

In Her Own Words

Excerpts from speeches by Judge Diane Sykes illustrate her legal philosophy and approach to judging.

Diane S. Sykes, L'84, recently completed her service as chief judge of the U.S. Court of Appeals for the Seventh Circuit and moved to senior status. During her career as a circuit judge in Milwaukee County, a Wisconsin Supreme Court justice, and a judge of the Seventh Circuit, she has given numerous lectures and talks, both in Wisconsin and across the nation. Here are condensed and edited excerpts from five of her speeches, including two given last year at Marquette Law School. They shed light on Sykes's legal approach, her respect for the judicial system, and her great interest in the law and the history of the United States.

Minimalism and Its Limits

This an edited text of a speech Judge Sykes gave as the B. Kenneth Simon Lecture in Constitutional Thought at the Cato Institute in Washington, D.C., on September 17, 2014, shortly before the beginning of the Supreme Court's 10th term during the tenure of Chief Justice John G. Roberts, Jr. The full version can be found at 2015 Cato Sup. Rev. 17 (2015).

From the beginning of his time as chief justice in 2005, John Roberts has been explicit about wanting to foster greater consensus on the Supreme Court. It's often suggested that the Court's legitimacy would be enhanced by fewer 5-4 rulings along the usual conservative/liberal fault line. In his confirmation-hearing testimony and more fully in his first major public address, the chief justice articulated his view that although differences among the justices should not be "artificially suppressed," a greater degree of consensus in the Court's decisions would bring "clear [jurisprudential] benefits." He famously set for himself this guiding principle: "If it's not necessary to decide more to dispose of a case, in my view it is necessary not to decide more. The broader the agreement among the justices, the more likely it is that the decision is on the narrowest possible ground."

For the first time since the 1940s, almost two-thirds of the Court's merits

opinions during the 2013-2014 term were unanimous on the bottom line, if not necessarily in their reasoning. This is generally thought to be a striking and welcome development. In some key respects it is, although it's important to note that a significant part of the Court's docket each term consists of technical statutory or procedural issues that do not engage the philosophical differences among the justices. Still, the uptick in bottom-line agreement is remarkable, especially in cases raising difficult constitutional questions.

I should probably begin with a definition. Modern judicial minimalism as a distinctive theory of decision-making is usually credited to Professor Cass Sunstein of Harvard Law School, who coined the term and is the leading academic proponent of this approach to judging. Sunstein proposes that judges should generally "avoid broad rules and abstract theories, and attempt to focus their attention only on what is necessary to resolve particular disputes." He advocates the practice of "saying no more than necessary to justify an outcome, and leaving as much as possible undecided." Minimalist judging of the Sunstein variant proceeds along two dimensions. First, judicial opinions should be narrow rather than wide, deciding the case at hand while avoiding pronouncing rules for resolving future cases. Second, judicial opinions should be shallow rather than deep, avoiding

large theoretical controversies and issues of basic principle.

On the surface, the theory sounds as if it's limited to process values, but it's not. Substantively, minimalism starts from a presumption of deference to the political branches. It self-consciously avoids invalidating acts of the legislative and executive branches either by upholding them on the merits or by using various techniques for avoiding constitutional questions. Minimalism also advocates a strong version of *stare decisis*; consistent adherence to precedent promotes stability and predictability, thereby preserving the Court's institutional interests. On a more philosophical level, modern minimalism promotes itself as a hedge against judicial supremacy. It calls on judges to go slowly and in small steps.

Of course, the Founding generation didn't need a theory of judicial minimalism. The common-law tradition, as it was understood and practiced at the time, was itself essentially minimalist, and important minimalist features are embedded in our constitutional design. The common law as applied in the courts of the new American states was based on English customary law, and in the Blackstonian tradition it was found, not made.

The philosophical terrain was also different than it is now. The Framers inherited a strong natural-rights tradition, but they also understood

that because natural-rights principles are quite general—today we would say “underdetermined”—the judges of the new federal judiciary, like their counterparts in the states, would be called upon to exercise a substantial element of judgment in individual cases. As a constraint on that authority, Article III limits the judicial power to cases or controversies that are explicitly judicial in nature. The Framers rejected a more active political role for judicial review by deciding against a Council of Revision. Beyond the constraining effect of the case-or-controversy limitation, the Framing generation generally understood that federal judges would follow long-established norms of judicial practice. They would be bound down by rules and precedents, to paraphrase *The Federalist No. 78*. This was thought to be a sufficient check against decisions based on will rather than judgment.

That was the “old” form of judicial minimalism; it was swept away by the legal realism of the 20th century. The “new” judicial minimalism is a response to the realist idea that, inescapably, appellate judges engage in discretionary lawmaking when they decide cases, including (and especially) cases of constitutional interpretation. If judges make constitutional law, then we need some theory or method to guide them.

It may help to place this minimalism in recent historical perspective.

The “living constitution” school of thought held sway in the decades that spanned the Warren Court and the early years of the Burger Court. This evolutionary approach authorized judges to interpret the core principles of the Bill of Rights and the Fourteenth Amendment in a way that reflects contemporary values and allowed them to adapt the Constitution’s broad language to address modern conditions and problems. In practice this theory produced the “rights revolution” of the 1950s and ’60s, which was aggressively interventionist in implementing social, political, and legal reform by judicial decree.

The conservative counterrevolution began in earnest in the 1980s and initially focused on restoring the practice of “restraint,” understood as judicial deference to the policy choices and value judgments of the political branches. In the early years, the primary concern was to stand athwart the jurisprudence of the Warren Court, yelling “Stop!” (Apologies to William F. Buckley, Jr.) But the emphasis on restraint did not address how the Constitution *ought* to be interpreted and applied. That would come later, as originalism was recovered, developed, and refined.

The animating principles of originalism arise from the legal justification for judicial review—the duty to decide cases according to law, including the law of the Constitution. Briefly stated, the basic theory is this: Because our Constitution is written, unlike the British Constitution, and because it is supreme law adopted by the people as the original sovereign that brought the American government into being, constitutional interpretation ought to be grounded in the public meaning of the text as understood at the time of ratification.

Modern judicial minimalism is flexible about when judges should proceed minimally. It explicitly acknowledges that not every case calls for a minimalist ruling. As Sunstein puts it, “there are times and places in which minimalism is rightly abandoned.” There’s a nonexclusive, multifactor test for determining when it’s best to issue a minimalist decision and when it’s best to go maximalist—but you probably guessed that already.

It should be clear from this discussion that although minimalism is an approach to judging, it’s *not* a theory of constitutional interpretation. Unlike originalism, it’s not a method for determining the meaning, scope, and application of the Constitution. Instead, it’s a theory of deference. Judges should defer to the political branches of government and to the

decisions of prior courts—except when they shouldn’t. It’s also a theory of avoidance. Judges should not make broad pronouncements on foundational matters of constitutional principle—except when they should. Got that?

As you’ve probably gathered, minimalism can be criticized for offering “no genuine guidance to judges.”

For my part, I tend to side with the critics. A unifying theory of minimalism is both unworkable and unwise. The Article III constraints on judicial power already enforce a degree of minimalism, and all judges respect and reason from precedent. We have well-established doctrines to ensure that judges do not unnecessarily decide constitutional questions, and the norm of analogical reasoning has a natural constraining effect. In other words, minimalism is inherent in standard judicial method. We do not need a heavy theoretical thumb on the scales. What’s important is how the traditional sources of law and legal interpretation—text, structure, history, canons of interpretation, precedent, and other well-established tools of the judicial craft—are prioritized, weighted, and applied.

A noteworthy feature of the Roberts Court at age 10 is its preference for using minimalist techniques to avoid or soften or at least postpone confrontation with the political branches in structurally or politically sensitive cases.

At a time of deep political polarization, the modesty and consensus values claimed by judicial minimalism seem especially attractive. Restraint is indeed a judicial virtue. Judicial mistakes on constitutional questions are extraordinarily difficult to fix. Arrogating too much power to the judiciary distorts our politics and undermines our ability to democratically shape and alter our basic legal, social, and economic institutions. But strong avoidance and deference doctrines are not the answer. They may serve prudential or political concerns, but they are not necessary to enforce the separation of powers and



A “Bold,” “Confident,” and Entertaining Moment at the Dedication of Eckstein Hall

Wisconsin Supreme Court Chief Justice Shirley S. Abrahamson (left) and Marquette University President, Rev. Robert A. Wild, S.J., (right), respectively applaud and laugh as Justice Antonin Scalia smilingly greets Judge Diane S. Sykes, upon her introducing him as the keynote speaker at the dedication of Ray and Kay Eckstein Hall on September 8, 2010. Occasioning the particular good humor were these closing lines of Judge Sykes’s introduction:

“When Dean Kearney unveiled the plans for this beautiful building two years ago, he famously declared that Eckstein Hall will be ‘noble, bold, harmonious, dramatic, confident, slightly willful, and, in a word, great.’ It certainly is. And with the possible exception of ‘harmonious’—Justice Scalia has been known to say that one of his charms is that he likes to tell people what they don’t want to hear—the dean’s description of this distinguished and splendid building might likewise be applied to our distinguished and splendid visitor. So, ladies and gentlemen, please join me in welcoming the noble, bold, dramatic, confident, slightly willful, and, in a word, great Justice Antonin Scalia.”

indeed may undermine that critical feature in our constitutional design. The Court’s legitimacy arises from the source of its authority—which is, of course, the Constitution—and is best preserved by adhering to decision methods that neither expand, nor contract, but *legitimize* the power of judicial review. The Court’s primary duty, in short, is not to minimize its role or avoid friction with the political branches, but to try as best it can to get the Constitution right.

Lincoln and the Human Dimension of Law Practice

This is an edited text of remarks by Chief Judge Sykes at the Marquette Law Review banquet on March 28, 2025.

One hundred and eighty-eight years ago this month, another newcomer to the profession was—like you—standing at the threshold of a career in the law.

He started inauspiciously, but Providence had other ideas in mind. In March 1837, Abraham Lincoln entered his name in the Roll of Attorneys at the Illinois Supreme Court.

Lincoln has always been my favorite president. The historical consensus that he was our greatest president seems right to me; his political life has a lot to teach us. But he was also the president with the most experience in the courtroom, and I think we can also learn from his approach to the practice of law.

I’d like to share a story about a small case Lincoln tried during his more than two decades as a lawyer riding circuit in the state courts of central Illinois. It’s a totally obscure and insignificant case. I stumbled on it by happenstance when I was serving on the Wisconsin Supreme Court and preparing a speech about Lincoln that I was scheduled to give

at several events around the state. My interest was to focus on Lincoln the lawyer, not Lincoln the president. I discovered this case in a wonderful book called *Herndon’s Informants*, a modern compendium of letters, interviews, and testimonials collected by William Herndon, Lincoln’s last law partner, after the president was assassinated.

Lincoln’s law practice, spanning more than two decades, encompassed a wide assortment of clients and cases. Very little of this work was glamorous or exciting. But he was especially good in front of a jury, and his law practice was infused with practical wisdom and a moral dimension that is instructive for us today. The humble case of *Case v. Snow Brothers*—Herndon’s testimonial no. 605—captures these qualities in a particularly vivid way.

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Let me set the stage with another testimonial recorded by William Herndon himself. It memorializes an interview with a Springfield resident who had witnessed a discussion between Lincoln and a prospective client seeking to engage his services in a lawsuit against a local widow. Herndon wrote:

A citizen of Springfield who visited our office on business . . . relates the following:

Mr. Lincoln was Seated at his table listening very attentively to a man who was talking earnestly in a low tone. After the would be Client had stated the facts of his case, Mr. Lincoln replied; Yes, there is no reasonable doubt but that I can gain your case for you; I can set a Whole neighborhood at loggerheads; I can distress a widowed Mother and her six fatherless children, and thereby get for you six hundred Dollars which you seem to have a legal claim to; but which rightfully belongs, it appears to me, as much to the woman and her children as it does to you. You must remember that some things that are legally right are not morally right. I shall not take your case—but I will give you a little advice for which I will charge you nothing. You seem to be a sprightly, energetic man, I would advise you to try your hand at making six hundred dollars in some other way.

With that small window on Lincoln's approach to the practice of law, now listen to the story of *Case v. Snow Brothers*, as recorded in the testimonial of a local pastor who served several churches in the Eighth Judicial Circuit in central Illinois, where Lincoln's law practice was concentrated. Lincoln's client was the plaintiff, Mr. Case, an old man who had sold several yokes of oxen and a plow to two teenagers, only to have them later renege on the payment. Their counsel asserted that because they were minors, the debt was void under the Illinois Minor Act. Here via Herndon is the story, in the words of the pastor who watched the trial:

In the spring term of the Tazewell County Court in 1847, which at that time was held in the village of Tremont, I was detained as a witness an entire week. Lincoln was employed in several suits, and among them was one of *Case vs. Snow Bros.* The Snow Bros., as appeared in evidence (who were both minors), had purchased from an old Mr. Case what was then called a "prairie team," consisting of two or three yoke of oxen and prairie plow, giving therefore their joint note for some two hundred dollars; but when pay-day came refused to pay, pleading the minor act. The note was placed in Lincoln's hands for collection. The suit was called and a jury impanelled. The Snow Bros. did not deny the note, but pleaded through their counsel that they were minors, and that Mr. Case knew they were at the time of the contract and conveyance. All this was admitted by Mr. Lincoln, with his peculiar phrase, "Yes, gentlemen, I reckon that's so." The minor act was read and its validity admitted in the same manner. The counsel of the defendants were permitted without question to state all these things to the jury, and to show by the statute that these minors could not be held responsible for their contract. By this time you may well suppose that I began to be uneasy. "What!" thought I, "this good old man, who confided in these boys, to be wronged in this way, and even his counsel, Mr. Lincoln, to submit in silence!" I looked at the court, Judge Treat, but could read nothing in his calm and dignified demeanor. Just then, Mr. Lincoln slowly got up, and in his strange, half-erect attitude and clear, quiet accent began: "*Gentlemen of the Jury*, are you willing to allow these boys to begin life with this shame and disgrace attached to their character? If you are, I am not. The best judge of human character that ever wrote has left these immortal words for all of us to ponder:

'Good name in man or woman,
dear my lord,
Is the immediate jewel of their
souls:
Who steals my purse steals trash;
'tis something, nothing:
'Twas mine, 'tis his, and has been
slave to thousands:
But he that filches from me my
good name
Robs me of that which not
enriches him
And makes me poor indeed.'"

Then rising to his full height, and looking upon the defendants with the compassion of a brother, his long right arm extended toward the opposing counsel, he continued: "Gentlemen of the jury, these poor innocent boys would never have attempted this low villainy had it not been for the advice of these lawyers." Then for a few minutes he showed how even the noble science of law may be prostituted. With a scathing rebuke to those who thus belittle their profession, he concluded: "And now, gentlemen, you have it in *your* power to set these boys right before the world." He plead for the young men only; I think he did not mention his client's name. The jury, without leaving their seats, decided that the defendants must pay the debt; and the latter, after hearing Lincoln, were as willing to pay it as the jury were determined they should. I think the entire argument lasted not above five minutes.

What's your first reaction to this story? I won't call on anyone; let's just have a show of hands. Was this a compelling closing argument? Yes, obviously. Was it an *improper* closing argument—inviting the jury to nullify the law? Maybe so, when judged from our perspective as 21st-century law students and lawyers accustomed to the prevailing doctrine that the court is the sole judge of the law and that explicit appeals to jury nullification are forbidden. But Lincoln's argument was comfortably within the legal norms of his time, which generally

accepted that the jury's power extended to the facts *and* the law. With that in mind, was this a just verdict? An unjust verdict?

My own view is that it was just—and that Lincoln's argument in *Case v. Snow Brothers*, together with his advice to that prospective client whose case against the widow he declined to take, has something to teach us about the ethics of everyday law practice. I don't mean ethics in the sense of the rules contained in the code of professional conduct. The choice to plead the Minor Act on behalf of the Snow brothers was obviously fully ethical in that formal sense. Had this case arisen today and were the statute still on the books, no doubt it would have been resolved in favor of the defendants on summary judgment; the court would have little choice but to void the debt.

But the defense attorneys had another option available to them: they could have counseled their young clients to keep their promise to old Mr. Case and settled the debt in a way that would make it possible for the teenagers to fulfill their obligation notwithstanding their youth. To paraphrase Lincoln's advice to that would-be client, they could have explained to the Snow brothers that just because you *have* a legal advantage doesn't make it right for you to *take* that legal advantage, especially when more important principles are at stake. The statute that allows the court to void contracts made by minors exists to shield them from predatory adults, not to permit them to take advantage of others. Mr. Case had charged a fair price for his prairie team. (I checked; it was in line with the going rate at the time.) The Minor Act was surely an available legal defense, but invoking it would come at a cost to the character of those young men as they stood on the threshold of adulthood establishing their reputations for honesty. Their lawyers could have counseled them to do the right thing and keep their word. As it was, Abraham Lincoln's eloquent five-minute closing argument achieved the same thing.

This single, small case from Lincoln's life as a prairie lawyer reminds us of the human dimension of the practice of law. After Lincoln's death, White House secretaries discovered a document on which he had recorded some notes for a law lecture apparently intended for an audience of new lawyers. It's dated July 1, 1850, but historians do not know if that's accurate or whether he ever delivered the lecture. The notes contain many words of wisdom for new lawyers; I'll close with just one short passage that reflects his emphasis on the capacity of lawyers to be forces for good within their communities. He advised the young lawyers, "Persuade your neighbors to compromise whenever you can. . . . As a peacemaker the lawyer has a superior opportunity of being a good man. There will still be business enough."

Compromise in the law is not always the best course and is sometimes impossible. But the larger point remains and speaks an enduring truth. Our law is the just instrument by which we secure and order our freedom and live peacefully together. Lincoln's challenge to all of us is this: In our daily work in this noble profession, we should try whenever possible to deploy the law in a way that promotes human flourishing and serves the common good.

I'm confident that your time here at Marquette Law School did and will continue to set you on a solid legal and ethical foundation from which to meet this challenge. Congratulations on all your successes on the law review and in law school. I wish you all the best as you continue and conclude your legal education and enter the legal profession.

Citizens United in the Montana Supreme Court

This is an edited text of a talk Judge Sykes gave on a number of occasions, starting in November 2012.

When I came to the Seventh Circuit in 2004, I had been a state court judge for 12 years—seven years on the trial-court bench in Milwaukee and five years

on the Wisconsin Supreme Court. So I brought with me to the federal bench a deep appreciation for the distinct and autonomous role of the state courts, especially the state supreme courts.

Sometimes, however, the two court systems come into conflict; occasional disagreement is inevitable. But the federal courts have well-established doctrines that promote respect for the prerogatives of the separate judiciaries, along with procedural rules that keep us from stepping on each other's toes.

Of course, the United States Supreme Court sits atop the judicial hierarchy, and when it decides an issue of federal law, the justices of the state supreme courts are bound by the Supremacy Clause to follow the Court's decision, whether they agree with it or not. That was settled a long time ago in the venerable case of *Martin v. Hunter's Lessee* (1816).

So it's noteworthy when a modern state supreme court thumbs its nose at an unequivocal decision of the U.S. Supreme Court on a question of federal constitutional law. The doctrine of hierarchical precedent is so firmly established and well understood that a state supreme court's open resistance to the authority of the U.S. Supreme Court on a question of federal law is practically unthinkable.

Think again. About 10 months ago, on December 30, 2011, the Montana Supreme Court issued an extraordinary decision in a case called *Western Tradition Partnership v. Attorney General*. The case raised a First Amendment challenge to a state law that prohibited corporations from independently spending money on political speech in state elections. The decision was extraordinary because, of course, the United States Supreme Court had resolved this very question just the year before in the famous *Citizens United v. FEC* case, striking down a nearly identical federal law. Yet the Montana court upheld the state law. The court purported to apply *Citizens United*, but the two decisions are irreconcilable.

Reaction from legal commentators was swift and incredulous. Even those who viscerally disagreed with *Citizens United* understood that the Montana Supreme Court had seriously overreached. The Supreme Court quickly stayed the Montana decision, and in June 2011, at the very end of its term, granted certiorari and summarily reversed the Montana Supreme Court. “There can be no serious doubt,” the Court held, that “*Citizens United* applies to the Montana state law” and all of Montana’s arguments “were already rejected in *Citizens United*, or fail to meaningfully distinguish that case.”

That a state supreme court would so flagrantly disregard the Supreme Court’s hierarchical authority is highly unusual in the modern era. The Court’s authority to review and decide state-court cases raising questions of federal law was conclusively established early in our nation’s history. As Justice Joseph Story explained in his famous opinion for the Court in *Hunter’s Lessee*:

Judges of equal learning and integrity, in different states, might differently interpret a statute, or a treaty of the United States, or even the constitution itself: If there were no revising authority to control these jarring and discordant judgments, and harmonize them into uniformity, the laws, the treaties, and the constitution of the United States would be different in different states, and might, perhaps, never have precisely the same construction, obligation, or efficacy, in any two states. The public mischiefs that would attend such a state of things would be truly deplorable; and it cannot be believed that they could have escaped the enlightened convention which formed the constitution.

Justice William Johnson concurred. He agreed with Justice Story’s emphasis on national uniformity, but he added that the Court’s role as the final decisionmaker is also grounded in its status as a *federal* institution with democratic legitimacy:

And another claim I may assert, in *the name of the American people*; in this court, every state in the union is represented; we are constituted by the voice of the union, and when decisions take place, which nothing but a spirit to give ground and harmonize can reconcile, ours is the superior claim upon the comity of the state tribunals.

In other words, the Supreme Court has a superior claim to interpretive authority by virtue of its status as a national institution—appointed by the nationally elected president and confirmed by the nationally representative Senate and pursuant to the Supremacy Clause.

Thoughts on the Book, *Cosmic Constitutional Theory*, by Judge J. Harvie Wilkinson III

This an edited text of remarks by Judge Sykes to the Indianapolis Lawyers Chapter of the Federalist Society on December 12, 2012.

One of the important and recurring themes in our perennial debate about constitutional adjudication is the role of judicial restraint. But the issue only rarely breaks through into the public consciousness. The role of judicial restraint was a prominent theme in some of the early analysis of the Supreme Court’s divided decision in the health care case earlier this year, *National Federation of Independent Business v. Sebelius*.

A new book, *Cosmic Constitutional Theory*, by Judge J. Harvie Wilkinson III of the U.S. Court of Appeals for the Fourth Circuit, arrives at a pivotal time in our law and politics. Because it comes from one of our nation’s most highly regarded appellate judges, it deserves our most serious reflection.

Before the Supreme Court issued the health care decision in June, my colleague Judge Richard Posner published a very interesting article in the *California Law Review*, titled “The Rise

and Fall of Judicial Self-Restraint.” He focused on a particular kind of restraint: the judicial policy, premised on respect for the political branches of government, that legislative and executive actions should be upheld against constitutional challenges unless their invalidity is clear beyond doubt. Judge Posner pronounced this kind of judicial restraint dead, at least as a philosophical commitment of today’s Supreme Court, although he suggests that it might continue to function as a “trace element” in the justices’ behavior.

Judge Wilkinson doesn’t go quite that far. For him, judicial restraint is not dead, but it is seriously endangered. His thesis is that the rise of constitutional theory in the post-New Deal era is displacing the time-honored practice of judicial deference to the political branches of government, providing intellectual cover for judicial adventurism and threatening to choke off democratic self-governance. He makes a thoughtful case for restoring restraint as a defining judicial virtue.

Please forgive my generalizations as we proceed here. Judge Wilkinson first takes aim at the theory known as “living constitutionalism,” practiced most prominently by the Warren Court and particularly by Justice William Brennan (and perhaps contrasted most starkly by the jurisprudence of Justice Antonin Scalia, who likes to say that he interprets the “dead Constitution”). The basic idea behind this school of thought is that the Constitution evolves to reflect contemporary understandings of the core principles contained in the majestic provisions of the Bill of Rights and the Fourteenth Amendment.

This evolutionary approach authorizes judges to implement contemporary values and adapt the Constitution’s broad language to modern conditions and problems. In practice, this theory produced the rights revolution of the Warren Court (continuing under the Burger Court) and was aggressively interventionist in implementing liberal social, political, and legal reform by

judicial decree. As Judge Wilkinson explains, the results were in some cases a virtue and in others a vice, but in all cases the theory empowered judges to deploy the Constitution as a malleable instrument of social and legal change according to their own lights and at the expense of the democratic process. It produced a conservative counterrevolution.

Originalism and pragmatism are the two main theories of constitutional interpretation currently in use by judges. Let's take originalism first. Judge Wilkinson briefly discusses the foundational contributions of Chief Justice John Marshall and to a lesser extent Justice Hugo Black but quickly moves to Judge Robert Bork's exposition of the textualist/originalist theory of constitutional interpretation and explains how it gained acceptance in the legal academy—even among prominent liberal scholars—and then eventually took root at the Supreme Court. Much of this discussion presents originalism in a positive light.

For the uninitiated, the animating principles of originalism arise from the legal justification for judicial review: the judicial duty to decide cases according to law, including the law of the Constitution. On this view, constitutional adjudication begins with an inquiry into the meaning and scope of the provision in question based on its text and the historical evidence of its original meaning.

As Judge Wilkinson explains, “[p]erhaps more than any other theory, originalism focuses on judicial constraints” because it “recogniz[es] that ultimate legal authority stems from sources external to the judge.” But he ultimately concludes that originalist theory has failed to deliver on its initial promise, largely because judges are amateur historians and the textual and historical indicators of original meaning are all too often inconclusive. He concedes that “[t]here is nothing intrinsically wrong with gaps between

theory and practice.” “Indeed,” he writes, “they are unavoidable.” What matters is “whether the gap between theory and practice leads to salutary outcomes or detrimental ones.” With originalism, he concludes, “the results are anything but salutary.”

Finally, Judge Wilkinson turns to Judge Posner's pragmatic approach to judging, which he describes as an antitheoretical response to the various unifying theories of constitutional interpretation that have arisen in the post-New Deal era. To vastly oversimplify, Judge Posner's legal pragmatism is a flexible approach to judging that focuses on the consequences of judicial decisions—for the parties and for the broader economic, social, and political systems. The object is to achieve good outcomes.

Not surprisingly, Judge Wilkinson faults pragmatism for its explicit judge-empowering premises. Whereas originalism tethers judges to constitutional text, structure, and history—“traditional legal materials whose democratic imprimatur cannot be questioned if properly discerned and relevantly applied”—with pragmatism, he writes, there is “no tether at all.”

In his last chapter, Judge Wilkinson argues for an escape from all this theory and a return to judicial restraint to guard against the perils of judicial supremacy and its interference with democratic choice. I detect a nod to originalism here; there's a sense in his summation that he thinks originalist theory might have a role to play if only it could be trusted to channel restraint. Judge Wilkinson is a traditionalist and a moderate conservative who highly values the institutions of civil society; he sees judicial restraint as a mediating influence between the extremes of the progressive and libertarian visions of the Constitution now contending on the legal battlefield. He closes with an eloquent plea for judicial humility:

[T]heory-driven judges and scholars have forgotten that wisdom lies

simply in knowing the limits of one's knowledge, that good sense is more often displayed in collective and diverse settings than in a rarefied appellate atmosphere, and that the language, structure, and history of law serve best as mediums of restraint rather than excuses for intrusion.

I share Judge Wilkinson's view that the responsibility of judicial review is so consequential that it's best to take the long view of our nation's history and proceed with a clear-eyed understanding of the constitutional limits on the judicial role and the prudential limits of judicial competence.

Where I part company with Judge Wilkinson is in his claim that all modern theories of constitutional law are inconsistent with a proper understanding of the judicial role and ought to be resisted in favor of judicial restraint, understood as a general policy of deference to the political branches. Deference is warranted when deference is due, and a default position of judicial nonintervention doesn't answer the question of when, precisely, it is right to defer. Or to be more specific, it answers the question in a way that invites judges to unduly defer—to relinquish their own constitutional role as a check on unconstitutional exercises of authority by the other branches of government even in the face of ascertainable constitutional limits on that authority. And that is contrary to the essence of judicial duty.

The duty of judicial review requires some method of constitutional interpretation. Precedent will answer many questions but not all, and sometimes precedents are wrong. The Supreme Court regularly decides cases for which there is no controlling precedent; that goes with the territory. At the court of appeals, we decide quite a few cases in this category.

As faithful judicial interpreters, our inquiry into the law of the Constitution ought to be grounded in the principles the Framers and ratifiers fixed in its text and structure. Implementing doctrine

has an important role to play, but Judge Wilkinson is entirely right that by anchoring constitutional adjudication in the text, structure, and history of the Constitution, originalism best legitimizes judicial review.

Learning the Rules, the Language—and the Pursuit of the Common Good

This is an edited text of remarks by Chief Judge Sykes at the orientation for first-year Marquette law students on August 22, 2025.

I am a proud Marquette lawyer—Class of 1984—and I’m delighted to join you today as you begin your legal education at this wonderful law school. Forty-four years ago, I sat where you now sit. Back then, of course, we were next door in Sensenbrenner Hall. You have the good fortune to study and learn in Eckstein Hall, the Law School’s strikingly beautiful new home—courtesy of generous gifts from alumni and the extraordinary efforts and vision of Dean Kearney and his talented team here at the Law School.

This spectacular building opened 15 years ago, and since then it has become a vibrant forum for a wide variety of important public events—lectures and debates and discussions that bring together members of our legal community and leaders in the spheres of government, business, social services, and even the arts. Just last month, I was here with an audience of lawyers, judges, and opera lovers for the Florentine Opera’s sold-out performance of the comic opera about the unlikely friendship between Justice Scalia and Justice Ginsburg. Though these public events here at the Law School are not at the core of your legal education, I encourage you to take advantage of them and the other academic enrichment opportunities offered here in Eckstein Hall.

Of course, what will matter most in your three-year course of law study is not this impressive building or the

community leaders who will visit during your tenure, but the content and character of the legal education offered here. You will find it to be first-rate, holistic, and multidimensional—as you might expect from a law school at a Jesuit university with an abiding commitment to “Care for the Whole Person” and a mission of promoting Excellence, Faith, Leadership, and Service.

The foundation of your law school education will involve learning the language and content of the rules found in the varied sources of our law: federal and state constitutions, statutes, regulations, court rules of procedure, and the common-law domains—primarily torts, contracts, property. These rules govern the relationship between the individual, the body politic, and the government; between the federal and state governments; and between private parties (both individuals and organizational associations, such as corporations). Many of these terms will be new, and some will be mysterious, but the *language* of the law matters enormously. In a democratic system grounded in the rule of law, the rules that bind us are *written*, not just declared. To become a lawyer, you must first and foremost learn the language and content of our basic legal rules.

But learning how to read and understand a legal text is the starting point; it’s not the whole of your legal education. Your professors will also introduce you to the multitude of substantive legal doctrines that pervade our law. These doctrines are developed in court cases—judicial opinions that establish the interpretive rules, standards, tests, elements, and forms of legal claims. Reading judicial opinions is not like reading statutes or regulations. When you study the judge-made doctrines in our case law, you will learn how to reason by analogy, how to notice and explain factual and legal distinctions, and how to apply abstract standards and tests in concrete and particularized factual settings.

But that’s not all: you will also spend time learning how to examine the “why” questions. Your professors won’t just teach you the language and content of the legal rules. They will encourage you to think about the *reasons* for each rule. What’s its history and purpose? To be sure, this second-tier inquiry is not itself *the law*. In our system, the legitimacy of the law depends on its promulgation *in writing* by a constitutionally appropriate authority. A misalignment between the *language* of the law and the lawmaker’s *purpose* is a conundrum that we’ve been debating for 250 years. You will need to learn how to understand and engage in that debate.

And finally, your professors will challenge you to think about the “ought” questions. Is the existing legal rule the best one? Has it stood the test of time, or is it antiquated and ripe for reconsideration? This last set of questions sometimes entails a utilitarian or practical inquiry: Is the existing legal rule the most efficient or the least costly? On the other hand, sometimes this inquiry calls for ethical or moral reasoning. What do we owe each other? How should we structure our government, secure our liberty and individual rights, and order our relationships in society? How can we best achieve the common good and promote human flourishing?

The study of law has all these dimensions. And there is one more: learning your responsibilities as a member of this learned profession and internalizing the ethics of lawyering. These include the multifaceted and sometime conflicting duties of being an advisor, an advocate, and an officer of the court.

Over the next three years, you’ll be challenged to think about and learn all these dimensions of the practice of law. I’m confident that your time here at Marquette will set you on a solid legal and ethical foundation from which to meet these challenges. Congratulations, and welcome to Marquette Law School. ■