THE PROVINCE OF THE LAW

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My topic for tonight's speech is the "province of the law." I aim to mark out the boundaries of this province and to consider what lies within the substance of its soil. The province of the law matters because, as Alexander Hamilton said, "[t]he interpretation of the laws is the proper and peculiar province of the courts."[1] To take the metes and bounds of law's province should reveal something about the judicial province and judicial duty.

My starting point is that law *has* a province. To make such an assertion is already to stand on one side of many important jurisprudential debates. It assumes that within our constitutional system law has a distinct domain, and that legal interpretation is a distinct enterprise, not to be confused with abstract moral philosophy, economics, or political theory. This separation was once taken for granted, but today it is often supplanted by legal theories that both deny the boundaries of the law and corrupt its substance.

We have followed the fabled "path of the law"[2] further and further away from our constitutional origins. Rather than go any further, we should turn back to the idea that law has a province. It is a place, not a journey.

My lecture proceeds as follows. I begin by explaining the concept of law's province. Thinking about the law as a province suggests

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1. THE FEDERALIST NO. 78, at 404 (Alexander Hamilton) (Gideon ed., 2001).

2. *Cf.* Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457 (1897).

not only that law has limits, but also that it has substance, the soil that makes up our legal traditions. The limits of this province and its distinct content shape the judicial duty. I will then turn to exploring these two aspects of the province of the law, its limits and its substance.

First, the boundaries of law's province have come under siege from many different directions—including living constitutionalism and an unbounded administrative state. In response, originalists and textualists have sought to defend law's boundaries. Legal interpretation requires determining the original meaning of the Constitution and what Justice Scalia called the "fair reading" of statutes.[3] Much of the conservative legal movement's efforts have been to rebuild the proper borders around the province of the law. And this has been essential work, to understand the nature of law, to consider the proper role of judges, and to expound the distinct powers vested in the political branches.

Second, the province of the law is more than just its boundaries. The terrain of our law includes the foundational political theory animating the Constitution, not to mention roots resting in the common law and natural law. To interpret and apply our laws correctly, we must unearth and examine our distinctly Anglo-American legal principles and constitutional commitments. The proper and peculiar province of the courts is to interpret the law, staying within law's province and drawing from its rich history and traditions.

For those who believe law has a province, we must focus on the task of understanding what belongs in it. Appreciating our laws with humility and respect for preceding generations will promote, as Lincoln said, "the perpetuation of our political institutions."[4]

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3. ANTONIN SCALIA & BRYAN A. GARNER, READING LAW 33–41 (2012).

4. Abraham Lincoln, *The Perpetuation of Our Political Institutions: Address Before the Young Men's Lyceum of Springfield, Illinois* (Jan. 27, 1838), *reprinted in* THE ESSENTIAL LINCOLN: SPEECHES AND CORRESPONDENCE 6 (Orville V. Burton ed. 2009).

This lecture serves as a kind of response against those who would deny the boundaries of law's province, leaving only a wilderness of evolving norms, abstract justice, or something like the common good. It is an affirmative case for the province of the law.

I. LAW'S PROVINCE

To understand the province of the law and the province of the courts, the best place to start is with the Constitution. We are, after all, at an event hosted by the Georgetown Center for the Constitution and here at the National Archives, just a few feet away from an original copy of our great charter.

The Constitution establishes what counts as law and how it must be enacted.[5] The Constitution also establishes and limits the powers of the three branches of government, powers that, importantly, are *vested* in particular actors. The legislative power is vested in Congress; the executive power is vested in a single President; and the judicial power is vested in courts.[6]

Vesting power in a particular actor grants authority that includes a bundle of duties, many of them exclusive to the particular office.[7] This echoes a fundamental principle of property law, namely that when title to land *vests*, its owner possesses a specific and exclusive bundle of rights that attach to a particular place. As Madison said in explaining the separation of powers, "[t]he interest of the man, must be connected with the constitutional rights of *the place*."[8]

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5. *See* U.S. CONST. art. I, §§ 1, 7; *id.* art. VI, cl. 2.

6. *See id.* art. I, § 1; *id.* art. II, § 1; *id.* art. III, § 1.

7. Steven Calabresi, along with others, has examined the original meaning of the vesting clauses and the importance of vesting for understanding the Constitution's separation of powers. *See, e.g.*, Steven G. Calabresi, *The Vesting Clauses as Power Grants*, 88 NW. U. L. REV. 1377, 1380–82 (1994).

8. THE FEDERALIST NO. 51, *supra* note 1, at 268 (James Madison) (emphasis added).

My particular concern is with the federal courts, which are vested with the Article III "judicial Power."[9] This includes particular duties and obligations that flow from the original understanding of this power. Chief Justice Marshall, echoing Hamilton, famously said, "[i]t is emphatically the *province* and *duty* of the judicial department to say what the law is."[10]

Understanding what is within the province and duty of the judiciary requires understanding what is within the province of the law. Hamilton and Marshall's reference to "province" indicates a framework for thinking about law and judicial duty. First, law's province has limits and boundaries. Second, our legal province is made up of the peculiar soil and substance of American legal traditions.

Both the limits of the law and its substance are essential for understanding law's province and therefore the province and duty of the courts.

II. BOUNDARIES OF LAW'S PROVINCE

Let me next explore what it means for law to have a province, a fixed place with firm boundaries. In our society, the boundaries of law's province are marked out by the Constitution. The Constitution limits the powers of the federal government and establishes what counts as law. One way to appreciate these boundaries is to consider some ways in which they have been eroded. I cannot possibly detail them all in a dinner lecture but let me note just a few.

The early twentieth century progressives waged the first modern assault on the Constitution's exclusive vesting of government power in specific and distinct actors. Give them credit; they were honest about what they were doing. Woodrow Wilson and others

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9. *See* U.S. CONST. art. III, § 1 ("The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.").

10. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) (emphasis added).

openly stated that the Constitution's protections for individual liberty and rights had to yield to social efficiency and progressive policies geared toward the common good.[11] The progressives maintained that the legislature is too slow, the courts too traditional, and the need for progress too urgent to leave political reform to the constitutional process.[12] Instead, the progressives borrowed from then-popular German social thought in the belief that the collective good required government by experts.[13]

The Progressive Era ushered in what I will, for the sake of simplicity, call the wilderness theory of law. A wilderness approach promotes an unbounded understanding of government power in pursuit of particular substantive ends. Instead of keeping law within its well-defined province, the progressives tore down the fences that separated the legal enterprise from a free-wheeling social science inquiry.

It no longer mattered that the Constitution vested limited legislative power in Congress.[14] Executive agencies would now be able to exercise what amounted to the lawmaking power in the name of

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11. WOODROW WILSON, CONGRESSIONAL GOVERNMENT: A STUDY IN AMERICAN POLITICS 284–85 (1885) ("The 'literary theory' of checks and balances is simply a consistent account of what our constitution-makers tried to do; and those checks and balances have proved mischievous just to the extent to which they have succeeded in establishing themselves as realities."); *cf.* PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? 458 (2014) (describing Wilson's project of severing constitutional law from administrative function).

12. *See, e.g.*, FRANK JOHNSON GOODNOW, THE AMERICAN CONCEPTION OF LIBERTY AND GOVERNMENT 21 (1916) (celebrating the fact that "the sphere of governmental action is continually widening and the actual content of individual private rights is being increasingly narrowed"); JAMES M. LANDIS, THE ADMINISTRATIVE PROCESS 96 (1938) (complaining that, unlike adjudication by administrative bodies, judicial interpretation "suffer[s] not only from inexpertness but more from the slowness of that process to attune itself to the demands of the day").

13. *See* HAMBURGER, *supra* note 11, at 370–71, 458–66 (citing Woodrow Wilson, *The Study of Administration*, 2 POL. SCI. Q. 197 (1887)); *see also* West Virginia v. EPA, 142 S. Ct. 2587, 2617 n.1 (2022) (Gorsuch, J., concurring) (discussing Woodrow Wilson's disdain for democracy).

14. *See* Neomi Rao, *Why Congress Matters: The Collective Congress in the Structural Constitution*, 70 FLA. L. REV. 1 (2018).

efficiency.[15] The administrative state allows for the creation of law outside constitutional channels and the imposition of nationwide directives controlling the health, safety, and government-defined moral well-being of the people.

Many of these agencies combine the exercise of legislative, executive, and judicial functions—effectively making laws, enforcing them, and adjudicating public and private rights.[16] Despite the Constitution's vesting of all executive power in a single President, we have numerous independent agencies, such as the National Labor Relations Board and the Federal Election Commission.[17] Congress may of course create administrative agencies, so long as it acts within its limited and enumerated powers. But nowhere does the Constitution allow for the *delegation* of legislative power, the *comingling* of government powers, and execution of the laws *independent* of the Chief Executive.

In the original progressive approach, the power vested in the courts would also have to be diminished—the judiciary could not scrutinize these innovations and state the obvious: that many were unconstitutional. Rather, the courts had to adjust to the progressive project and the sweeping reforms of the New Deal. The courts largely stood aside as the fences around law's province were breached, and in some places torn down entirely.[18]

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15. *See* Neomi Rao, *Administrative Collusion: How Delegation Diminishes the Collective Congress*, 90 N.Y.U. L. REV. 1463, 1465 (2015) ("Delegation undermines separation of powers, not only by expanding the power of executive agencies, but also by unraveling the institutional interests of Congress.").

16. *See* Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1233–49 (1994).

17. *See* Neomi Rao, *Removal: Necessary and Sufficient for Presidential Control*, 65 ALA. L. REV. 1205, 1207–25 (2014).

18. *See* Wickard v. Filburn, 317 U.S. 111 (1942) (endorsing an expansive interpretation of the Commerce Clause); Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398 (1934) (adopting a narrow view of the Contracts Clause); Humphrey's Executor v. United States, 295 U.S. 602 (1935) (upholding removal restrictions that limit presidential control of so-called independent agencies); Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 474 (2001) (cataloguing the broad delegations of legislative power that have been found permissible since the New Deal).

While the courts retreated from enforcing the Constitution's actual boundaries, some judges also ventured out on new paths, far from law's province. Courts had long recognized the duty to say what the law is: to say what was within the province of the law.[19] But the Supreme Court gradually decided it would say and enforce what the law *should* be. That it would impose judge-made rules based on new concepts of liberty and reliance on the social good. Wholly apart from the Constitution's amendment process, jurists such as Justice Marshall and Justice Brennan emphasized that an enlightened Supreme Court should further hazy values like human dignity and develop new variants of liberty and equality, grown not from our legal soil but from select contemporary values.[20]

Spinning rights from the emanations and penumbras of the Constitution,[21] the courts further pushed law into the wilderness, far from its origins and roots.

Against these attacks, many people have sought to restore the province of the law—to fix, as it were, the fences that surround it.

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19. *See, e.g.*, Marbury v. Madison, 5 U.S. 137 (1 Cranch), 177 (1803).

20. *See, e.g.*, Furman v. Georgia, 408 U.S. 238, 271 (1972) (Brennan, J., concurring) ("The primary principle [for interpreting the Eighth Amendment] is that a punishment must not be so severe as to be degrading to the dignity of human beings."); Milliken v. Bradley, 418 U.S. 717, 782 (1974) (Marshall, J., dissenting) ("[H]owever imbedded old ways, however ingrained old prejudices, this Court has not been diverted from its appointed task of making a living truth of our constitutional ideal of equal justice under law." (internal quotation marks omitted)); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 71 (1973) (Marshall, J., dissenting) (stating that the "right of every American to an equal start in life . . . is far too vital" to rely on "the vagaries of the political process" to determine how public education is financed); *cf.* Neomi Rao, *Three Concepts of Dignity in Constitutional Law*, 86 NOTRE DAME L. REV. 183, 269–71 (2011) (discussing how certain appeals to dignity in constitutional decisionmaking undermine the protection of individual rights).

21. *See* Griswold v. Connecticut, 381 U.S. 479, 484 (1965) ("The foregoing cases suggest that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance.").

Judges and scholars have articulated theories of textualism and originalism, which depend on the claim that the law has a determinate meaning.[22] These approaches to interpretation restored the old fences and returned to the traditional American way of thinking about law as possessing specific content and specific limits. Proponents of textualism and originalism pushed back against the skepticism about law's meaning from progressives, legal realists, and living constitutionalists.

Marking the boundaries of law also helped to mark the boundaries of judicial power, its "proper and peculiar" province.[23] Most judges now at least claim to follow a text-first approach to statutory interpretation and to recognize the importance of the original meaning of the Constitution. "We're all textualists now," said Justice Kagan.[24] This recognition makes it harder, perhaps impossible, to justify the wilderness theory of law, harder to justify the judicial creation of entirely new rights.

Importantly, following the original meaning of the Constitution or the text of a statute is the best way to respect the moral and political choice of the American people to ratify the Constitution and its particular structure of lawful government.[25] The people did not

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22. *See, e.g.*, Clarence Thomas, *Judging*, 45 U. KAN. L. REV. 1, 5 (1996) ("My vision of the process of judging is unabashedly based on the proposition that there are right and wrong answers to legal questions."); Stephen E. Sachs, *Originalism as a Theory of Legal Change*, 38 HARV. J.L. & PUB. POL'Y 817, 819 (2015) ("Whatever rules of law we had at the Founding, we still have today, unless something legally relevant happened to change them. *Our* law happens to consist of *their* law, the Founders' law, including lawful changes made along the way.").

23. THE FEDERALIST NO. 78, *supra* note 1, at 404 (Alexander Hamilton).

24. Harvard Law School, *The 2015 Scalia Lecture: A Dialogue with Justice Elena Kagan on the Reading of Statutes*, YOUTUBE (Nov. 25, 2015), https://www.youtube.com/watch?v=dpEtszFT0Tg [https://www.perma.cc/VVT4-L37L].

25. *See generally* Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971); Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL'Y 61 (1994); Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541 (1994); ANTONIN

agree to a legal wilderness, nor did they choose an unbounded government. Rather, the people chose a government with separated and limited powers. This was the structure they believed would best prevent arbitrary rule and preserve their individual liberties—social, religious, and economic.

These efforts to explain the reasons for law's boundaries are now familiar. And the at least partial success of textualism and originalism is undeniable.

In our constitutional system, what counts as law is limited, as are the powers of the legislative, executive, and judicial departments. Text-based and originalist interpretation respects the boundaries of law's province and the fundamental moral choice of the people to live under "a government of laws, and not of men."[26]

III. WHAT IS INSIDE THE PROVINCE OF THE LAW?

This brings me to the heart of this lecture, to a consideration of what is *inside* our legal province. Fixing the fences around the province of the law has had a tremendous impact on our legal culture and on the courts.

Understanding the province of the law, however, requires more than marking out its boundaries. It also requires understanding what properly exists within the province, within the soil and foundations of our law.

In light of contemporary debates about legal interpretation, it seems increasingly obvious that it is not sufficient for judges merely

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SCALIA, A MATTER OF INTERPRETATION (1997); JOHN O. MCGINNIS & MICHAEL B. RAPPAPORT, ORIGINALISM AND THE GOOD CONSTITUTION (2013); Sachs, *supra* note 22; J. Joel Alicea, *The Moral Authority of Original Meaning*, 98 NOTRE DAME L. REV. 1 (2022) (offering a defense of originalism based in the framework of natural law); *cf.* PHILIP HAMBURGER, LAW AND JUDICIAL DUTY 606–09 (2008).

26. 4 THE WORKS OF JOHN ADAMS 106 (Charles Francis Adams ed. 1851) (emphasis omitted).

to stay nominally within law's province.[27] Rather, we must also endeavor to understand what is properly within it.

Critics of textualism and originalism often equate formal methods of interpretation with literalism, as utterly empty and indifferent to truth.[28] But textualism and originalism are far from empty procedural methodologies. To be a practicing textualist or originalist requires understanding the substantive content of law's province.

Last month, in a different lecture, I discussed what I call the political morality of textualism—by which I mean the deep moral foundations of textualism's claim that statutes must be interpreted by their terms and in light of longstanding background principles and legal reasoning.[29]

Constitutional interpretation and the search for original meaning similarly occur within the context of our Anglo-American legal history. Originalism and all its variants are part of a robust dialogue in the academy, and it seems, even on Twitter. I will not delve into those particulars tonight.

Rather, I wish simply to recognize that originalism incorporates a substantive legal background that matters when judges are faced with difficult constitutional questions. Breaking new constitutional

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27. *Compare* ADRIAN VERMEULE, COMMON GOOD CONSTITUTIONALISM (2022) (arguing courts should abandon originalism and instead import principles of natural law into constitutional interpretation), *with* William H. Pryor Jr., *Against Living Common Goodism*, 23 FEDERALIST SOC. REV. 24, 26 (2022) (calling this approach "indistinguishable in everything but name from Justice Brennan's living constitutionalism"), *and* William Baude & Stephen E. Sachs, *The "Common-Good" Manifesto*, 136 HARV. L. REV. 861, 861 (2023) (book review) (arguing Vermeule's treatise "fails to support its hostility toward originalism, to motivate its surprising claims about outcomes, or even to offer an account of constitutionalism at all").

28. William N. Eskridge, Jr., *Textualism, the Unknown Ideal?*, 96 MICH. L. REV. 1509, 1548 (1998) (voicing the concern that textualism means "[m]ajority-based choices . . . would more often be trumped by dictionary-toting, grammar-minded judges holding Congress to the letter of what it writes"); VERMEULE, *supra* note 27, at 105 (criticizing textualism as creating "law without mind").

29. *See* Neomi Rao, *Sumner Canary Memorial Lecture at Case Western Law School: Textualism's Political Morality* (Mar. 3, 2022), 73 CASE W. L. REV. (forthcoming).

ground is a task primarily for the Supreme Court. On the D.C. Circuit, however, I have had to decide unsettled constitutional questions, which has required ascertaining the original meaning of constitutional provisions considered within the structure of our government.[30]

In doing so, I have come to appreciate the many layers of reasoning that are required. At one level there is the meaning of specific words or phrases: this includes analyzing how the words were used and understood at the time of the ratification, how they were defined in Founding-era dictionaries,[31] and how they appeared in debates such as those between the Federalists and the Anti-Federalists.[32]

At another level, and in addition to the linguistic inquiry, the province of the law also includes deeper roots. For example, the meaning of the Constitution reflects the political theory that influenced the Framers.

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30. *See, e.g.*, Maloney v. Carnahan, 45 F.4th 215, 221 (D.C. Cir. 2022) (Rao, J., dissenting from the denial of rehearing en banc) ("[T]he text and structure of the Constitution, historical practice, and the Supreme Court's decisions all establish that individual members of Congress cannot bring suit to assert injuries to the legislative power."); Larrabee v. Del Toro, 45 F.4th 81, 91 (D.C. Cir. 2022) ("The rule suggested by the [Supreme] Court's caselaw is consistent with our understanding of the original meaning of the [Constitution's] Make Rules Clause."); Trump v. Mazars USA, LLP, 940 F.3d 710, 749 (D.C. Cir. 2019) (Rao, J., dissenting) ("The text and structure of the Constitution, its original meaning, and longstanding practice demonstrate that Congress's legislative and judicial powers are distinct and exercised through separate processes, for different purposes, and with entirely different protections for individuals targeted for investigation.").

31. *See, e.g.*, SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (9th ed. 1790) (unpaginated).

32. *See, e.g.*, Perez v. Mortg. Bankers Ass'n, 575 U.S. 92, 119–24 (2015) (Thomas, J., concurring) (using one such debate to help interpret the meaning of the "judicial power").

The Framers drew from thinkers such as Locke, Hutcheson, Vattel, Montesquieu, Blackstone, and others.[33] When the people ratified the Constitution, they made a moral and political decision to establish a governmental authority with certain limited lawmaking powers for the good of society. That decision reflected prior *natural law reasons* for creating and living within a defined province of law.[34] The Anglo-American legal tradition also draws from Roman law, civil law, and natural law, but it has incorporated those in a unique way.[35] Any reference to these sources must be bounded by *our* constitutional system of government.

Justice Thomas, for whom I was so fortunate to clerk, frequently pulls together these sources when interpreting the Constitution, particularly in his masterful concurrences and dissents. He interprets the Constitution in light of foundational and theoretical principles undergirding our great document.[36] For example, when explaining why Congress cannot delegate legislative power, he rightly relies on "principles about the relationship between private rights and governmental power [that] profoundly influenced the men who crafted, debated, and ratified the Constitution."[37] Justice

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33. *See, e.g.*, Gundy v. United States, 139 S. Ct. 2116, 2133 (2019) (Gorsuch, J., dissenting) (citing Locke as "one of the thinkers who most influenced the framers' understanding of the separation of powers"); Robert Curry, *Getting to 1776*, CLAREMONT R. OF BOOKS, Apr. 10, 2017 (discussing the role of Francis Hutcheson), https://claremontreviewofbooks.com/digital/getting-to-1776/ [https://perma.cc/GLN9-Q5K7]; Franchise Tax Bd. of Cal. v. Hyatt, 139 S. Ct. 1485, 1493–94 (2019) (citing Vattel as "the founding era's foremost expert on the law of nations"); THE FEDERALIST NO. 9, *supra* note 1, at 38–40 (Alexander Hamilton) (discussing Montesquieu); *id.* NO. 47, 250–52 (James Madison) (same).

34. *See* HAMBURGER, *supra* note 25, at 606–09; Alicea, *supra* note 25, at 16–33.

35. Professor Richard Helmholz has examined this issue at length. *See, e.g.*, R.H. HELMHOLZ, NATURAL LAW IN COURT 94–126 (2015). *See generally* R.H. Helmholz, *Magna Carta and the Ius Commune*, 66 U. CHI. L. REV. 297 (1999) (discussing the role of Roman and canon law in Magna Carta); R.H. Helmholz, *Natural Law and Human Rights in English Law: From Bracton to Blackstone*, 3 AVE MARIA L. REV. 1 (2005).

36. *See* Neomi Rao, *Saying What the Law Is, Justice Thomas Style*, 2021 HARV. J.L. & PUB. POL'Y PER CURIAM 6, at *1 (2021).

37. Dep't of Transp. v. Ass'n of Am. Railroads, 575 U.S. 43, 74 (2015) (Thomas, J., concurring).

Thomas's understanding of separation of powers draws on what he calls the "ancient roots" that are part of our law.[38] And he recognizes that the scope of individual constitutional rights, such as the Second Amendment right to bear arms, cannot be fleshed out with reference to the text alone. Instead, he has looked to Magna Carta and the English Bill of Rights.[39]

In analyzing the meaning of the Constitution and understanding its legal background, we must be mindful of the animating spirit and the institutional structure of *our* law. We must draw on our distinctly Anglo-American legal reasons and principles.[40] All of this is to say that we cannot look to any source that pleases us in the present, digging around the province of someone else's law to chart our own.

Our province reflects the exceptionalism of the American legal context, which locates the sovereignty of government in the people.[41] Our constitutional government emphasizes a certain kind of civil liberty that encourages hard work, entrepreneurship, and strong communities.

As George Washington recognized in a letter addressed to the Hebrew Congregation of Newport, Rhode Island, "[t]he citizens of the United States . . . have a right to applaud themselves for having given to mankind examples of an enlarged and liberal policy: a policy worthy of imitation." The policy required industrious and "*good* citizens." With such a policy and such citizens in mind, President Washington cited the Book of Micah and expressed the hope that

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38. *Id.* at 70.

39. *See* McDonald v. City of Chicago, 561 U.S. 742, 815–16 (2010) (Thomas, J., concurring in part and concurring in the judgment).

40. *See* James E. Pfander & Daniel D. Birk, *Article III and the Scottish Judiciary*, 124 HARV. L. REV. 1613, 1631–42 (2011) (tracing the influence of the Scottish Enlightenment's leading political theorists—Hume, Reid, Smith, and Millar, among others—on the Founding generation).

41. U.S. CONST. pmbl.

"every one shall sit in safety under his own vine and figtree, and there shall be none to make him afraid."[42]

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In exploring the province of our law, we might not always agree about what is there. The political philosophy behind our Constitution may at times be contested, but it is something more determinate than abstract ideals of a good or favored moral philosophy. Finding the correct interpretation within our province may sometimes be difficult and judges may make good-faith mistakes. Disputes will arise as in many other legal inquiries,[43] but that is no reason to duck hard questions about what is necessarily and properly within our legal terrain.

This ongoing deliberation is essential because the province of the law is not static. Far from it. The scope of the law regularly changes based on legislation enacted by Congress. The Constitution may be amended, creating a more fundamental shift in the boundaries of law's province. Courts continue to decide cases and further articulate the meaning of the laws.

But new statutes, amendments, and precedents cannot be understood except by reference to what already exists within law's province. This perspective can help us to identify what is not properly within the province of our law. We must learn to recognize the concepts or doctrines that are simply weeds and to explain why they are foreign invaders that have taken root in our soil.

It is the proper and peculiar province of the courts to interpret the laws—to keep the garden cultivated and free of such weeds.

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42. Letter from George Washington to the Hebrew Congregation in Newport, Rhode Island (Aug. 18, 1790), *reprinted in* 6 THE PAPERS OF GEORGE WASHINGTON SERIES 284, 285 (Dorothy Twohig et al. eds., 1996).

43. *Compare* McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 361 (1995) (Thomas, J., concurring) ("[T]he historical evidence indicates that Founding-era Americans opposed attempts to require that anonymous authors reveal their identities on the ground that forced disclosure violated the 'freedom of the press.'"), *with id.* at 371–85 (Scalia, J., dissenting) (employing an originalist methodology but reaching the opposite conclusion).

In keeping with this analogy, Chief Justice Marshall and other early jurists often referred to improper and outlandish interpretations as "wild."[44] Wild was defined at the Founding to mean "not tame," "not cultivated," and "uncivilized."[45] In contrast to *wild* interpretations, the orderly province of the law includes principles drawn from the text and structure of the Constitution.

Early justices had no difficulty discarding the arguments they deemed "wild" and inconsistent with our cultivated law. Faithfully exercising the judicial duty requires stating what the law is, and what is simply too wild and too foreign to be considered part of our law. And by pointing to the outlandish and the wild, the judiciary keeps the other departments in check as well—setting down markers for what types of legislation and execution are within the province of the law and what will be deemed outside of it, in the wilderness. The political branches also have an obligation to maintain the province of the law, but within their particular spheres.

When tending to law's province, judicial precedents can raise difficult questions. Judges conventionally follow stare decisis, standing by what has already been decided. But sometimes things are decided incorrectly and at odds with the Constitution and our legal foundations—they are, in a sense, an invasive species within law's province.

Judges are often cautioned to stand by even these decisions, to simply settle the dust around these strange plants, perhaps to prune here and there, and hope the weeds stay within their little plots.[46]

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44. *See, e.g.*, McCulloch v. Maryland, 17 U.S. (1 Wheat.) 316, 403 (1819) (Marshall, C.J.) ("No political dreamer was ever wild enough to think of breaking down the lines which separate the States, and of compounding the American people into one common mass."); Anderson v. Dunn, 19 U.S. (6 Wheat.) 204, 228–29 (1821) (Johnson, J.) (rejecting as "a supposition too wild to be suggested" that the House lacks a contempt power).

45. 2 SAMUEL A. JOHNSON, *Wild*, A DICTIONARY OF THE ENGLISH LANGUAGE (4th ed. 1773).

46. *See, e.g.*, June Med. Servs. L.L.C. v. Russo, 140 S. Ct. 2103, 2133–42 (2020) (Roberts, C.J., concurring in the judgment), *abrogated by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

Yet part of the judge's duty is to say what the law is within our peculiar and proper province. In so doing, judges must point out the precedents that do not fit.[47] And this takes some work, because human beings are adaptable and quickly grow accustomed to new landscapes. Part of the judicial power requires identifying and uncovering what has been grown over, to help people to see the broader context, not just the latest and brightest foliage.

It should go without saying that in our constitutional republic, judges cannot introduce new laws or impose new values. But sometimes judges introduce the weeds, and it may fall on later judges to pull them up.[48]

Judges must tend to the new and the old, saying what the law is and how it fits together. Of course, this is a task that must be undertaken with good judgment and learning and a fair measure of humility, because law's province is extensive and complex. Yet the difficulty of the task does not erase the duty of the judges.

CONCLUSION

Let me bring this lecture to a close with a few final thoughts.

There is at present an understandable and rising frustration with literalism and shallow linguistic positivism. The solution, however,

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47. *See, e.g.*, Gamble v. United States, 139 S. Ct. 1960, 1984 (2019) (Thomas, J., concurring) ("[I]f the Court encounters a decision that is demonstrably erroneous—*i.e.*, one that is not a permissible interpretation of the text—the Court should correct the error . . . ."); Caleb Nelson, Stare Decisis *and Demonstrably Erroneous Precedents*, 87 VA. L. REV. 1 (2001). Most jurists recognize that there comes a point when mistaken precedents must be discarded. Conventional analysis about when to overturn a precedent sometimes focuses on the distortions that the weeds create on other areas of the law, requiring not just error, but egregious error. *See, e.g.*, Ramos v. Louisiana, 140 S. Ct. 1390, 1414 (2020) (Kavanaugh, J., concurring in part) ("A garden-variety error or disagreement does not suffice to overrule. In the view of the Court that is considering whether to overrule, the precedent must be egregiously wrong as a matter of law in order for the Court to overrule it."); William Baude, *Precedent and Discretion*, 2019 SUP. CT. REV. 313, 319–29 (2020) (comparing the different approaches to precedent articulated by Justice Thomas and Justice Alito).

48. *Compare* Roe v. Wade, 410 U.S. 113 (1973), *with Dobbs*, 142 S. Ct. 2228.

is not to tear down the boundaries of the law or to import new, abstract ideals. Rather we must focus on understanding the particular substance of our laws. Law's province has both limits and substance. The judicial duty requires both staying within law's limits and accounting for the law's deep and rich legal foundations.

And by insisting on a province for the law, I must admit to an institutional ambition for the courts. Often the lack of legal boundaries is associated with judicial supremacy and the expansion of the judicial power. I think this is a mistake, certainly in the long run. If there are no boundaries to the law and no limits on the judge's province, then the importance of judgment dissipates. Without law, there remain only will and politics, and judges, as we know, "have neither force nor will, but merely judgment."[49] Judges have no law to interpret if their province is a legal wilderness governed by abstract reasoning about justice, efficiency, the common good, or whatever philosophy is most in vogue.

If it is the peculiar and proper province of the judiciary to say what the law is, in the absence of any defined province, the judiciary will eventually become irrelevant.

Invoking judicial "legitimacy" by sitting on the bench and letting the weeds take over will preserve neither the courts nor the law. Law is not a path, moving farther and farther from its origins. It is a province, in which new things may be built by the people, but only within constitutional limits and with firm roots in our distinct legal soil.

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49. THE FEDERALIST NO. 78, *supra* note 1, at 402 (Alexander Hamilton) (formatting modified).