUMPTION THAT STATUTES OPERATE PROSPECTIVELY AND CANNOT BE
67 APPLIED RETROACTIVELY IN THE ABSENCE OF CLEAR LEGISLATIVE INTENT;
68 AND BE IT FURTHER

69 RESOLVED, THAT A COPY OF THESE RESOLUTIONS BE TRANSMITTED
70 FORTHWITH BY THE CLERK OF THE SENATE TO THE JUSTICES OF THE SUPREME
71 JUDICIAL COURT, THE ATTORNEY GENERAL AND THE STATE AUDITOR.

SUBMITTED BY:

SENATOR FEENEY

COSPONSORS:

SENATOR FRIEDMAN

SENATOR ELDRIDGE